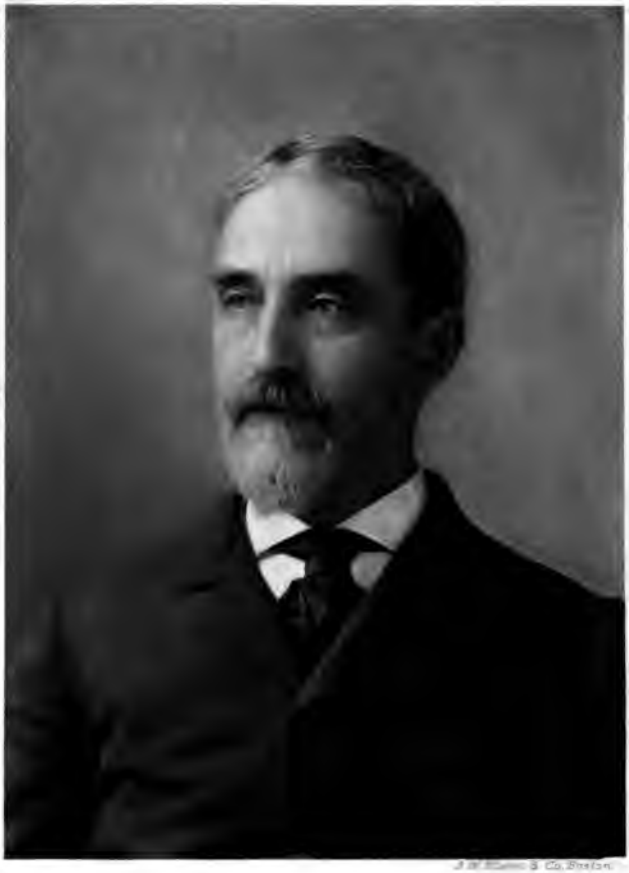
LEGAL ESSAYS



LEGAL ESSAYS

by

JAMES BRADLEY THAYER

Boston

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PREFATORY NOTE

At the time of his death Professor Thayer was actively at work on a second volume on Evidence. This, as he said in the introduction to his "Preliminary Treatise on Evidence at the Common Law," was to be similar in form to the Preliminary Treatise, but "of a more immediately practical character, giving a concise statement of the existing law of evidence." He hoped to finish the book within a year, and he meant then to publish a single volume on Constitutional Law resembling the Preliminary Treatise in its form and general scope. He had collected much material for both books, but it was not in shape for publication, and to one who knew the standards which he set for himself, and his ceaseless labor in revising and perfecting his work, even when it seemed most complete, the attempt to shape his matter by another hand would be little short of desecration.

It appears from notes in his diary that he also had it in mind in the meantime to collect in book form some of the essays which he had prepared on many different occasions. The shape in which these were left makes this work possible after his death, and it is of special value from the fact that much of the material which would have gone into the proposed treatise on Constitutional Law may be found in these essays. Thus in a measure they preserve the fruits of his long and deep study of constitutional topics.

Some of the essays were prepared for oral delivery, and in some cases for non-professional audiences. In these Professor Thayer would probably have made sub-

stantial changes. Others were published many years before his death, and to these he would certainly have made valuable additions as the result of his later studies. That indeed could be safely assumed of all, however careful their preparation.

I am fully aware how far my work, even in merely collecting what has already been published, must fall short of what would have come from my father's hand. And I have also had some painful doubts whether he would approve of publishing some of the articles at all in their present form without his revision. But it has seemed to me on the whole that with an explanation, which I have undertaken in each instance to give, of the date and circumstances under which they were written, their publication is justified.

I have made no changes in the articles except in the case of clerical errors and the like, which Professor Thayer had corrected in his own copy. All notes which I have added are enclosed in square brackets. Most of the matter so added, and all which shows the result of study or research, is taken from memoranda of Professor Thayer's on the margin of his copies or in his collections of cases.

Whenever the article has already appeared in a magazine or periodical, the name of the publication is stated hereafter. Such articles are now reprinted by the kind permission of the publishers.

I am indebted to my friend Edward Brinley Adams, Esq., for the index and table of cases and for much help in seeing the book through the press.

EZRA RIPLEY THAYER

Boston, December, 1907.

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LEGAL ESSAYS

THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW

[In 1893 Professor Thayer accepted an invitation to address the Congress on Jurisprudence and Law Reform which was to meet at the World's Fair in Chicago, and he read this paper before the Congress on August 9th. It was afterwards published in pamphlet form by Little, Brown, & Company, and was reprinted in the Harvard Law Review (7 Harv. Law Rev. 129).

The scope of the judicial power in passing on the constitutionality of legislation — a question which Professor Thayer deemed of peculiar importance — he discussed further in 1901 in chapters III, IV, and V of his Biographical Sketch of Chief Justice Marshall (John Marshall, Riverside Biographical Series, Houghton, Mifflin, & Company, 1901).]

I. How did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?

It is a singular fact that the State constitutions did not give this power to the judges in express terms; it was inferential. In the earliest of these instruments no language was used from which it was clearly to be made out. Only after the date of the Federal constitution was any such language to be found; as in Article XII of the Kentucky constitution of 1792. The existence of the power was at first denied or doubted in some quarters; and so late as the year 1825, in a strong dissenting opinion, Mr. Justice Gibson, of Pennsylvania, one of the ablest of American

judges, and afterwards [illegible] f justice of that State, wholly denied it under any constitution which did not expressly give it.[1] He denied it, therefore, under the State constitutions generally, while admitting that in that of the United States the power was given: namely, in the second clause of Article VI., when providing that the constitution, and the laws and treaties made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."[2]

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there.[3] "The restrictions," says Dicey, in his admirable Law of the Constitution, "placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from

[1] Eakin *v.* Raub, 12 S. & R. 330.

[2] This opinion has fallen strangely out of sight. It has much the ablest discussion of the question which I have ever seen, not excepting the judgment of Marshall in Marbury *v.* Madison, which, as I venture to think, has been overpraised. Gibson afterwards accepted the generally received doctrine. "I have changed that opinion," said the Chief Justice to counsel, in Norris *v.* Clymer, 2 Pa. St., p. 281 (1845), "for two reasons. The late convention (apparently the one preceding the Pennsylvania constitution of 1838) by their silence sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case."

[3] [See "The Legislatures and the Courts," by Charles B. Elliott, 5 Pol. Sc. Quarterly, 225.]

being formally inscribed in the constitution, and from the resulting support of public opinion." [1]

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence, — as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means, — by forfeiture of the charters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the appellate court in England. These charters were in the strict sense written *law:* as their restraints upon the colonial legislatures were enforced by the English court of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.[2]

[1] Ch. ii. p. 127, 3d ed. President Rogers, in the preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," p. 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, *ubi supra*, and Bryce, Am. Com., I. 430, note (1st ed.), as to possible qualifications of this statement.

[2] For the famous cases of Lechmere *v.* Winthrop (1727–28), Phillips *v.* Savage (1734), and Clark *v.* Tousey (1745), see the Talcott Papers, Conn. Hist. Soc. Coll., iv. 94, note. For the reference to this volume I am indebted to the Hon. Mellen Chamberlain, of Boston. The decree of the Privy Council, in Lechmere *v.* Winthrop, declaring "null and void" a provincial Act of nearly thirty years' standing, is found in Mass. Hist. Soc. Coll., sixth series, v. 496. [See also Bowman *v.* Middleton, 1 Bay, 252 (1792).]

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took his place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler, — ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative Act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the People thereof, independent of any King or Prince whatsoever;" and then two or three familiar fundamental rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases

of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of Trevett *v.* Weeden, in the Rhode Island Supreme Court in 1786.[1]

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention,[2] and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island legislature at the action of the court in Trevett *v.* Weeden seems to indicate an impression in their minds that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence.[3] In Vermont it seems to have been the

[1] Varnum's Report (Providence, 1787); s. c. 2 Chandler's Crim. Trials, 269.

[2] ["It was explicitly said [in the convention] that the judges would have the right to disregard unconstitutional laws anyway, — an opinion put forward by some of the weightiest members. Yet some denied it. And we observe that the power was not expressly given. When we find such a power expressly denied, and yet not expressly given; and when we observe, for example, that leading public men, *e. g.*, so conspicuous a member of the convention as Charles Pinckney of South Carolina, afterwards a senator from that State, wholly denied the power ten years later;(a) it being also true that he and others of his way of thinking urged the express restraints on state legislation, — we may justly reach the conclusion that this question, while not overlooked, was intentionally left untouched. Like the question of the bank and various others, presumably it was so left in order not to stir up enemies to the new instrument; left to be settled by the silent determinations of time, or by later discussion." Thayer's Marshall, 65, 66.]

[3] [For the resolutions of the Rhode Island legislature summoning the judges of the Supreme Court to attend and "assign the reasons and grounds of the aforesaid judgment," see 2 Arnold's History of Rhode Island, 526.] And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of Rutgers *v.* Waddington. Dawson's edition of this case, "With an Historical Introduction" (Morrisania, 1866), pp. xxiv *et seq.* In an "Address to the People of the State," issued by the committee of a public meeting of "the violent Whigs," it was declared (p. xxxiii) "That there should be a power vested in Courts of Judicature, whereby they might control the

(a) "What Pinckney said in 1799 was this: 'Upon no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country.' Wharton, State Trials, 412."

established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connecticut, as expressed in 1795 by Swift, afterwards chief justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 *et seq.*, the learned reporter, writing (in 1824) of the period of the Vermont constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the legislature, or to pronounce them void for any cause, or even to question their validity." And at page 25, speaking of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814,[1] for the first time, I believe, we find this court announcing an Act of the State legislature to be "void as against the constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by Eng-

Supreme Legislative power, we think is absurd in itself. Such powers in courts would be destructive of liberty, and remove all security of property." For the reference to this case, and a number of others, I am indebted to a learned article on "The Relation of the Judiciary to the Constitution" (19 Am. Law Rev. 175) by William M. Meigs, Esq., of the Philadelphia bar. It gives all the earliest cases. [See also Symsbury Case, Kirby, 448, 452 (1784); *ib.* 444 (1785).] The first, so far as is now known, was the unreported New Jersey case of Holmes *v.* Walton, in 1780. This date has been ascertained by Professor (now President) Scott, of Rutgers College. See 2 Am. Hist. Assoc. Papers, 45 (1886). For this reference I am indebted to the courtesy of Mr. Meigs since this paper was in print.

The early practice of repealing Acts which had been held unconstitutional is significant. Meigs, in 19 Am. Law Rev. 188.

[In 1755 the Governor of Rhode Island was also elected Chief Justice of the Superior Court. 2 Arnold's History of Rhode Island, 194.]

[1] Dupuy *v.* Wickwire, 1 D. Chipman, 237.

lish writers, and even by judges at times, but was never acted on.[1] It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.[2]

In Swift's "System of the Laws of Connecticut," published in 1795,[3] the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while mentioning that the contrary opinion "is very popular and prevalent." "It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — *e. g.*, an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the legislature of Ohio for holding Acts of that body to be void.[4]

II. When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our

[1] [See "The Legislatures and the Courts," Charles B. Elliott, 5 Pol. Sc. Quarterly, 227, 232.]

[2] This subject is well considered in a learned note to Paxton's Case (1761), Quincy's Rep. 51, relating to Writs of Assistance, understood [and so stated by Mr. Justice Matthews in Hurtado *v.* California, 110 U. S. 516, 526] to have been prepared by Horace Gray, Esq., now Mr. Justice Gray, of the Supreme Court of the United States. See the note at pp. 520–530. James Otis had urged in his argument that "an Act of Parliament against the Constitution is void" (Quincy, 56, n., 474). The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morals or of government, — *e. g.*, in Quincy, 529, citing Bowman *v.* Middleton, 1 Bay, 252, and in 1 Bryce, Am. Com., 431, n., 1st ed., citing Gardner *v.* Newburgh, 2 Johns. Ch. Rep. 162, — will be found, on a careful examination, to require no such explanation.

[3] Vol. i. pp. 50 *et seq.*

[4] Cooley, Const. Lim., 6th ed., 193, n.; 1 Chase's Statutes of Ohio, preface, 38–40. For the last reference I am indebted to my colleague Professor Wambaugh. [See also "The Legislatures and the Courts," 5 Pol. Sc. Quarterly, 251, 252.]

written constitutions, how was the power to be conceived of? Strictly as a judicial one. The State constitutions had been scrupulous to part off the powers of government into three; and in giving one of them to each department, had sometimes, with curious explicitness, forbidden it to exercise either of the others. The legislative department, said the Massachusetts constitution in 1780,[1] —

"Shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end, it may be a government of laws, and not of men."

With like emphasis, in 1792, the constitution of Kentucky[2] said: —

"Each of them to be confided to a separate body of magistracy; to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another. No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their acts. Judge Cooley has lately said: [3] —

"The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact."

[1] Part I. Art. 30.
[2] Art. I.
[3] Journal of the Michigan Pol. Sc. Association, vol. I. p. 47.

Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it.[1] Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can

[1] ["It is argued that the legislature cannot give a construction to the constitution, relative to private rights secured by it.

"It is true that the legislature, in consequence of their construction of the constitution, cannot make laws repugnant to it. But every department of government, invested with certain constitutional powers, must, in the first instance, but not exclusively, be the judge of its powers, or it could not act. And certainly the construction of the constitution by the legislature ought to have great weight, and not be overruled, unless manifestly erroneous." Kendall *v.* Kingston, 5 Mass. 524, 533.]

regularly emerge. It may be, then, that the mere legislative decision will accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided, — as in the case of the first and second charters of the United States Bank, and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court.[1] So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. The local courts were divided on it, and professional opinion has always been divided. Yet it was the legislature that determined this question, not merely primarily, but

[1] [Compare Tyler *v.* Judges of Court of Registration, 179 U. S. 405. In that case it was held by a bare majority of the court that even if the Massachusetts Land Registration Act was unconstitutional as divesting titles to land without notice to the owners, the statute could still not be attacked by any person who had in fact received notice of the proceedings. Consequently the Land Court has continued in active operation since 1898, while if it had been possible to obtain the opinion of the Supreme Court on the grave questions upon which the Justices of the Supreme Judicial Court of Massachusetts were divided, the Land Court might have been held to be a tribunal without legal authority.]

once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.[1] As the opportunity of the judges to check

[1] The constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil matters and judicial procedure." And in the case of legislative bills which are objected to by "the government" as unconstitutional, if the legislature insist on the bill, as against a veto by the government, it shall be submitted to the Supreme Court, which is to decide upon this question finally. Arts. 90 and 150. See a translation of this constitution by Professor Moses, of the University of California, in the supplement to the Annals of the American Academy of Political and Social Science, for January, 1893.

We are much too apt to think of the judicial power of disregarding the acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power. In New York, however, the constitution of 1777 provided a Council of Revision, of which several of the judges were members, to whom all legislative Acts should be submitted before they took effect, and by whom they must be approved. That existed for more than forty years, giving way in the constitution of 1821 to the common expedient of merely requiring the approval of the executive, or in the alternative, if he refused it, the repassing of the Act, perhaps by an increased vote, by both branches of the legislature. In Pennsylvania (Const. of 1776, s. 47) and Vermont (Const. of 1777, s. 44) a Council of Censors was provided for, to be chosen every seven years, who were to investigate the conduct of affairs, and point out, among other things, all violations of the constitution by any of the departments. In Pennsylvania this arrangement lasted only from 1776 to 1790; in Vermont from 1777 to 1870. In framing the constitution of the United States, several of these expedients, and others, were urged, and at times adopted; *e. g.*, that of New York. It was proposed at various times that the general government should have a negative on all the legislation of

and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation, — an ordinary and humble judicial duty, as the courts sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account

the States; that the governors of the States should be appointed by the United States, and should have a negative on State legislation; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two houses of Congress might obtain opinions from the Supreme Court. But at last the convention, rejecting all these, settled down upon the common expedients of two legislative houses, to be a check upon each other, and of an executive revision and veto, qualified by the legislative power of reconsideration and enactment by a majority of two-thirds; — upon these expedients, and upon the declaration that the constitution, and constitutional laws and treaties, shall be the supreme law of the land, and shall bind the judges of the several States. This provision, as the phrasing of it indicates, was inserted with an eye to secure the authority of the general government as against the States, *i. e.*, as an essential feature of any efficient Federal system, and not with direct reference to the other departments of the government of the United States itself. The first form of it was that "legislative Acts of the United States, and treaties, are the supreme law of the respective States, and bind the judges there as against their own laws." ["Later, the Committee on Style changed the phrase 'law of the respective States' to 'law of the land.' But the language, as to binding the judges, was still limited to the judges of the several States." Thayer's Marshall, 64.]

and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law.[1] Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion.

III. Let us observe the course which the courts, in point of fact, have taken, in administering this interesting jurisdiction.

They began by resting it upon the very simple ground that the legislature had only a delegated and limited authority under the constitutions; that these restraints, in order to be operative, must be regarded as so much law; and, as

[1] ["While this is a body of *law*, — of law in a strict sense, as distinguished from constitutional history, politics, or literature, since it deals with the principles and rules which courts apply in deciding litigated cases; and while, therefore, it is an exact and technical subject; yet it has that quality which Phillipps, the writer on Evidence, alluded to when he said, in speaking of the State Trials, that 'The study of the law is ennobled by an alliance with history.' The study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life.

"In this wide and novel field of labor our judges have been pioneers. There have been men among them, like Marshall, Shaw, and Ruffin, who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function. Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place." 1 Thayer's Const. Cas. Preface, v.]

being law, that they must be interpreted and applied by the court. This was put as a mere matter of course. The reasoning was simple and narrow. Such was Hamilton's method in the Federalist, in 1788,[1] while discussing the Federal constitution, but on grounds applicable, as he conceived, to all others. So, in 1787, the Supreme Court of North Carolina had argued that no Act of the legislature could alter the constitution;[2] that the judges were as much bound by the constitution as by any other law, and any Act inconsistent with it must be regarded by them as abrogated. Wilson, in his Lectures at Philadelphia in 1790–1791,[3] said that the constitution was a supreme law, and it was for the judges to declare and apply it; what was subordinate must give way; because one branch of the government infringed the constitution, it was no reason why another should abet it. In Virginia, in 1793, the judges put it that courts were simply to look at all the law, including the constitution: they were only to expound the law, and to give effect to that part of it which is fundamental.[4] Patterson, one of the justices of the Supreme Court of the United States, in 1795, on the Pennsylvania circuit,[5] said that the constitution is the commission of the legislature; if their Acts are not conformable to it, they are without authority. In 1796, in South Carolina,[6] the matter was argued by the court as a bald and mere question of conformity to paramount law. And such, in 1802, was the reasoning of the General Court of Maryland.[7] Finally, in 1803 came Marbury *v.* Madison,[8] with the same severe line of argument.[9] The people, it was said, have estab-

[1] No. 78, first published on May 28, 1788. See Lodge's edition, pp. xxxvi and xliv.
[2] Den d. Bayard *v.* Singleton, 1 Martin, 42.
[3] Vol. I. p. 460.
[4] Kamper *v.* Hawkins, 1 Va. Cas. 20.
[5] Vanhorne's Lessee *v.* Dorrance, 2 Dall. 304.
[6] Lindsay *v.* Com'rs, 2 Bay, 38.
[7] Whittington *v.* Polk, 1 H. & J. 236.
[8] 1 Cranch, 137.
[9] [See Professor Thayer's discussion of Marbury *v.* Madison in his memoir of Chief Justice Marshall, pp. 72–79, 84, 95–101.]

lished written limitations upon the legislature; these control all repugnant legislative Acts; such Acts are not law; this theory is essentially attached to a written constitution; it is for the judiciary to say what the law is, and if two rules conflict, to say which governs; the judiciary are to declare a legislative Act void which conflicts with the constitution, or else that instrument is reduced to nothing. And then, it was added, in the Federal instrument this power is expressly given.

Nothing could be more rigorous than all this. As the matter was put, the conclusions were necessary. Much of this reasoning, however, took no notice of the remarkable peculiarities of the situation; it went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations.[1]

[1] ["The reasoning is mainly that of Hamilton, in his short essay of a few years before in the 'Federalist.' The short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of McCulloch *v.* Maryland, Cohens *v.* Virginia, and other great cases; and this treatment is much to be regretted. Absolutely settled as the general doctrine is to-day, and sound as it is, when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations — such, too, as affect to-day the proper administration of this extremely important power — which are not touched by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning does not answer the difficulties that troubled Swift, afterwards chief justice of Connecticut, and Gibson, afterwards chief justice of Pennsylvania, and many other strong, learned, and thoughtful men; not to mention Jefferson's familiar and often ill-digested objections.

"It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of disregarding the act of a co-ordinate department, and the action of a federal court in dealing thus with the legislation of the local States; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other.

"Had Marshall dealt with this subject after the fashion of his greatest opinions he must also have considered and passed upon certain serious suggestions arising out of the arrangements of our own constitutions and the exigencies of the different departments. All the departments, and not merely the judges, are sworn to support the Constitution. All are bound to decide for themselves, in the first instance, what this instrument requires of them. None can have help from the courts unless, in course of time, some litigated case should arise; and of some questions it is true that they never can arise in the way of litigation.

But these simple precepts were supplemented by a very significant rule of administration, — one which corrected their operation, and brought into play large considerations not adverted to in the reasoning so far mentioned. In 1811,[1] Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated this rule as follows: —

What was Andrew Johnson to do when the Reconstruction Acts of 1867 had been passed over his veto by the constitutional majority, while his veto had gone on the express ground, still held by him, that they were unconstitutional? He had sworn to support the Constitution. Should he execute an enactment which was contrary to the Constitution, and so void? Or should he say, as he did say to the court, through his Attorney-General, that 'from the moment (these laws) were passed over his veto, there was but one duty, in his estimation, resting upon him, and that was faithfully to carry out and execute these laws'?(*a*) And why is he to say this?

"Again, what is the House of Representatives to do when a treaty, duly made and ratified by the constitutional authority, namely, the President and Senate, comes before it for an appropriation of money to carry it out? Has the House, under these circumstances, anything to do with the question of constitutionality? If it thinks the treaty unconstitutional, and so void, can it vote to carry it out? If it can, how is this justified?

"Is the situation necessarily different when a court is asked to enforce a legislative act? The courts are not strangers to the case of political questions, where they must refuse to interfere with the acts of the other departments, — as in the case relating to Andrew Johnson just referred to; and in dealing with what are construed to be merely directory provisions of the Constitution; and with the cases, well approved in the Supreme Court of the United States, where courts refuse to consider whether provisions of a constitution have been complied with, which require certain formalities in passing laws, — accepting as final the certificate of the officers of the political departments. A question, passed upon by those departments, is thus refused any discussion in the judicial forum, on the ground, to quote the language of the Supreme Court, that 'the respect due to coequal and independent departments requires the judicial department to act upon this assurance.'

"So far as any necessary conclusion is concerned, it might fairly have been said, with us, as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal. Could Marshall have had to deal with this great question, in answer to Chief Justice Gibson's powerful opinion in Eakin *v.* Raub, in 1825,(*b*) instead of deciding it without being helped or hindered by any adverse argument at all, as he did, we should have had a far higher exhibition of his powers than the case now affords." Thayer's Marshall, 96–101.]

[1] Com. *v.* Smith, 4 Bin. 117.

(*a*) Mississippi *v.* Johnson, 4 Wallace, 475, 492 (1866).

(*b*) 12 S. & R. 330; s. c. 1 Thayer's Const. Cas. 133.

"For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

When did this rule of administration begin? Very early. We observe that it is referred to as thoroughly established in 1811. In the earliest judicial consideration of the power of the judiciary over this subject, of which any report is preserved, — an *obiter* discussion in Virginia in 1782,[1] — while the general power of the court is declared by other judges with histrionic emphasis, Pendleton, the president of the court, in declining to pass upon it, foreshadowed the reasons of this rule, in remarking, —

"How far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and, I will add, a tremendous question, the decision of which would involve consequences to which gentlemen may not . . . have extended their ideas."

There is no occasion, he added, to consider it here. In 1793, when the General Court of Virginia held a law unconstitutional, Tyler, Justice, remarked,[2] —

"But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might produce much public good."

In the Federal convention of 1787, while the power of declaring laws unconstitutional was recognized, the limits of the power were also admitted. In trying to make the judges revise all legislative Acts before they took effect,

[1] Com. v. Caton, 4 Call, 5.
[2] Kamper v. Hawkins, 1 Va. Cases, p. 60.

Wilson pointed out that laws might be dangerous and destructive, and yet not so "unconstitutional as to justify the judges in refusing to give them effect."[1] In 1796 Mr. Justice Chase, in the Supreme Court of the United States,[2] said, that without then determining whether the court had power to declare an Act of Congress void, "I am free to declare that I will never exercise it but in a very clear case." And in 1800, in the same court,[3] as regards a statute of Georgia, Mr. Justice Patterson, who had already, in 1795, on the circuit, held a legislative Act of Pennsylvania invalid, said that in order to justify the court in declaring any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."

In 1808 in Georgia[4] it was strongly put, in a passage which has been cited by other courts with approval. In holding an Act constitutional, Mr. Justice Charlton, for the court, asserted this power, as being inseparable from the organization of the judicial department. But, he continued, in what manner should it be exercised?

"No nice doubts, no critical exposition of words, no abstract rules of interpretation, suitable in a contest between individuals, ought to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole. I shall endeavor to illustrate this: the first section of the second article of the constitution declares that the executive function shall be vested in the governor. Now, if the legislature were to vest the executive power in a standing committee of the House of Representatives, every mind would at once perceive the unconstitutionality of the statute. The judiciary would be authorized without hesitation to declare the Act unconstitutional. But when it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided, because there is a possibility in such a case of the constitution being with the legislature."

[1] 5 Ell. Deb. 344.
[2] Ware *v.* Hylton, 3 Dall. 171.
[3] Cooper *v.* Telfair, 4 Dall. 14.
[4] Grimball *v.* Ross, Charlton, 175.

In South Carolina, in 1812,[1] Chancellor Waties, always distinguished for his clear assertion of the power in the judiciary to disregard unconstitutional enactments, repeats and strongly reaffirms it: —

"I feel so strong a sense of this duty that if a violation of the constitution were manifest, I should not only declare the Act void, but I should think I rendered a more important service to my country than in discharging the ordinary duties of my office for many years. . . . But while I assert this power and insist on its great value to the country, I am not insensible of the high deference due to legislative authority. It is supreme in all cases where it is not restrained by the constitution; and as it is the duty of legislators as well as judges to consult this and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest. This confidence is necessary to insure due obedience to its authority. If this be frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise on another account. The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated."[2]

[1] Adm'rs of Byrne *v.* Adm'rs of Stewart, 3 Des. 466.

[2] This well-known rule is laid down by Cooley (Const. Lim., 6th ed., 216), and supported by emphatic judicial declarations and by a long list of citations from all parts of the country. In Ogden *v.* Saunders, 12 Wheat. 213 (1827), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "If I could rest my opinion in favor of the constitutionality of the law . . . on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses

IV. I have accumulated these citations and run them back to the beginning, in order that it may be clear that

the honest sentiments of each and every member of this bench." In the Sinking Fund Cases, 99 U. S. 700 (1878), Chief Justice Waite, for the court, said: "This declaration (that an Act of Congress is unconstitutional) should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In Wellington *et al.*, Petitioners, 16 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation (they will) never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt." In Com. *v.* Five Cents Sav. Bk., 5 Allen, 428 (1862), Chief Justice Bigelow, for the court, said: "It may be well to repeat the rule of exposition which has been often enunciated by this court, that where a statute has been passed with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and that the court will not declare it to be . . . void unless its invalidity is established beyond reasonable doubt." And he goes on to state a corollary of this "well-established rule." In *Ex parte* M'Collum, 1 Cow., p. 564 (1823), Cowen, J. (for the court), said: "Before the court will deem it their duty to declare an Act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." In People *v.* Supervisors of Orange, 17 N. Y. 235 (1858), Harris, J. (for the court), said: "A legislative Act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable intendment or allowable presumption." In Perry *v.* Keene, 56 N. H. 514, 534 (1876), Ladd, J. (with the concurrence of the rest of the court), said: "Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that before we can declare this law unconstitutional, we must be fully satisfied — satisfied beyond a reasonable doubt — that the purpose for which the tax is authorized is private, and not public." In Cincinnati, etc., Railroad Company *v.* Com'rs, 1 Oh. St. 77 (1852), Ranney, J. (for the court), said: "While the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority. . . . It is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. And this results from the very nature of the question involved in the inquiry. . . . The adjudged cases speak a uniform language on this subject. . . . An unbroken chain of decisions to the same effect is to be found in the State courts." In Syndics of Brooks *v.* Weyman, 3 Martin (La.), 9, 12 (1813), it was said by the court: "We reserve to ourselves the authority to declare null any legislative Act which shall

the rule in question is something more than a mere form of language, a mere expression of courtesy and deference. It means far more than that. The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question — the really momentous question — whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, — merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to an-

be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt." (Cited with approval in Johnson *v.* Duncan, 4b. 539.) In Cotten *v.* County Commissioners, 6 Fla. 610 (1856), Dupont, J. (for the court), said: "It is a most grave and important power, not to be exercised lightly or rashly, nor in any case where it cannot be made plainly to appear that the legislature has exceeded its powers. If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law. . . . In further support of this position may be cited any number of decisions by the State courts. . . . If there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."

[See also Livingston *v.* Van Ingen, 9 Johns. 507, 572, 573; *In re* Northampton, 158 Mass. 299, 304; People *v.* Rosenberg, 138 N. Y. 410, 415; Interstate Ry. Co. *v.* Massachusetts, 207 U. S. 79, 88.]

other department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley,[1] to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

Will any one say, You are over-emphasizing this matter, and making too much turn upon the form of a phrase? No, I think not. I am aware of the danger of doing that. But whatever may be said of particular instances of unguarded or indecisive judicial language, it does not appear to me possible to explain the early, constant, and emphatic statements upon this subject on any slight ground. The form of it is in language too familiar to courts, having too definite a meaning, adopted with too general an agreement, and insisted upon quite too emphatically, to allow us to think it a mere courteous and smoothly transmitted platitude. It has had to maintain itself against denial and dispute. Incidentally, Mr. Justice Gibson disputed it in 1825, while denying the whole power to declare laws unconstitu-

[1] Const. Lim., 6th ed., 68; cited with approval by Bryce, Am. Com., 1st ed., i. 431.

tional.[1] If there be any such power, he insisted (page 352), the party's rights "would depend, not on the greatness of the supposed discrepancy with the constitution, but on the existence of any discrepancy at all." But the majority of the court reaffirmed their power, and the qualifications of it, with equal emphasis. This rule was also denied in 1817 by Jeremiah Mason, one of the leaders of the New England bar, in his argument of the Dartmouth College case, at its earlier stage, in New Hampshire.[2] He said substantially this: "An erroneous opinion still prevails to a considerable extent, that the courts . . . ought to act . . . with more than ordinary deliberation, . . . that they ought not to declare Acts of the legislature unconstitutional unless they come to their conclusion with absolute certainty, . . . and where the reasons are so manifest that none can doubt." He conceded that the courts should treat the legislature "with great decorum, . . . but . . . the final decision, as in other cases, must be according to the unbiassed dictate of the understanding." Legislative Acts, he said, require for their passage at least a majority of the legislature, and the reasons against the validity of the Act cannot ordinarily be so plain as to leave no manner of doubt. The rule, then, really requires the court to surrender its jurisdiction. "Experience shows that legislatures are in the constant habit of exerting their power to its utmost extent." If the courts retire, whenever a plausible ground of doubt can be suggested, the legislature will absorb all power. Such was his argument. But notwithstanding this, the Supreme Court of New Hampshire declared that they could not act without "a clear and strong conviction;" and on error, in 1819, Marshall, in his celebrated opinion at Washington, declared, for the court, "that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution."

Again, when the great Charles River Bridge Case[3] was

[1] Eakin v. Raub, 12 S. & R. 330.
[2] Farrar's Rep. Dart. Coll. Case, 36.
[3] 7 Pick. 344.

before the Massachusetts courts, in 1829, Daniel Webster, arguing, together with Lemuel Shaw, for the plaintiff, denied the existence or propriety of this rule. All such cases, he said (p. 442), involve some doubt; it is not to be supposed that the legislature will pass an Act palpably unconstitutional. The correct ground is that the court will interfere when a case appearing to be doubtful is made out to be clear. Besides, he added, "members of the legislature sometimes vote for a law, of the constitutionality of which they doubt, on the consideration that the question may be determined by the judges." This Act passed in the House of Representatives by a majority of five or six.

> "We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it *was* doubtful; leaving it to this court to determine the question. If the legislature is to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen placed! The legislature pass it *de bene esse;* if the question is not met and decided here on principle, responsibility rests nowhere. . . . It is the privilege of an American judge to decide on constitutional questions. . . . Judicial tribunals are the only ones suitable for the investigation of difficult questions of private right."

But the court did not yield to this ingenious attempt to turn them into a board for answering legislative conundrums. Instead of deviating from the line of their duty for the purpose of correcting errors of the legislature, they held that body to its own duty and its own responsibility. "Such a declaration," said Mr. Justice Wilde in giving his opinion, "should never be made but when the case is clear and manifest to all intelligent minds. We must assume that the legislature have done their duty, and we must respect their constitutional rights and powers." Five years later, Lemuel Shaw, who was Webster's associate counsel in the case last mentioned, being now Chief Justice of Massachusetts, in a case[1] where Jeremiah Mason was

[1] Wellington *et al.*, Petitioners, 16 Pick. 87.

one of the counsel, repeated with much emphasis "what has been so often suggested by courts of justice, that . . . courts will . . . never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt."

A rule thus powerfully attacked and thus explicitly maintained, must be treated as having been deliberately meant, both as regards its substance and its form. As to the form of it, it is the more calculated to strike the attention because it marks a familiar and important discrimination, of daily application in our courts, in situations where the rights, the actions, and the authority of different departments, different officials, and different individuals have to be harmonized. It is a distinction and a test, it may be added, that come into more and more prominence as our jurisprudence grows more intricate and refined. In one application of it, as we all know, it is constantly resorted to in the criminal law in questions of self-defence, and in the civil law of tort in questions of negligence, — in answering the question what might an individual who has a right and perhaps a duty of acting under given circumstances, reasonably have supposed at that time to be true? It is the discrimination laid down for settling that difficult question of a soldier's responsibility to the ordinary law of the land when he has acted under the orders of his military superior. "He may," says Dicey, in his "Law of the Constitution,"[1] "as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. . . . Probably," he goes on, quoting with approval one of the books of Mr. Justice Stephen, ". . . it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. . . . The only line that presents itself to my mind is that a soldier should be protected by orders for which he might

[1] 3d ed., 279–281.

reasonably believe his officer to have good grounds."[1] This is the distinction adverted to by Lord Blackburn in a leading modern case in the law of libel.[2] "When the court," he said, "come to decide whether a particular set of words . . . are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal . . . might, not unreasonably, hold such words to be libellous." It is the same discrimination upon which the verdicts of juries are revised every day in the courts, as in a famous case where Lord Esher applied it a few years ago, when refusing to set aside a verdict.[3] It must appear, he said, "that reasonable men could not fairly find as the jury have done. . . . It has been said, indeed, that the difference between (this) rule and the question whether the judges would have decided the same way as the jury, is evanescent, and the solution of both depends on the opinion of the judges. The last part of the observation is true, but the mode in which the subject is approached makes the greatest difference. To ask 'Should we have found the same verdict,' is surely not the same thing as to ask whether there is room for a reasonable difference of opinion." In like manner, as regards legislative action, there is often that ultimate question, which was vindicated for the judges in a recent highly important case in the Supreme Court of the United States,[4] viz., that of the reasonableness of a legislature's exercise of its most undoubted powers; of the permissible limit of those powers. If a legislature undertakes to exert the taxing

[1] It was so held in Riggs *v.* State, 3 Cold. 85 (Tenn., 1866), and United States *v.* Clark, 31 Fed. Rep. 710 (U. S. Circ. Ct., E. Dist. Michigan, 1887, Brown, J.). I am indebted for these cases to Professor Beale's valuable collection of Cases on Criminal Law (Cambridge, 1803). The same doctrine is laid down by Judge Hare in 2 Hare, Am. Const. Law, 920.

[2] Cap. & Count. Bank *v.* Henty, 7 App. Cas., p. 776.

[3] Belt *v.* Lawes, Thayer's Cas. Ev., 2d ed., 163, n.

[4] Chic. &c. Ry. Co. *v.* Minnesota, 134 U. S. 418. The question was whether a statute providing for a commission to regulate railroad charges, which excluded the parties from access to the courts for an ultimate judicial revision of the action of the commission, was constitutional.

power, that of eminent domain, or any part of that vast, unclassified residue of legislative authority which is called, not always intelligently, the police power,[1] this action must not degenerate into an irrational excess, so as to become, in reality, something different and forbidden, — *e. g.*, the depriving people of their property without due process of law; and whether it does so or not, must be determined by the judges.[2] But in such cases it is always to be remembered that the judicial question is a secondary one. The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation.[3] The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.[4]

[1] [" Discussions of what is called the 'police power' are often uninstructive, from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter, — what are the limits of legislative power in general? In talking of the 'police power,' sometimes the question relates to the limits of a power admitted and fairly well-known, as that of taxation or eminent domain; sometimes to the line between the local legislative power of the States and the Federal legislative power; sometimes to legislation as settling the details of municipal affairs, and local arrangements for the promotion of good order, health, comfort, and convenience; sometimes to that special form of legislative action which applies the maxim of *Sic utere tuo ut alienum non lædas*, adjusts and accommodates interests that may conflict, and fixes specific limits for each. But often, the discussion turns upon the true limits and scope of legislative power in general, — in whatever way it may seek to promote the general welfare." 1 Thayer's Const. Cas. 693, n.]

[2] Compare Thayer's Preliminary Treatise on Evidence, 208, 209.

[3] [Cf. People *v.* Smith, 21 N. Y. 595, 599.]

[4] There is often a lack of discrimination in judicial utterances on this subject, — as if it were supposed that the legislature had to conform to the judge's opinion of reasonableness in some other sense than that indicated above. The true view is indicated by Judge Cooley in his Principles of Const. Law, 2d ed., 57, when he says of a particular question: " Primarily the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action, for the obvious

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a *postulate*," said Mr. Justice Gibson, "in the theory of our government . . . that the people are wise, virtuous, and competent to manage their own affairs."[1] "It would be indecent in the extreme," said Marshall, C. J.,[2] "upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of a State." And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent, — but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs, — what such persons may reasonably think or do, what is the permissible view for them. If, for example, what is presented to the court be a question as to the constitutionality of an Act alleged to be *ex post facto,* there can

reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." And again, on another question, by the Supreme Court of the United States, Waite, C. J., in Terry *v.* Anderson, 95 U. S., p. 633: "In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this Statute (of Limitations) is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." See Pickering Phipps *v.* Ry. Co., 66 Law Times Rep. 721 (1892), and a valuable opinion by Ladd, J., in Perry *v.* Keene, 56 N. H. 514 (1876). [See also Com. *v.* Perry, 155 Mass. 117, 124; Sharpe *v.* Wakefield, [1891], A. C. 173, 179.]

[1] Eakin *v.* Raub, 12 S. & R., p. 355.

[2] Fletcher *v.* Peck, 6 Cranch, p. 131.

be no assumption of ignorance, however probable, as to anything involved in a learned or competent discussion of that subject. And so of the provisions about double jeopardy, or giving evidence against one's self, or attainder, or jury trial. The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.

The ground on which courts lay down this test of a reasonable doubt for juries in criminal cases, is the great gravity of affecting a man with crime. The reason that they lay it down for themselves in reviewing the civil verdict of a jury is a different one, namely, because they are revising the work of another department charged with a duty of its own, — having themselves no right to undertake *that* duty, no right at all in the matter except to hold the other department within the limit of a reasonable interpretation and exercise of its powers. The court must not, even negatively, undertake to pass upon the facts in jury cases. The reason that the same rule is laid down in regard to revising legislative acts is neither the one of these nor the other alone, but it is both. The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is very clear, because the consequences of setting aside legislation may be so serious.

If it be said that the case of declaring legislation invalid is different from the others because the ultimate question here is one of the construction of a writing; that this sort of question is always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and a wrong way of construing it, and only one right way; and that it is ultimately for the court to say what

the right way is, — this suggestion appears, at first sight, to have much force. But really it begs the question. Lord Blackburn's opinion in the libel case[1] related to the construction of a writing. The doctrine which we are now considering is this, that in dealing with the legislative action of a co-ordinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*[2]

It may be suggested that this is not the way in which the judges in fact put the matter; *e. g.*, that Marshall,

[1] Cap. & Count. Bank *v.* Henty, 7 App. Cas. 741.

[2] ["It is fortunate for the country and for the future of our system of constitutional law that the Supreme Court has recognized the essentially political nature of the questions with which the General Government has had to deal in legislating for our new possessions. But it is also matter for regret and anxiety that, in reaching its conclusions, the court should have had so narrow a majority. This fact, and much that is said in these opinions [De Lima *v.* Bidwell, 182 U. S. 1; Goetze *v.* U. S., *ib.* 221; Dooley *v.* U. S., *ib.* 222; Armstrong *v.* U. S., *ib.* 243; Downes *v.* Bidwell, *ib.* 244; Huus *v.* New York, etc. Steamship Co., *ib.* 392], may well draw sharp attention to the vital and absolutely fundamental distinction between the legislative and the judicial question in cases of the class to which these now under consideration belong. Where our system intrusts a general subject to the legislature, nothing but the plainest constitutional provisions of restraint, and the plainest errors, will justify a court in disregarding the action of its co-ordinate legislative department, — no political theories as to the nature of our system of government will suffice, no party predilections, no fears as to the consequences of legislative action. In dealing with such questions the judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means." The Insular Tariff Cases, J. B. Thayer, 15 Harv. Law Rev. 164.]

in McCulloch *v.* Maryland,[1] seeks to establish the court's own opinion of the constitutionality of the legislation establishing the United States Bank. But in recognizing that this is very often true, we must remember that where the court is sustaining an Act, and finds it to be constitutional in its own opinion, it is fit that this should be said, and that such a declaration is all that the case calls for; it disposes of the matter. But it is not always true; there are many cases where the judges sustain an Act because they are in doubt about it; where they are not giving their own opinion that it is constitutional, but are merely leaving untouched a determination of the legislature; as in the case where a Massachusetts judge concurred in the opinion of his brethren that a legislative Act was "competent for the legislature to pass, and was not unconstitutional," "upon the single ground that the Act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void."[2] The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt, — this declaration is really a steady announcement that their decisions in support of the constitutionality of legislation do not, as of course, import their own opinion of the true construction of the constitution, and that the strict meaning of their words, when they hold an Act constitutional, is merely this, — not unconstitutional beyond a reasonable doubt. It may be added that a sufficient explanation is found here of some of the decisions which have alarmed many people in recent years, — as if the courts were turning out but a broken reed.[3] Many more

[1] 4 Wheat. 316.

[2] *Per* Thomas, J., in the Opinion of Justices, 8 Gray, p. 21.

[3] "It matters little," says a depressed, but interesting and incisive writer, in commenting, in 1885, upon the Legal Tender decisions of the Supreme Court of the United States, "for the court has fallen, and

such opinions are to be expected, for, while legislatures are often faithless to their trust, judges sometimes have to confess the limits of their own power.

It all comes back, I think, to this. The rule under discussion has in it an implied recognition that the judicial duty now in question touches the region of political administration, and is qualified by the necessities and proprieties of administration. If our doctrine of constitutional law — which finds itself, as we have seen, in the shape of a narrowly stated substantive principle, with a rule of administration enlarging the otherwise too restricted substantive rule — admits now of a juster and simpler conception, that is a very familiar situation in the development of law. What really took place in adopting our theory of constitutional law was this: we introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments, — not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that befit their task. In such a work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately juris-

It is not probable it can ever again act as an effective check upon the popular will, or should it attempt to do so, that it can prevail." The "Consolidation of the Colonies," by Brooks Adams, 55 Atlantic Monthly, 307.

diction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes[1]: —

> "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."[2]

V. Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a co-ordinate department; (2) where they act as advisers of the other departments; (3) where, as representing a government of paramount authority, they deal with acts of a department which is not co-ordinate.

(1) The case of a court passing upon the validity of the act of a co-ordinate department is the normal situation,

[1] By Professor Gray in 6 Harv. Law Rev. 33, n., where he justly refers to the remark as showing "that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers."

[2] Bishop Hoadly's Sermon preached before the King, March 31, 1717, on "The Nature of the Kingdom or Church of Christ." London: James Knapton, 1717. It should be remarked that Bishop Hoadly is speaking of a situation where the supposed legislator, after once issuing his enactment, never interposes. That is not strictly the case in hand; yet we may recall what Dicey says of amending the constitution of the United States: "The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but, for all that, a federal constitution is apt to be unchangeable."

to which the previous observations mainly apply. I need say no more about that.

(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.[1] A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement,[2] and a doctrine in the State of Colorado, founded upon considerations peculiar to the constitution of that State,[3] do not call for any qualification of the general remark, that such opinions, given by our judges, — like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice, — are merely advisory, and in no sense authoritative judgments.[4] Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in Queen Caroline's Case, and in MacNaghten's Case, in England, are

[1] Com. *v.* Green, 12 Allen, p. 163; Taylor *v.* Place, 4 R. I., p. 362. See Thayer's Memorandum on Advisory Opinions (Boston, 1885), Jameson, Const. Conv., 4th ed., Appendix, note *e*, p. 667, and a valuable article by H. A. Dubuque, in 24 Am. Law Rev. 369, on "The Duty of Judges as Constitutional Advisers."

[2] Opinion of Justices, 70 Me., p. 583 (1880). *Contra*, Kent, J., in 58 Me., p. 573 (1870): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., *ibid.*, p. 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion"; and Libby, J., in 72 Me., p. 562–3 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point. [The views criticised by Professor Thayer have since been overruled by the Supreme Court of Maine in Opinions of the Justices, 95 Me. 564, 566, 573. In this opinion the whole subject of advisory opinions is exhaustively reviewed.]

[3] *In re* Senate Bill, 12 Colo. 466, — an opinion which seems to me, in some respects, ill considered.

[4] Macqueen's Pract. House of Lords, pp. 49, 50.

reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of legislative Acts, have no application. What is asked for is the judge's own opinion.

(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments, — where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a para-

mount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.[1]

[1] [Compare the following observations by Professor Thayer on the regulation of interstate commerce:

"The subject (interstate commerce) has unusual complications. There exist not merely the common difficulties in constitutional questions about accommodating the just extent of judicial control to that of legislative power, — such difficulties, *e. g.*, as appear in revising a legislative determination of what are reasonable railroad rates (Reagan *v.* Farmers &c. Trust Co., 154 U. S. 362; 1 Thayer's Const. Cas. 672); but other embarrassments, also, arising out of the necessity of adjusting the relative powers of two legislative bodies, the local and the national. It is Congress and not the courts, to whom is intrusted the regulation of that portion of commerce which is interstate, foreign, and with the Indian tribes; and, primarily, it would appear to be the office of the Federal legislature, and not of the Federal courts, to supervise and moderate the action of the local legislatures, where it touches these parts of commerce.

"The present state of the decisions seems to invite one or two more suggestions. The principal difficulties seem now to lie in that region of the general subject as to which it is said that when a matter admits only of one uniform system or plan of regulation the power of Congress is exclusive; and where again, it is said that when Congress is silent this silence is, virtually, a regulation, — a declaration that the given subject shall remain as it is.

"Now the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what, on practical grounds, is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another; as in the cases of quarantine and pilotage laws, and laws regulating the bringing in and sale of particular articles, such as intoxicating liquors or opium. As regards the last-named drug, the desirable rule for California, where there are many Chinamen, and for Vermont, where they are few, may conceivably be different. It is not in the language itself of the clause of the Constitution now in question, or in any necessary construction of it, that any requirement of uniformity is found, in any case whatever. That can only be declared necessary, in any given case, as being the determination of some one's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not for the courts, — except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion.

"If this be so, then no judicial determination of the question can stand against a reasonable enactment of Congress to the contrary; such, for example, as was made in the 'Wilson Bill' (see *In re* Rahrer, 140 U. S. 545), by which a determination of the court in Leisy *v.* Hardin was superseded. Compare Pa. *v.* Wheeling, &c. Bridge Co., 18 Howard, 421. It would seem to follow that the courts should abstain from interference, except in cases so clear that the legislature cannot legitimately supersede their determinations; for the fact that the legislature may do this, in any given case, shows plainly that the question is legislative and not judicial.

"But if it be said, leaving aside any inquiry as to whether or not a uniform rule is required, that the courts have merely been construing

I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the con-

the silence and non-action of Congress as being a declaration that no rule is required, and enforcing that, we do not really escape from the difficulty just mentioned. As regards State regulations of commerce in matters which do not require uniformity of rule, it is admitted that the silence of Congress is not conclusive against them; some positive intervention of Congress is required (Cooley *v.* Port Wardens, 12 Howard, 299). If, then, the courts would know, in any given case of a regulation of commerce, what the silence of Congress means, how are they to tell, unless they first determine under which head the given regulation belongs, that of regulations requiring a uniform rule, or of those which do not. But that, as we have seen, they cannot settle without passing on a legislative question, except in cases so clear that there cannot reasonably be two opinions.

"It may then be conjectured that the decisions of the Federal courts are likely to incline, as time goes on, to the side of leaving it to Congress to check such legislation of the States as may be challenged on the ground now in question, and of limiting their own action, in respect to such cases, to that class of State enactments which is so clearly unconstitutional that no consent of Congress could help the matter out. An illustration of this method may be observed in the case of Neilson *v.* Garza, 2 Wood's Circuit Court Reports, 287, in considering the question whether a law of Texas was an inspection law, and if so, whether it transgressed the constitutional limit in laying, without the consent of Congress, a duty or impost on imports or exports beyond what was absolutely necessary for executing the inspection law. Mr. Justice Bradley, after remarking that the right to make inspection laws is not granted to Congress but is reserved to the States, — with this limitation as to the means of executing them, that duties on imports or exports, not passed upon by Congress, must be absolutely necessary, — went on to say, as to who shall determine whether a duty is excessive or not, that the question is for Congress, 'the duty must stand until Congress shall see fit to alter it.'

"In like manner, accepting the approved principle of Cooley *v.* Port Wardens, 12 Howard, 299, that subjects of interstate and foreign commerce which require one uniform rule are exclusively for Congress, it can make no difference whether this principle be stated in express terms in the Constitution, like the qualification about inspection laws, or be only a just implication. To the question, Who shall say whether one uniform rule is required? as well as to the other question, Who shall say whether the inspection duty is absolutely necessary? the answer is the same: that question is for Congress, and the State regulation 'must stand until Congress shall see fit to alter it.' And so Mr. Justice Curtis, in giving the court's opinion in Cooley *v.* Port Wardens, 12 Howard, 299, points to the legislative character of the question when he says: 'The Act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject (pilotage) is such that . . . it is local and not national.'

"If it be thought that Congress will very likely be dilatory or negligent, or that it may even purposely allow, and connive at, what should be forbidden, — that is quite possible. But the objection is a criticism upon the arrangements of the Constitution itself, in giving so much power to the legislature and so little to the courts. It should be observed, however, that the great thing which the makers of the Constitution had in view, as to this subject, was to secure power and control to a single hand, the general government, the common representative of all, instead of leaving it divided and scattered among the

formity of an Act of their own legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is *sustained* below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal.[1]

The view which has thus been presented seems to me highly important. I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one. If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been often remarked that private rights are more respected by the legislatures of some countries which have no written constitution, than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality,

States; and that this object is clearly accomplished. It is also to be remembered that much in State action, which may not be reached by the courts under the present head, may yet be controlled by them under other parts of the Constitution, as in such cases as Crandall *v.* Nevada, 6 Wall. 35, and Corfield *v.* Coryell, 4 Wash. C. C. 371." (2 Thayer's Const. Cas. 2190, n.)]

[1] Gibson, J., in Eakin *v.* Raub, 12 S. & R., p. 357. Compare *Ib.*, p. 352. The same result is reached by the court, on general principles, in The Tonnage Tax Cases, 62 Pa. St. 286: "A case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary. The presumption in favor of a co-ordinate branch of the State government, the relation of her courts to the State, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands" (Agnew, J., for the court). [See also Livingston *v.* Van Ingen, 9 Johns. 507, 572.]

of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.[1] Meantime they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled, as well as demoralized. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible mischief that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.[2]

[1] "A singular result of the importance of constitutional interpretation in the American government . . . is this, that the United States legislature has been very largely occupied in purely legal discussions. . . . Legal issues are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters." — 1 Bryce, Am. Com., 1st ed., 377. On page 378 he cites one of the best-known writers on constitutional law, Judge Hare, as saying that "In the refined and subtle discussion which ensues, right is too often lost sight of, or treated as if it were synonymous with might. It is taken for granted that what the constitution permits it also approves, and that measures which are legal cannot be contrary to morals." See also *Ib.*, 410.

[2] La volonté populaire: tel est, dans les pays libres de l'ancien et du Nouveau Monde, la source et la fin de tout pouvoir. Tant qu'elle est saine, les nations prospèrent malgré les imperfections et les lacunes de leurs institutions; si le bon sens fait défaut, si les passions l'emportent, les constitutions les plus parfaites, les lois les plus sages, sont impuissantes. La maxime d'un ancien: *quid leges sine moribus?* est, en somme, le dernier mot de la science politique. — *Le Système*

Judiciaire de la Grande Bretagne, by le Comte de Franqueville, I. 25 (Paris: J. Rothschild, 1893).

[See also The Federalist (Lodge's ed.), 153; 1 Story on the Constitution (5th ed.), s. 533, note *a* (Gouverneur Morris); Roberts *v.* Boston, 5 Cush. 198, 206, 207 (Shaw, C. J.); Hurtado *v.* California, 110 U. S. 516, 535 (Matthews, J.).

"The people of the States, when making new constitutions, have long been adding more and more prohibitions and restraints upon their legislatures. The courts, meantime, in many places, enter into the harvest thus provided for them with a light heart, and too promptly and easily proceed to set aside legislative acts. The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints, — certainly as concerning the exact extent of these restrictions, — turning that subject over to the courts; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do, — as if honor and fair dealing and common honesty were not relevant to their inquiries.

"The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives.

"From these causes there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted, — would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; to-day it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly

thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all, — that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them, — the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature, — the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a co-ordinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their co-ordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course — the true course of judicial duty always — will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." Thayer's Marshall, 103–110.]

ADVISORY OPINIONS

[In 1883 the Senate of Rhode Island asked the opinion of the judges of the Supreme Court on the question whether the General Assembly had the power to call a constitutional convention. The judges answered in the negative, on the ground that the mode provided in the constitution for its amendment was the only method by which it could lawfully be changed. (*In re* Constitutional Convention, 14 R. I. 649.) This conclusion was criticised by Hon. Charles S. Bradley, formerly Chief Justice of Rhode Island, in a pamphlet entitled "The Methods of Changing the Constitutions of the States, especially that of Rhode Island. Boston. Alfred Mudge & Son. 1885." The following article was prepared by Professor Thayer at the request of Chief Justice Bradley, who was his cousin, and appeared as an appendix to the pamphlet, with the title, "Memorandum on the Legal Effect of Opinions given by Judges to the Executive and the Legislative under Certain American Constitutions."

On the questions discussed by Chief Justice Bradley reference may be made to Professor Thayer's note in his Cases on Constitutional Law, vol. i, p. 220.]

1. There are but four constitutions[1] in which any provision is made for taking the opinion of the judges by the

[1] [Now increased to seven. "In this country the constitutions of seven States have provided for obtaining opinions from the judges of the highest court upon application by the executive or the legislature, viz., of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. In one other State, Missouri, a similar clause was introduced in the Constitution of 1865, just after the war; but it continued only ten years, and was left out of the Constitution of 1875. It dates in Massachusetts from 1780, — Part II., c. iii. s. 2; in New Hampshire from 1784, — Part II., title, *Judiciary Power;* in Maine (formerly a part of Massachusetts) from 1820, — Art. VI., s. 3; in Rhode Island from 1842, — Art. X., s. 3; in Florida from 1868, — Art. V., s. 16, amended in 1875, — Amendment XI.; in Colorado from 1886, — Amendment to Art. VI., s. 3; in South Dakota from 1889, — Art. V., s. 13. In the first three States, the judges are to give their opinions 'upon important questions of law and upon solemn occasions.' In Rhode Island, 'upon any question of law, whenever requested,' etc. In Florida, at any time, upon the Governor's request 'as to the interpretation of any portion of this Constitution, or upon any point of law' (the power of calling for opinions, it will be noticed, was given only to the Governor; on the other hand it was

executive or legislative department, — those of Massachusetts, New Hampshire, Maine, and Rhode Island. They

a wide power, covering 'any point of law'); this was amended by limiting the last alternative to 'any question affecting his executive powers and duties.' As it now stands, the Florida clause may be compared with a peculiar one in the constitution of Virginia (Art. IV., s. 6), giving the governor power to require the 'opinion in writing of the attorney-general upon any question of law connected with his official duties.' Opinions rendered under this provision in its earlier and later form are found in 12 Florida, 651 and 660, both in 1868; *Ib.* 686 and 690, both in 1869; 13 Florida, 687 (1870); *Ib.* 700 (1871); 15 Florida, 736 and 739, both in 1875; and 16 Florida, 842 (1877). I observe nothing in them indicating any impression on the part of the judges that they are authoritative; while on the other hand in 12 Florida, at p. 664, one of the judges (the common practice here is that of separate opinions) hardly conceals his surprise, in quoting the intimations of a Maine opinion in 7 Greenl. 482 (1830): 'It will be perceived,' he says, 'that the justices in this case go so far as to say that the Senate, in making its decision, must construe the constitution in accordance with the opinion of the Court; thus intimating that their opinion interpreting a clause in the constitution as to the manner of exercising a power vested exclusively in the Senate, was a law to the Senate itself in its action.' Although the power of calling for opinions is given only to the governor, on one occasion the Legislature, by a concurrent resolution, requested the governor to ask the judges for an opinion; and upon his transmitting the resolution to them with a request for an answer, the judges gave it without any remark. 12 Florida, 686. In Colorado, the provision reads: 'The Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives: and all such opinions shall be published in connection with the reported decisions of the court.' This has been *held* (In the Matter of Senate Bill No. 65, 12 Colo. 466, in 1889) to be limited to questions of law and such as are questions *publici juris*, and to call not merely, as elsewhere generally held, for the opinions of the justices, but for authoritative judgments of the court. The resort to this power in Colorado was prompt and troublesome. See a group of opinions in 9 Colo. 620–642. In South Dakota, the Governor may 'require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions.' In Missouri, the provision only varied from that in Massachusetts by the insertion of a word, — 'upon important questions of *constitutional* law,' etc.

"In the Federal Convention of 1787, it was proposed that 'each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.' 5 Ell. Deb. 445. But nothing came of it. It is, however, interesting to see that the first President, who had also presided over the Convention, asked for an opinion from the justices. [See *infra*, p. 53.]

"It may be added that the Constitution of the Hawaiian Islands of 1887, Art. 70 (5 Haw. Rep. 716), gives 'the King, His Cabinet, and the Legislature . . . authority to require the opinions of the justices of the Supreme Court upon important questions of law, and upon solemn occasions.' This provision is said to run back through the Constitution of 1864 (art. 70) to that of 1852 (art. 88), where it seems to have been first introduced, in a slightly different form. A number of such opinions are preserved in the Hawaiian Reports, beginning with one entitled 'The

are named in the order of their dates. The clause was put into the Constitution of Massachusetts (the only constitution that State has ever had) in 1780, in this form: "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." — Const. Mass., Part II., c. iii. s. 2.

It was not in the brief Constitution of New Hampshire of 1776, but appeared first in the fuller document of 1784, thus: "Each branch of the legislature, as well as the president and council, shall have authority to require the opinions of the justices of the Superior Court upon important questions of law and upon solemn occasions." — Const. N. H. (1784), Part II., title, *Judiciary Power.* The clause is retained in the same part of the Constitution of 1792 (the existing one) in precisely the same form, substituting only the term "governor" as the later name of the chief magistrate.

In the Maine Constitution of 1820 (Maine has had but one) the provision is: "They (the justices of the Supreme Judicial Court) shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, Senate, or House of Representatives." — Const. Maine, Art. VI., s. 3.

In the Rhode Island Constitution of 1842 (the only one; there was nothing in the charter which touches this question) it is provided: "They (the judges of the Su-

Segregation of Lepers,' 5 Haw. Rep. 162 (May, 1884)." 1 Thayer's Const. Cas. 175, 176; also Supplementary Memorandum on Advisory Opinions, printed by Professor Thayer soon after original paper.

"It should have been stated in the Memorandum that the results there reached came from a personal examination of what relates to the judicial power, in all the American constitutions, with their amendments, included in Poor's two volumes (1877), compiled by order of the Senate of the United States. There are one hundred and two constitutions, including that of the general government. Since finding that the Florida provision was put under the head of the executive department, I have added a personal examination of all the *latest* constitutions in these volumes, under the head of the executive and legislative departments. I have also examined such later constitutions as are known to me." Thayer's Supplem. Mem. on Adv. Opin.]

preme Court) shall also give their written opinion upon any question of law, whenever requested by the governor, or by either house of the General Assembly." — Const. R. I., Art. X., s. 3. There is no council in Rhode Island.

To make the statement complete, it should be added that in the second Constitution of Missouri, that of 1865, there was introduced, for the first time, a similar provision: "The judges of the Supreme Court shall give their opinion upon important questions of constitutional law, and upon solemn occasions, when required by the governor, the Senate, or the House of Representatives; and all such opinions shall be published in connection with the reported decisions of said Court." — Const. Missouri (1865), Art. VI., s. 11. There was no council in Missouri. In the Constitution of 1875 (the existing one) no such provision is found.

And it has not been found, I believe, in any other constitution in the country, past or present.

2. The clause appears to have been copied into the other constitutions from that of Massachusetts. The identity or close similarity of the language points pretty plainly to that. In Rhode Island there is a peculiarity, in requiring a written opinion; but this is rather an apparent difference than a real one, the American usage having been uniform, it is believed, in favor of written opinions. The short-lived Missouri clause was limited to questions of constitutional law. And it may be added that in Rhode Island the qualification of "important" questions of law and that of "solemn" occasions are omitted.

3. Where did Massachusetts get it? That question is no doubt correctly answered, in one of the best of these opinions, by the justices of the Supreme Court of Massachusetts. After quoting the provision, they remark: "This article, as reported in the convention that framed the Constitution, limited the authority to the governor and council and the Senate, and was extended by the convention so as to include the House of Representatives; and, as may be

inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the king, as well as the House of Lords, whether acting in their judicial or their legislative capacity, had the right to demand the opinions of the twelve judges of England" (126 Mass. at p. 561). This opinion (an extremely learned and valuable consideration of the meaning of the term "money-bills," which is understood to have been drawn by Chief Justice Gray) refers to English precedents, coming down as late as 1760, in which the king called for opinions from the judges; and also adverts to the well-known practice, still continuing, by which the House of Lords requires such opinions.[1] The latest recorded instance in which such a response was rendered to the king was one of March, 1760, concerning the proposed trial of Lord George Sackville by court martial, reported in 2 Eden (Appendix), 371.

4. What is the legal quality of such opinions? Are they authoritative declarations or merely advisory?

(*a*) In England. The character of all these opinions is well indicated in the one just referred to, rendered by Lord Mansfield and other judges to the king in 1760. After briefly stating that an officer who had been dismissed from the service could nevertheless be tried by court martial, it is added: "But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the court has no jurisdiction; or if the court should refuse to proceed, in case the party thinks they have jurisdiction; we shall be ready without difficulty, to change our opinion, if we see cause, upon objections that may

[1] ["The giving of such opinions by judges is not an exercise of the judicial function. The relation of the English judges to the king, in former days, and their ancient place as assistants to the House of Lords, led to a practice, on the part of that House, as well as the king, of calling on them for advisory or 'consultative' opinions. This may be traced very far back in our records, *e. g.*, in 1387 (2 Stat. Realm, 102–104), King Richard II. puts to his judges a long string of questions." 1 Thayer's Const. Cas. 175.]

be then laid before us, though none have occurred to us at present which we think sufficient."

But the matter may be further illustrated by considering the opinions given to the House of Lords. (1) The case in which the Lords in their judicial capacity[1] call for the opinion of the judges, is a very familiar one.[2] No one supposes that in this instance the law Lords are bound by the opinions thus given. It is unnecessary to cite cases to show that the Lords use them simply as advice. O'Connell's Case (11 Clark & Fin. 155) is one where the decision of the Lords was against the opinion of a majority of the judges. (2) A well-known case where the judges were called on for an opinion in a matter of legislation is what is known as the Queen's Case. In that matter no litigation was pending. The Lords had in hand a legislative measure, a bill of pains and penalties touching Queen Caroline, and were making certain preliminary inquiries and examining witnesses. The judges were called in and kept at hand to answer questions of evidence from time to time. These answers, in several instances ill-considered, and hastily given, as appears in Hansard, are also reported in 2 Brod. & Bing. 284, from which they are often cited as if they had been given in the course of a regular trial. Their true character, as touching any supposed authoritative quality, appears to be correctly indicated by a valuable English writer, Best, in his work on Evidence, s. 474: "It may be doubted how far the proceedings in Queen Caroline's Case are binding on tribunals, the answers of the judges to the House of Lords having no binding force *per se*[3]; and although in that case the House adopted and acted on

[1] A body which Bagehot, after referring to the Judicial Committee of the Privy Council, characterized as "what is in fact, though not in name, the Judicial Committee of the House of Lords." Bagehot, English Constitution (3d ed.), 126.

[2] [A recent instance of this is the Trial of Earl Russell, [1901] A. C. 446.]

[3] [So Lord Eldon in Head v. Head, 1 T. & R. 138, 140: "The answers given by the judges, therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the Kingdom, are not to be considered as judicial decisions."]

those answers, it was not sitting judicially, but with a view to legislation which finally proved abortive." (3) For an instance which brings out with the greatest plainness the purely advisory quality of these judicial responses, a very well-known precedent may be cited, M'Naghten's Case, 10 Clark & Fin. 200. Here not only was there no litigated question before the Lords, but not even any pending legislative question. The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the Central Criminal Court, but not in any way before them, — a case developing interesting questions in the law relating to insanity, — conceived that they would like to know a little more accurately what the law on these points was. They accordingly put a set of "abstract" questions to the judges, — questions not arising out of any business before them, actual or contemplated. One of the judges (Maule) protested against this proceeding, but, as the others answered, he also answered. The Lords took notice of this, and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on "abstract questions of existing law." "For your lordships," said Lord Campbell, "may be called on, in your legislative capacity, to change the law."

It needs no argument to show that opinions so given are not binding upon any body, and should not be. If reasons were asked for such a view, it would be enough to refer to what Mr. Justice Maule suggested in his protest, when he objected that the questions put "do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms"; that he had heard no argument; and that he feared "that, as the questions relate to matters of criminal law of great importance, the answers to them by the judges might embarrass the administration of justice when they are cited in trials."

So much for England.

(*b*) To turn to this country. It might be anticipated that since the constitutional arrangement now under discussion was introduced into Massachusetts from England, it would be dealt with on similar principles. It has been so dealt with. The first recorded opinion given by the Massachusetts justices under the provision in question was only very lately reported, in 126 Mass. 546. The several judges, upon very short notice, came personally into the Senate on Feb. 22, 1781, and "delivered their several opinions in writing." A joint order of the two legislative houses had called for opinions in writing. It is quite apparent, from the tone of these answers, that the judges conceived of their function as merely advisory. Mr. Justice Sargeant says that he has done as well as is possible "in the very short time allowed me. . . . Perhaps, if I had heard all the arguments that have been made use of (in the legislature), I might be of a different opinion." Mr. Justice Sewall says: "I do not, therefore, at present see," etc., etc. Mr. Justice Sullivan civilly remarks that he is "very sensible of the honor done to the bench by the command of the legislature in this instance; but am obliged to say, that in a question so complicated, and of such magnitude, I could have wished that a longer space than two days had been allowed me." Other early opinions, of 1791 and 1807, may be found in 3 Mass. 567, and *ib.* 568.

The matter, however, has been expressly passed upon, both in opinions of the character now under consideration and in solemn judgments in litigated cases; and it is settled doctrine in Massachusetts that such opinions have no binding quality. Opinions of the justices in 7 Pick. 125, *note,* at p. 130; 5 Met. at p. 597; 9 Cush. 604; 122 Mass. at p. 603; 126 Mass. at p. 566. In the last citation the judges say: "In giving such opinions the justices do not act as a court, but as the constitutional advisers of the other departments of the government."

But the best citation is Com. *v.* Green, 12 Allen, 155, 164. This is a decision in a capital case, where the court

were required to adjudicate a point on which they had previously given an opinion to the governor. The judges advert to this opinion, declare it to be not at all binding, and state that they have sought to free their minds from all prepossessions resulting from their having given it. "The opinion," they declare, "thus given, like all others of a similar character, was formed without the aid of counsel learned in the law, or any statement of the reasons on which the regularity or validity of the proceedings had been called in question. Although it is well understood and has often been declared by this court, that an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision," yet it necessarily supposes that an opinion has been formed by the judges, and the court feel the duty of guarding against any bias from this fact, etc. So also in a precisely similar situation the court (Wilde, J.) said, in Adams *v.* Bucklin, 7 Pick. at p. 127: "We do not, however, consider that opinion binding upon us in this action."

Such is the doctrine in Massachusetts. In New Hampshire the same view appears to be taken. It is expressed in an opinion of the justices in 25 N. H. 537. The Senate had called for an opinion on the constitutionality of a certain legislative bill. The judges advert to several embarrassing circumstances, such as the lack of precise questions, the absence of any aid from counsel, etc., and it is then added: "Upon these considerations we feel it due to ourselves in justice to say, that whatever opinions we might express upon this bill must be regarded as impressions by which we should not feel ourselves bound, if the bill should become a law, and if the rights of a citizen should depend on its construction." And again in an opinion of June 10, 1881, a date not yet reached in the published volumes of New Hampshire reports,[1] the judges

[1] [Now 60 N. H. 585.]

in advising the Senate that the legislature had the power and right to proceed then to the election of a United States senator, quote the language of the judges of Massachusetts in 126 Mass. 566, partly cited above, and say: "In giving such an opinion, the justices do not act as a court, but as the constitutional advisers of either branch of the legislature requiring their opinion; and it has never been considered essential that the question proposed should be such as might come before them in their judicial capacity." It should be added that there are signs here and there in the New Hampshire opinions that their advisory quality is less distinctly apprehended than it is in Massachusetts; *e. g.*, in 58 N. H. at p. 622, one of the judges phrases a brief supplementary opinion of his own, thus: "For reasons peculiar to myself, I think I should be excused from sitting as a member of the court in the decision of this question." And he goes on to express the hope that "the question having now been three times decided by the court without any dissent and without any conflicting decision, it may be considered as finally settled and put at rest." But such expressions weigh little as against the language of the opinions first cited.

The judges remark, in 41 N. H. at p. 552: "We have always to regret that when called upon by the legislature for our opinions upon questions of law, we have not the usual aid from the investigations of interested parties and their learned counsel." But they sometimes call in their friends. In 53 N. H. 640, in an answer to the governor, the judges state that of their own motion they had written to two gentlemen, "requesting each as a friend of the court to furnish to the members of the court a brief upon the points raised by your inquiries. Accordingly we have received from each of those gentlemen an able brief, which we have considered." [1]

[1] Something of the same sort was done in Massachusetts, in the case of an opinion given in 1825. 7 Pick. at p. 130, note. [In Respub. *v.* De Longchamps, 1 Dall. 111, 115 (1784), where the President and Executive Council asked the opinion of the judges on several questions arising out of an assault on the French consul, the judges heard arguments of counsel on both sides.]

In Rhode Island the doctrine of the advisory character of such opinions is clearly laid down. In Taylor *v.* Place, 4 R. I. 324, the court, in a litigated case, had occasion to deal with a question which had formerly been the subject of an opinion given by the judges to the governor. On p. 362 the court (Ames, C. J.) says of a certain question then under discussion: "This is the first time since the adoption of the constitution that this question has been brought *judicially* to the attention of the court. The advice or opinion given by the judges of this court, when requested, to the governor or to either House of the Assembly, under the third section of the tenth article of the constitution, is not a *decision* of this court; and given, as it must be, without the aid which the court derives in adversary cases from able and experienced counsel, though it may afford much light from the reasonings or research displayed in it, can have no weight as a precedent."[1] The italics are those of the opinion. — A phrase occurs in one of the statements of the judges in the old Rhode Island case of Trevett *v.* Weeden, which may perhaps indicate practices before the Revolution that might throw light upon the question. When the Superior Court of Judicature for the County of Newport had rendered a decision in the case above named, in 1786, which in effect annulled

[1] [Compare Allen *v.* Danielson, 15 R. I. 480, in which Knowles, Petitioner, 13 R. I. 90, was overruled, and the court said of that case (15 R. I. 482, 483): "The case was a petition for an opinion on a case stated, and was doubtless submitted without full argument or presentation of authorities, so that the court, prepossessed in favor of the rule in bankruptcy on the score of equality and by familiarity with it, and wishing to avoid a diversity of rules, supposing that there were two lines of decision of about equal authority to choose between, naturally, without the consideration which it might otherwise have bestowed, chose that line of decision which was in accord with the rule in bankruptcy. The case is not without respectable support. Amory *v.* Francis, 16 Mass. 308; Farnum *v.* Boutelle, 13 Metc. 159; Wurtz, Austin & McVeigh *v.* Hart, 13 Iowa, 515. But we have no doubt that we should have decided the case differently, if we had had before us, when we decided it, the same array of authorities which we have before us now. The question then is, shall we adhere to it out of regard for the maxim *stare decisis*, or shall we adopt what we now consider the sounder rule? We have come to the conclusion that, considering how recently the case was decided, very little harm will come from overruling it."]

an act of the legislature, they were summoned before that body. Mr. Justice Howell, in the course of a long speech before the legislature, remarked that "the order by which the judges were before the house might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination." While wholly declining to do the last, he remarked that as to the former, "the court were ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislature in framing new or repealing former laws." 2 Chandler's Criminal Trials, 327. I am not aware of any ante-Revolutionary usage of the sort referred to.

It is an interesting fact that Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined to respond. The President and Cabinet came to the conclusion to ask this opinion from the judges on July 12, 1793. Those who were at hand appear to have suggested delay until they could communicate with their absent associates. A letter of July 23, from the President to Chief Justice Jay and his brethren, is preserved, in which he assents to this delay, but expresses the pleasure that he shall have in receiving the opinion at a convenient time. (Sparks's Washington, X. 359.) The date was but a little later, — not far from August 1, as it would seem, — of which Marshall speaks when he says (Life of Washington, Ed. Phil. 1807, V. 441): "About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them."[1] It was, perhaps, fortunate for the judges and

[1] [See also Thayer's Marshall, pp. 70, 71.]

their successors that the questions then proposed came in so formidable a shape as they did. There were twenty-nine of them, and they fill three large octavo pages in the Appendix to the tenth volume of Sparks's Washington. Had they been brief and easily answered the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system. As it is, we may now read in 2 Story, Const. s. 1571, that while the President may require the written opinion of his Cabinet, "he does not possess a like authority in regard to the judicial department." [1]

[1] ["The case of the refusal to answer, of Jay and his associates, may be compared with the 'Report of the Judges,' 3 Binney, 595 (1808). A *statute* of Pennsylvania provided 'That the judges of the Supreme Court are hereby required to examine and report to the next Legislature which of the English statutes are in force in this Commonwealth,' etc. The judges answered, without remark, in an elaborate paper. The reporter (p. 595) has this note: 'This important document is here inserted at the request of the judges of the Supreme Court. In many respects it deserves to be placed by the side of judicial decisions. . . . It may not, perhaps, be considered as authoritative as judicial precedent, but,' etc. But in an interesting Minnesota case, In the Matter of the Application of the Senate, 10 Minnesota, 78 (1865), the judges refused an answer to the Senate, and declared unconstitutional a statute which provided that 'either house may by resolution require the opinion of the Supreme Court or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court, or judges thereof, when so requested, respectively to give such opinion in writing.'" Thayer's Supplem. Mem. on Adv. Opins.

"A statute similar to that declared unconstitutional in Minnesota, is found in Vermont (Rev. St. Vt. (1880) s. 795): 'The Governor, when the interests of the State demand it, may require the opinion of the judges of the Supreme Court or a majority of them upon questions of law connected with the discharge of his duties.' So in New York, by a provision first introduced in 1829 (2 Rev. St., ed. 1829, 658; Part iv. tit. 1, ss. 13, 14), when a person was convicted and sentenced to death, the presiding judge was required to inform the Governor and to send to him the judge's notes of the testimony; whereupon the Governor might 'require the opinion of the Chancellor, the justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished.' A case in which an opinion was given under this statute is People *v.* Green, 1 Denio, 614 (1845). By a statute of 1847, the judges of the Court of Appeals were substituted for the Chancellor; and the law so stands now. (N. Y. Code Crim. Proc., ss. 493, 494.)

"Without any such statute, and without any constitutional requirement, the judges have sometimes been called on for such extra-judicial advice and aid, and have given it. There are indications that this was done, more or less, during the colonial period, — as in the expressions of Mr. Justice Howell (*ante*, p. 53) in the Rhode Island case of Trevett *v.* Weeden in 1786. On February 25, 1780, the Constitutional Convention of Massachusetts voted 'to signify to the judges of the Superior Court in writing the request of this Convention that they would give their attend-

Reference has now been made to the principles adopted in all of the four States before mentioned, excepting Maine. As to Maine there is something different to say. The early procedure here showed small signs of any impression on the part of the judges that they were engaged, when handing in these responses, in a matter of binding operation. Early opinions are found in 2 Greenl. 431; 3 *ib.* 477; and 6 *ib.* 486. In 6 Greenl. 513, it appears from one of the communications of the judges to the council, that "the members of the court proceeded to ascertain each other's views by letter, not being able from their scattered situation to have a personal interview." And, again, it is said, that "questions propounded in this manner are necessarily decided without argument, and we have not been able to meet for discussion among ourselves." Indeed it appears (*ib.* p. 507) that the Chief Justice sent in his opinion without consulting his associates at all, and notified his scattered brethren of it, "requesting them, if

ance this evening, as matters of importance are to be acted on.' (Journal of Conv. of 1779–80, 142.) In Pennsylvania (Archives, vols. 8, 11, and 12) there are various instances of opinions given by the justices to the executive department between 1780 and 1790. An account of such an opinion is found in Respublica *v.* De Longchamps, 1 Dall. 111, 115–116 (1784); and an opinion or 'report' is found in 3 Binney, Appendix, 598 (1808). For other like opinions, given upon request, without any legal requirement, see Jameson, Const. Conv., 4th ed., 663 (in New York), *In re* Power of the Governor, 79 Ky. 621 (1881), and 37 Neb. 425 (1893). In this last case, Norval, J., gives strong reasons for refusing to join with his brethren in giving the opinion. It seems to have been not an uncommon practice in Nebraska to give them.

"In England the judges are sometimes called upon to exercise what is there called a 'consultative' function; but its non-judicial quality is distinctly asserted. *Ex parte* County Council of Kent, [1891] 1 Q. B. 725; compare Overseers *v.* L. & N. W. R'y. Co., 4 App. Cas. 30." 1 Thayer's Const. Cas. 183, n.

A Delaware statute (Rev. St. 1852, c. xxvii, s. 4), authorizing the Governor to ask the opinion of the Chancellor and Judges "touching the proper construction of any provision in the Constitution of this State or of the United States or the constitutionality of any law enacted by the Legislature of this State," may be compared with the Minnesota and Vermont statutes above referred to. In 1895 the Legislature by a joint resolution (Laws of 1895, c. 167) requested the Governor to submit to the judges a question as to the apportionment of delegates to a constitutional convention. The Executive Register, however, discloses no action taken by the Governor in the matter, and it may be inferred that the question was not submitted. (Compare 12 Florida, 686, cited *supra*, p. 43, n.)]

they think proper, to adopt a similar mode of proceeding." Is it to be supposed that such opinions are binding upon any body? And yet the justices of the Supreme Court of Maine, in January, 1880 (70 Maine, at p. 583), in an opinion answering certain questions put by the legislature, while adverting to one or two previous opinions then lately given, held the following remarkable language: "Various questions, involving the true construction of the constitution and statutes . . . arose, and the governor called upon this Court for its opinion on the questions propounded. The Court was required by the constitution to expound and construe the provisions of the constitution and statutes involved. It gave full answers. The opinion of the Court was thus obtained in one of the modes provided in the constitution for an authoritative determination of 'important questions of law.' The law thus determined is the conclusive guide of the governor and council in the performance of their ministerial duties. Any action on their part . . . in violation of the provisions of the constitution and law thus declared is a usurpation of authority and must be held void." This strange doctrine was laid down with no citation of authority, no reference to any line of reasoning upon which it could be supported, and no recognition of the history and the law bearing upon the topic in hand, which is herein set forth. It should also be said that it was laid down at a time of great political excitement as regards the questions discussed.

It may be confidently expected that the subject, in Maine, will not rest where it is thus left.[1]

[1] [This prediction was fully verified in 1901, when the judges, although differing on the propriety of answering the questions put to them by the House of Representatives, all expressly stated that their answers if given would not have the character of judicial decisions. Five of the judges said: "Another reason why it would be improper for the Justices to answer any question submitted, unless upon a solemn occasion, is, that such questions frequently affect the individual rights of citizens, and, unless the occasion is within the contemplation of the Constitution, the question should be submitted in a judicial proceeding where all persons interested may have an opportunity to appear and be heard in their behalf. An opinion given in answer to questions thus propounded, without notice, hearing or argument, although it has not

5. It will be well, by way of completing this statement, to refer to the usage in Missouri under the Constitution of 1865. Here also the judges held that their function was not that of a court. In 55 Mo. 295 (in 1873), they had occasion to answer a call of the House of Representatives upon "the Supreme Court of this State to give their opinion to this House," etc. The judges reply: "If the annexed resolution is to receive a literal interpretation, it appears to be a call on the Supreme Court for its opinion as to the constitutionality of the present township and organization law. This Court has no authority . . . to give opinions on abstract questions of law. Its office is to hear and determine real controversies. . . . It was not the intention of Sec. 11 of Article VI. of the Constitution to allow the Supreme Court to give its opinion on questions of constitutional law, referred to in that section. The judges and not the court are required by that section, etc.; . . . but assuming that the intention of the resolution was that the judges should give their opinion as law officers *pro hac vice*, we will proceed," etc. After this it is strange to find the reporter describing this as an "opinion of the Supreme Court." The first instance of these opinions in Missouri is one of Nov. 27, 1865, reported in 37 Mo. 129. The second response (37 Mo. 135), on Dec. 9, 1865, declined to answer certain questions of the Senate, and defined in very narrow limits the power of the other departments to ask the opinion of the judges. In like manner they also declined to answer questions of the Senate in 51 Mo. 586, and said: "It is not contemplated by the Constitution that the judges are to give their opinion

the binding force of a judgment of court, is certainly prejudicial to the interests of those to whom it is adverse." (95 Maine, 566.) The other three judges said: "It is not now questioned that the opinions given under this constitutional provision are not adjudications, and are not within the principle of *stare decisis*. They are merely opinions in the way of advice, like those of counsel. The justices giving them are in no degree bound to adhere to them when the same questions arise again, should argument or further research and reflection change their prior views." (95 Maine, 573.) See also note 2, p. 34, *supra*.]

on any questions which may afterwards come before them for adjudication." Again, in February, 1874 (55 Mo. 497), they declined, "with the highest respect for the House of Representatives," to answer certain questions. The next and last instance of these responses is given, as of "October term, 1874," in 58 Mo. 369. The judges again declined to answer the questions put to them; and thereupon the Constitution of the next year wholly relieved them of this sort of duty.[1] It is pretty manifest that the judges put upon the Constitution of 1865 a much narrower construction than it should have received, in view of the origin and history as herein traced of the function which they were exercising; but as regards the advisory nature of this function, they were in accord with almost all the precedents.

6. Upon the whole, it seems clear that the opinions herein referred to are purely advisory. There is, indeed, a popular impression that they are on the same footing as decisions in litigated cases; witness, *e. g.*, the language of leading newspapers, such as the "Boston Daily Advertiser" of Jan. 12, 1880.[2] But if such responses under any of our

[1] Instances of declining to answer may, perhaps, be found elsewhere, *e. g.*, in 122 Mass. 600; but the refusals in Missouri in their ten years' experience probably outnumber all in the four New England States from the beginning. Indeed, outside of Missouri, I do not recall a second case.

[See also 148 Mass. 623; 186 Mass. 603, 608; 190 Mass. 611, 613; 56 N. H. 574; 67 N. H. 600; 85 Maine, 545, where in spite of the Governor's statement in the question put by him of his belief that it was a "solemn occasion," the court replied that it was not, and declined to answer on this ground; and 95 Maine, 564, where a similar result was reached by a majority of the court, although three of the judges took the view that they had no right to review the legislature's conclusion on this point, and accordingly returned an answer to the questions which their five brethren had refused to answer.]

[2] This leading New England newspaper designated the opinion of the Maine judges above quoted as a "decision of the court," and laid it down that there are two ways of exercising judicial power, — one, the regular way of litigation, and the other, that of giving these opinions, — and that they are equally binding. "So far," it added, "as Gov. Garcelon and his council are concerned, there can be no doubt of its binding force. . . . The opinion of the court is supreme and binding upon all in authority as public officers, as much as a final judgment, entered up after a full hearing, is upon an individual. In the constitutional method . . . a decision has been reached, and it is no longer advice or counsel, but has the force of the constitution itself. The view of Gov. Garcelon

constitutions are to hold their place (and it appears to me that they are useful), it is of grave importance that the notion of their binding quality should be dispelled.

would make a farce of all judicial appeals," etc. Since I have criticised the Maine opinion, I take leave to add that I sympathized with the side which that opinion supported, and greatly admired the political good sense which led all parties, under the circumstances of that time, to accept the conclusions of the judges.

LEGAL TENDER

[This article was written in 1887 for one of the earliest numbers of the Harvard Law Review (1 Harv. Law Rev. 73).]

THE question whether Congress has the power to make paper a good tender in payment of debts, and the question whether under any given circumstances it is wise or right that Congress should use it, are very different things. He who asserts the power may well enough deny the wisdom, the justice, or the morality of any particular instance of its exercise; recalling what Sir Matthew Hale said of the king's prerogative regarding the coin: "It is true that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonor to the nation if it should . . . but surely if we respect the right of the thing, it is within the king's power to do it."[1] The topic which it is now proposed to consider is the purely legal one of constitutional power.

I. As regards the clauses of the Constitution relating to money, and as to the opinion of the framers of it about the emission of bills and making paper a legal tender.

The specifications of the power which is given to the Congress of the United States in the Constitution, relating to money, are two: power is given to borrow money and to coin money. Art. I., Sec. 8, clause 2, reads: (The Congress shall have power) "to borrow money on the credit of the United States." In clause 5 the power is given "to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures." Provisions corresponding to these are found in Art. 9, Secs. 4 and 5, of the Articles of Confederation; and the language there

[1] 1 Hale, P. C. 193.

used accounts in part for that of the Constitution. The clauses above quoted originally stood, in Pinckney's Plan of a Federal Constitution,[1] as follows: "The Legislature of the United States shall have the power to borrow money and emit bills of credit; . . . to coin money, and regulate the value of all coins, and fix the standard of weights and measures." The Plan was referred to a committee. In the draft of the Constitution reported by the committee of detail[2] on August 6, after more than two months, the first clause stood nearly as before, while the other one read thus: "to coin money, to regulate the value of foreign coin." There was now no difficulty in regard to the clause about coining money; it passed without opposition, taking on at some later stage the shape in which it now stands, namely, that which is first quoted above. As regards the other clause, that part of it was stricken out which authorized Congress to emit bills, and it was left thus: "to borrow money on the credit of the United States." In the articles of Confederation it had been: "to borrow money or emit bills on the credit of the United States;" and now, in the final result, they merely struck out, "or emit bills."

At no time did any plan or draft of the Constitution contain anything which in express terms touched the making of bills by Congress a legal tender; nothing was said for or against that power. That omission was not, of course, because the subject was unfamiliar; it was, in fact, very much brought to the attention of the framers of the Constitution, and so were all the possibilities of legislative action about it. It was suggested by Madison that this power of emitting bills of credit should not be struck out, but that the making of such bills a legal tender should be prohibited. It was suggested by others that if there were merely a striking out and no prohibition, the power both to emit bills and to make them a legal tender would exist in Congress. But still no prohibition was

[1] 5 Elliott's Debates, 130.
[2] *Ib.* 378.

inserted, and there was simply a striking out of the express authority to emit bills.[1]

Now, as regards the States. In Pinckney's Plan, Art. XI.,[2] they were forbidden, "without the consent of the Legislature of the United States . . . (to) emit bills of credit (or), make anything but gold, silver, or copper a tender in payment of debts." By the report of the committee of detail[3] they were forbidden absolutely to coin money; and the previous prohibition, "without the consent of the Legislature of the United States," was continued as to the clause about emitting bills of credit, or making anything but specie a tender in payment of debts. This condition was afterwards stricken out,[4] and the whole provision on the subject as regards the States, finally took its present form of an absolute prohibition.[5]

As things stood, therefore, when the instrument was launched, and as they stand now; *first,* both the Union and the States could borrow money; *second,* the States could not coin money, and they could not give the quality of "a tender in payment of debts" to anything but gold and silver coin; *third,* the Union could "coin money, regulate the value thereof, and of foreign coin." It was not restricted as to the metal it should coin. It was not given any express power to give or to withhold from its own coin or any other, the quality of a legal tender in payment of debts; and it was not denied any usual or naturally implied power of this sort; *fourth,* the States could

[1] *Ib.* 434.
[2] *Ib.* 131.
[3] *Ib.* 381.
[4] *Ib.* 484, 485.
[5] Const. U. S., Art. I., Sec. 10, clause 1: "No State shall . . . coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." What was meant by emitting bills of credit was afterwards a matter of controversy in the courts. The definition of "bills of credit" by the Supreme Court (by the majority, per Marshall, C. J.) in Craig *v.* Mo., 4 Pet. 432 (1830), included any paper medium issued by a State for the purposes of common circulation. But this was afterwards restricted to bills issued by the State, and "containing a pledge of its credit." Briscoe *v.* Bk. of Ky., 11 Pet. 257 (1837); Darrington *v.* Alabama, 13 How. 12 (1851). This change saved the State banks.

not emit bills, and, of course, they could not borrow by the aid of such bills; *fifth*, as to the power of Congress to emit bills, to supply a paper currency, or to make it a legal tender, the Constitution was silent.

The questions present themselves, Can Congress emit bills? Can it make them a legal tender? Can it make anything else a legal tender? In answer to the last of these questions, all agree that Congress can make coin a legal tender, — any coin. It is not restricted to its own coin; and it is not restricted to gold and silver. The power to do this is fairly, although not necessarily, implied in that of coining and regulating the value of coin. In view of the silence of the Constitution, the usual functions of coined money, and the usual powers of a government in regard to it, such a power cannot for a moment be doubted.

Can Congress emit bills and make them a legal tender? In considering the action of the Convention which framed the Constitution it is interesting to observe that this question presented itself, for the most part, not as a twofold question, but as a single one. The matter discussed was the emission of bills. Whatever this might mean, this was the dangerous thing. This was the power which it was proposed, in terms, to give, and this only; and this only is what was stricken out. If it should turn out that the power of emitting bills was not gone, by merely striking out the grant, then, of course, that act is not conclusive upon the question of giving them the legal tender quality. This power of making paper a legal tender may, indeed, be wanting for other reasons, but it is not wanting by reason merely of striking out the expression of a power to emit bills.

Let us see just what took place in the Convention as regards bills of credit, and what was then thought to be the effect of its action. What actually took place may be seen (so far as we have any report of it) by looking at pages 434 and 435 of the fifth volume of Elliott's Debates.

The Convention was discussing, on August 16, the draft of a Constitution submitted ten days before by the Committee of Detail: —

Mr. GOUVERNEUR MORRIS moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless. — Mr. BUTLER seconds the motion. — Mr. MADISON. Will it not be sufficient to prohibit the making them a *tender*? This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best. — Mr. GOUVERNEUR MORRIS. Striking out the words will leave room still for notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited. — Mr. GORHAM was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure. — Mr. MASON had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on, had such a prohibition existed. — Mr. GORHAM. The power, as far as it will be necessary or safe, is involved in that of borrowing. — Mr. MERCER was a friend to paper money, though, in the present state and temper of America, he should neither propose nor approve of such a measure. He was, consequently, opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens. — Mr. ELLSWORTH thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good. — Mr. RANDOLPH, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he

could not foresee all the occasions that might arise. — Mr. WILSON: It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered; and, as long as it can be resorted to it will be a bar to other resources. — Mr. BUTLER remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power. — Mr. MASON was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head. — Mr. READ thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation. — Mr. LANGDON had rather reject the whole plan than retain the three words, "and emit bills."

Morris's motion to strike out was then carried by a vote of nine States to two. In a note at the bottom of page 435, in accounting for the vote of Virginia, Madison says: "This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that the striking out of the words would not disable the government from the use of public notes so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts."

Now, in regard to that discussion, observe one or two points: *first*, that the objectionable thing was not merely making paper a legal tender, but having a paper currency at all. Madison's suggestion to insert a prohibition upon making bills a legal tender, was met by saying that all paper emissions must be prohibited; and Madison's note shows that he conceived that, in their final action, they were cutting away all pretext for a paper currency, and not merely for making it a legal tender; *second*, eleven persons only are reported as speaking in this discussion out of fifty-five, who, at one time or another, attended the Convention;[1] and most of those who spoke appear to have

[1] 1 Ell. Deb. 125.

assumed that striking out the phrase "emit bills on the credit of the United States" was equivalent to prohibition.[1] But, although most of the members may have assumed this, all of them did not. One prominent and respected member, Mr. Gorham, from Massachusetts, distinctly made the point that, while he favored striking out, he would not consent to prohibition; he would strike out, because leaving the words in would be a standing temptation to use the power. Madison also tells us, in explaining his vote, that he thought there would still be some power of using "public notes." Of these eleven speakers, five, viz.: Madison, Mason, Gorham, Mercer, and Randolph expressed themselves as not in favor of wholly prohibiting the emission of bills. And so, in accounting for the large vote in favor of Morris's motion, it is reasonable to suppose that a considerable number shared the opinion of Gorham, that striking out was not equivalent to prohibition. This sagacious policy of silence, rather than positive grant or positive prohibition, as regards the powers and duty of the Union, was resorted to on several occasions; they wished, as Gouverneur Morris is reported to have said of the instrument which they were preparing,[2] to "make it as palatable as possible." For example, on an unsuccessful motion to strike out a clause making the compensation of members of Congress payable out of the National treasury, Massachusetts voted to strike out; "not," says Madison, "because they thought the State treasury ought to be substituted, but because they thought nothing should be said on the subject, in which case it would silently devolve on the National Treasury to support the National Legislature." The members of the Convention were sensible that the Constitution, as Madison said, "had many obstacles to encounter," and they preferred sometimes to leave the instrument silent rather than to

[1] And so Luther Martin, in his Address to the Legislature of Maryland, 1 Ell. Deb. 369, 370.
[2] 4 Ell. Deb. 611.

invite opposition by express provisions, either one way or the other.[1]

Such was the action of the framers of the Constitution as to the power to emit bills and the closely related topic of making them a legal tender. Turn now and consider that it is the established law of the country that Congress may emit bills. There is no doubt about that. It has been practised for seventy years and more; and Chief Justice Chase, in delivering the opinion of the Supreme Court of the United States, in Veazie Bank *v.* Fenno,[2] says: "It cannot be doubted that, under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here," he adds, "to decide whether the quality of legal tender in payment of debts can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use, by those who see fit to use them, in all the transactions of commerce; to provide for their redemption; to make them a currency uniform in value and description, and convenient and useful for circulation. . . . Congress has undertaken to supply a currency for the entire country. . . . It now consists of coin, of United States notes, and of the notes of the National banks. Both

[1] Compare the striking out of a clause empowering Congress to grant charters of incorporation, a power which, nevertheless, it has, 5 Ell. Deb. 543, 544; and Jefferson's comments, 4 *ib.* 610; and the note, *ib.* 611; and see Legal Tender Cases, 12 Wall. 559, per Bradley, J. Compare also the fate of Mr. Gerry's motion ("he was not seconded") to extend to Congress the prohibition which was put upon the States, as to impairing the obligation of contracts, 5 Ell. Deb. 546; see the remarks of Morris, *ib.* 485. Compare also the language of Madison, in his letter of Feb. 22, 1831, to C. J. Ingersoll; a certain evil which he is there discussing was not, he says, foreseen, "and, if it had been apprehended, it is questionable whether the Constitution of the United States (which had many obstacles to encounter) would have ventured to guard against it by an additional provision." 4 Ell. Deb. 608.

[2] 8 Wall. 533, at p. 548.

descriptions of notes may properly be described as bills of credit. . . . Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. . . . Congress may restrain by suitable enactments the circulation as money of any notes not issued under its own authority." The two dissenting judges do not deny the power of the government to emit bills of credit, but they speak of them as being "issued under a constructive power to issue bills of credit, as no express power is given in the Constitution."[1] And again, in the case of Hepburn *v.* Griswold,[2] Chase, C. J., says: "No one questions the general constitutionality . . . of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts."

We are, therefore, to remark, that while the doctrine is now established that Congress may emit bills of credit, may furnish a paper currency, and may prohibit the circulation of any currency but its own, yet, in the debates of the Convention, so far as we know anything about them, the majority of the speakers thought that they were prohibiting bills of credit and paper money. They were wrong. They talked as if the striking out of the words "and emit bills on the credit of the United States" were prohibition; but it was not. Mr. Gorham's view is now the accepted one; the striking out was the removal of an express grant of power, but it was not a prohibition of the power. It had the effect to leave the question of power to be settled as it might arise, as in the instance of striking out the grant of power to give charters of incorporation.[3] And so as regards the further question of the power to make the cur-

[1] *Ib.*, at p. 555.
[2] *Ib.* 603, at p. 619.
[3] See also the express proviso of Art. IV. Sec. 3, as to the Territories.

rency a legal tender, this act of striking out the words "and emit bills on the credit of the United States" was merely neutral. We have seen that most of those who took part in the debates of the Convention appear to have thought that if the power of emitting bills of credit should exist at all, the power to make them a legal tender would also exist if it were not expressly prohibited. Although Madison seems to have conceived that dropping the power to emit bills would not wholly deprive the Union of that power, while it would leave it destitute of the power to make its issues a tender, yet, as Mr. Justice Gray remarks,[1] "he has not explained why" he thought so. He also thought that there would be no power to issue them as a currency, or to establish any paper currency; which is not so. And he thought, too, that forbidding the issuing of bills of credit to the States was only forbidding such as are made a legal tender;[2] which was not so. "The Constitution itself," said Marshall, C. J., in Craig *v.* The State of Missouri,[3] furnishes no countenance to this distinction. The prohibition (in the case of the States) is general. It extends to all bills of credit, not to bills of a particular description."

II. But while it is true that no argument can be drawn from the action of the Convention in dealing with the power of Congress to emit bills of credit, against its power to give the quality of legal tender to its paper currency, yet it may, of course, be true for other reasons that Congress has no such power. This was strongly declared by Mr. Webster, in his speech on the "Specie Circular," delivered in the Senate of the United States on the 21st of December, 1836. The debate related to an order of the Secretary of the Treasury to certain officials to require the payment of gold and silver for public lands. Mr. Webster said:[4] "What is meant by the 'constitutional currency' about

[1] 110 U. S., at p. 443.
[2] Letter to C. J. Ingersoll, Feb. 22, 1831, 4 Ell. Deb. 608.
[3] 4 Pet. 410, at p. 434.
[4] Webster's Works, IV. 270, 271.

which so much is said? What species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by *currency*. Currency, in a large, and, perhaps, in a just sense, includes not only gold, and silver, and bank notes, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the *legal money* of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender, in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender, in payment of debts, and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts. Congress has exercised this power, fully, in both its branches. It has coined money, and still coins it. It has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it, would shake the whole system. But, if the Constitution knows only gold and silver as a legal tender, does it follow that the Constitution cannot tolerate the voluntary circulation of bank notes, convertible into gold and silver at the will of the holder, as part of the actual money of the country? Is a man not only to be entitled to demand gold and silver for every debt, but is he, or should he be, obliged to demand it in all cases? Is

it, or should government make it, unlawful to receive pay in anything else? Such a notion is too absurd to be seriously treated. The constitutional *tender* is the thing to be preserved, and it ought to be preserved sacredly, under all circumstances. The rest remains for judicious legislation by those who have competent authority."

That is a very emphatic expression of opinion on the part of Mr. Webster, and it is often cited. He puts this doctrine as resulting from the fact that Congress, while not expressly prohibited, like the States, yet has no grant of power "in this respect, but to coin money and regulate the value of foreign coins."[1] If this ground be thought, as I venture to think it, not a very strong one, it must be remembered that Mr. Webster was not, just then, concerned with any careful or affirmative discussion of this topic; he was only making a passing concession to his opponents. His line of thought was this: "You talk of 'paper money' as unconstitutional; and of gold and silver as the only 'constitutional currency.' What is meant by 'constitutional currency?' If you mean that nothing but coin can be a legal tender, I agree; but if you mean that it is not constitutional to have a paper currency at all, I deny it." That is to say, he conceded a point, in passing, without at all undertaking to weigh carefully his language or his reasons as regards a matter upon which he assumes that all whom he is addressing think alike. Still he does give a reason; (*a*) there can be no legal tender but coin, as resulting from the action of a State, because the States are expressly prohibited from making anything but gold and silver a tender in payment of debts; (*b*) there can be no legal tender but coin resulting from the action of Congress, because, though not expressly prohibited, "as Congress has no power granted to it in this respect, but to coin money and regulate the value of foreign coins, it clearly has

[1] Mr. Webster is, of course, a little inaccurate here. Congress may also "regulate the value" of its own coin. And it is an error to say that Congress can make only gold and silver a tender.

no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts."

Now, as regards these statements of Mr. Webster, there is, in the first place, no difficulty in assenting to what he says about the power of the States. But as regards Congress, his conclusion is by no means so obvious. When it is said that Congress has no other power granted to it, in respect to legal tender, than that which is mentioned, if it is meant that no such power is granted by implication elsewhere, there is a begging of the question which we are discussing, and of which more will be said later on. If it is meant that there is no other express grant of the power, the statement is objectionable in its assumption that there is here any express grant of power to establish a legal tender; although, it is to be admitted that there is not any express grant of it elsewhere.

The argument as regards this last point, which Mr. Webster's expressions suggest, has been forcibly put by Mr. Holmes (now Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts), thus: "It is hard to see how a limited power, which is expressly given, and which does not come up to a desired height, can be enlarged as an incident to some other express power; an express grant seems to exclude implications; the power to coin money means to strike off metallic medals (coins) and to make those medals legal tender (money). If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"[1] In another place[2] Mr. Holmes again uses this argument and declares it to be, in his opinion, unanswerable. Mr. Justice Field, in the Legal Tender Cases[3] presses the same reasoning, in his dissenting opinion, and adds: "When the Constitution says that Congress shall

[1] In 1 Kent's Com. (12th ed.) 254 (1873); and also, before that, in 4 Am. Law Rev. 768 (July, 1870).
[2] 7 Am. Law Rev. 147 (1872).
[3] 12 Wall, 651 (Dec. 1870).

have the power to make metallic coins legal tender, it declares in effect that it shall make nothing else such tender." To which Mr. Holmes adds, "We should prefer to say, it excludes the implication of a grant of more extensive powers."

This reasoning seems to me obviously defective.

(1) It does not take the language of the Constitution as it stands. It puts a construction on it, viz.: that money and legal tender are here synonymous; and reasons as if this part of the Constitution contained the expression "legal tender." The Constitution does not, in terms, say that Congress may make coin a legal tender, although, truly, the power is not wanting; but it says nothing about legal tender. The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution.

(2) This construction appears to be wrong. The Constitution, in the coinage clause, simply confers on Congress one of the usual functions of a government, that of manufacturing metallic money and regulating the value of such money. As to what shall be done with it when it is manufactured and its value regulated, the Constitution says nothing. I cannot doubt that the word *money* in the coinage clause is limited to metallic money.[1] And Congress may do with it and about it, and may abstain wholly or in part from doing, what is ordinarily done by governments when they coin money; and so may make it a legal tender. But money is not necessarily a tender in discharge of contracts or debts; with us, foreign money is not;[2] some domestic money is not; for example, trade dollars,[3] silver coins, under the denomination of one dollar, for amounts over ten dollars,[4] copper and other minor coins,

[1] But see Mr. McMurtrie's very able "Observations on Mr. George Bancroft's Plea for the Constitution."
[2] U. S. Rev. St. s. 3584.
[3] 1 Suppl. Rev. St. p. 254.
[4] *Ib.* p. 488.

for amounts over twenty-five cents.[1] Undoubtedly the Legislature may make its coin a legal tender or not, as it pleases, and to such a partial extent, and with such qualifications as it pleases. In law, whatever is legal tender is money; but it is not true that whatever is money is legal tender. The clause of the Constitution, therefore, which provides for the coinage of money is not one which, by any necessary construction, says anything about legal tender. While, indeed, it is clear, having regard to the nature and ordinary use of coined money, to the ordinary powers of governments, to the control over this whole subject which is given to Congress by the Constitution, and to its silence as touching any restrictions regarding the power to make the money, when coined, a legal tender, — that Congress has full power to give or withhold this quality as regards its coined money, yet this power is inferential, and not express. The real argument, then, from the clauses relied upon by the learned persons above quoted, is not, as it is put; (*a*) Congress has an express power to make coin a legal tender; and so, (*b*) an implied power to make something else a legal tender is excluded. But it cannot be put higher than this: (*a*) Congress has an express power to coin money; (*b*) in that, is implied a power to make it a legal tender; and (*c*) this implied power excludes an implied power to make anything else a legal tender. That argument is not a strong one.

The power of Congress to make and put in circulation a paper currency, a paper medium of exchange, what Mr. Webster, in common with Adam Smith and Hamilton, and many another, calls "paper money," is now established. The express power to coin money does not exclude the implication of that. Why, then, should the implied power of making coined money a legal tender exclude an implied power of making "paper money" a legal tender? As the power to coin money, and so to furnish a medium of

[1] U. S. Rev. St. s. 3587.

exchange does not exclude an implied power to furnish another medium of exchange, a paper currency, "paper money," — so neither in its expression nor its implication does it exclude the implied power to make this other medium of exchange a legal tender.

But it may be thought that I have gone too far in saying, as regards metallic money, that the terms *money* and *legal tender* are not convertible terms. It is not forgotten that distinguished persons have held the contrary opinion. Mill has said: "It seems to me to be an essential part of the idea of money that it be legal tender."[1] A distinguished French writer, Say, has remarked: "The copper coin and that of base metal are not, strictly speaking, money; for debts cannot be legally tendered in this coin, except such fractional sums as are too minute to be paid in gold or silver."[2] Many other persons have held this as a doctrine of political economy, although it is a view which is by no means universally accepted.[3] In law, also, it is to be admitted that, generally, in the payment of debts and obligations, and on the side of penal law, as in a statute relating to the embezzlement of money, only what is a legal tender is money.[4] But it must also be remembered that the Constitution, in giving to Congress the power to coin money, is not, just then, concerned with the technicalities of law or political economy; it is disposing of one of the "*jura majestatis*" in brief and general terms, in phrases which are the language of statesmen. The terms used in this place import the manufacture of metallic coin, and do not comprehend the preparation of paper. But to say that they import no other metallic coin than that which is made a legal tender seems to be clearly an error. Even in strict law the term *money* sometimes

[1] Principles of Pol. Econ., Book iii. c. xii. s. 6.
[2] Pol. Econ., Book i. c. xxi. s. 10.
[3] See especially Francis A. Walker's acute and searching book on "Money."
[4] 2 Bish. Crim. Law, s. 357, Title Embezzlement, "Money means, as a general proposition, what is legal tender, and nothing else."

covers things other than legal tender, as in the case of a gift of "money" in a will, which includes bank notes.[1] Of bank notes, also, Lord Mansfield said, in 1758, in Miller *v.* Race,[2] in an action of trover for a bank note: "They . . . are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind. . . . They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Of the guinea, first coined in 1664 and not made a legal tender till 1717, Holt, C. J., said, in 1694, in St. Leiger *v.* Pope:[3] "Do you think that it is not high treason to counterfeit guineas? A guinea is the current coin of the kingdom, and we are to take notice of it." And then, above all, consider the usage of the time when the Constitution was made. Adam Smith, of whose great work on "The Wealth of Nations," the first edition was published in 1776, and the last, of those during his lifetime, in 1786, remarks: "Originally, in all countries, I believe, a legal tender of payment could be made only in the coin of that metal which was peculiarly considered as the standard or measure of value. In England, gold was not considered as a legal tender for a long time after it was coined into money."[4] I am not concerned with the precise accuracy of this statement in certain points of fact,[5] but only with its use of terms. Dr. Johnson, whose dictionary received his last corrections in the edition of 1773, defined money, with no reference to the idea of tender, simply and only as "metal, coined for the purposes of commerce." Hamilton, in 1790, in his opinion given to Washington, on the constitutionality of the bill to incorporate a United States Bank,[6] said: "The Bank will be conducive to the creation of a medium of exchange be-

[1] 2 Williams Ex., Pt. 3, Book iii. c. ii. s. 4.
[2] 1 Burr. 457.
[3] 5 Mod., at p. 7.
[4] Book i. c. v.
[5] See Coins of the Realm, by the Earl of Liverpool, 143.
[6] Lodge's Works of Alexander Hamilton, iii. 213.

tween the States. . . . Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose of money with different degrees of utility. Paper has been extensively employed." [1]

Observe, also, the sense of the term as used in our early statutes. In the first Coinage Act, of April 2, 1792,[2] in Sec. 9, ten coins, from eagles down to cents and half cents, are directed to be struck at the mint, and the value of them is regulated. Here appears to be the full exercise of the express power given in the Constitution, "to coin money and regulate the value thereof"; and it will be remarked that it is exercised in regard to the copper coins no less than the gold and silver ones. In a later section (Sec. 16) the gold and silver coins, and these only, are made "a lawful tender in all payments whatsoever." But can there be any doubt that the two copper coins were regarded as "money"? If so, the doubt will vanish on looking at the Act of May 8, 1792, to "provide for a copper coinage," [3] which, in furtherance of the previous Act, provided, among other things, that the cents and half cents were to be paid into the treasury, "thence to issue into circulation," and that after a fixed time "no copper coins or pieces whatsoever, except the said cents and half cents, shall pass current as money," and also enacted forfeiture and a penalty for paying or offering any other copper coins but these; but it said nothing of their being a tender. It was, I believe, more than seventy years before copper coin had the quality of legal tender.[4] As regards our later legislation, in the Revised Statutes of the United States (Sec. 3513), the trade dollar is classed

[1] It is needless to say that Hamilton was not here advocating making the paper a legal tender.

[2] 1 U. S. St. at Large, 246.

[3] 1 U. S. St. at Large, 283.

[4] Upton's Money in Politics, 259. Can there (to adopt the suggestion of a learned friend) be any doubt, if a State should issue a copper coinage like this, that the proceedings would be unconstitutional, as coining money?

among "the silver coins of the United States"; and in Sec. 3586 it is, with the rest, made a legal tender for amounts not over five dollars. By a statute of 1876,[1] the quality of legal tender is taken away from this "silver coin of the United States." Does it thereby cease to be money? The case of the trade dollar is peculiar. But imagine the government to coin some very large gold piece for supposed reasons of convenience in trade, without making it a legal tender; this, as I am told, was formerly done in Germany; is such a coin, therefore, not money? Suppose the government, for like reasons, to manufacture coins, of exactly the same size and value as those of England, or Russia, or Holland, not a legal tender, but supposed to be serviceable in foreign trade, would they not be money?[2] Suppose such coins to be made for use in China as being readily taken there, would the case be essentially different? And, finally, suppose that Congress, instead of repealing that part only of Title 39 of the Revised Statutes which related to the trade dollar had repealed all of it; it is the seven sections of this title, under the separate heading of "Legal Tender," which give that quality to the coins of the United States; would all our coins, manufactured as they are under the provisions of the separate Title 38, cease to be money? It seems clear that they would not; and we must conclude that the term money, as used in the coinage clause of the Constitution, has that large and universal sense in which it is used in the reasonings of Aristotle,[3] of Adam Smith, and of Hamilton, viz.: that of a common metallic medium of exchange, "the common measure of all commerce."[4]

[1] 1 Suppl. R. S. U. S. 254.

[2] [Cf. Bronson *v.* Rodes, 7 Wall. 229, 250.]

[3] Nicom. Eth., Bk. v. 5. "For this purpose money was invented, and serves as a medium (μέσον, mean, or means) of exchange, for by it we can measure everything. . . . Money is, indeed, subject to the same conditions as other things; its value is not always the same, but still it tends to be more constant than anything else," etc. Translation by F. H. Peters. London, 1881.

[4] 1 Hale's P. C. 184.

And, finally, before leaving this argument from the supposed express power in the coinage clause, it may be added, as was said before, that this argument would equally apply if the Constitution had retained the express clause giving power "to emit bills on the credit of the United States." It might still have been said that the implication of a power to give these bills the quality of legal tender was excluded by the coinage change. Yet the evident understanding of most of those who took part in the debates was, that if the power to emit bills was given it would carry with it the power to make them a tender, unless that power was expressly prohibited. There can be no doubt as to their understanding of that. The coinage clause was not even alluded to. We have, then, in a way, the authority of these framers of the Constitution against the argument that the coinage clause excluded the implication of a power to make paper a legal tender.

III. But there are other grounds on which the power now in question is denied. It is said that it is not necessary and proper to the end of carrying out any express power given to Congress, and that it is inconsistent with the letter and spirit of the Constitution. Of these arguments an article in the "American Law Review," [1] understood to have been written by Mr. Holmes, whose general contention they are put forward to support, has expressed a slighting opinion. "The case of Hepburn *v.* Griswold," he says, "(8 Wall. 603), was argued very much on the question whether the Legal Tender Act was a necessary and proper means of carrying out some of the powers expressly given to Congress . . . and the case presented the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy." And, after referring to the later decision, in 12 Wall. 457, and expressing the opinion already referred to, that the argument drawn from the coinage clause is unan-

[1] Vol. vii. p. 146.

swerable to show that there is no power to make paper a legal tender, it is added: "Judges Strong and Bradley are more successful, to our mind, in meeting the shadowy argument drawn from the spirit of the Constitution as to impairing the obligations of contract, etc., than in overthrowing this. Less attention is given than in Hepburn *v.* Griswold to the fitness of the legal tender acts to accomplish their ends, which we must think a purely legislative question, in the absence of an obvious fraud on the Constitution."

This view of the arguments alluded to appears to be a sound one. It is said to be inconsistent with the spirit of the Constitution to make paper a legal tender because it is unjust; and it is pointed out that a great and avowed purpose of the Constitution was the establishment of justice.[1] That is an argument which has often been repeated, but it is of very slight importance. I do not mean that it is of slight importance to do an unjust thing; that is never a matter of small importance. But we are considering the value of arguments, and of arguments for the judicial setting aside of legislation; and I mean that this argument, as one justifying the declaration that a legislative act is void, is a slight one. The preamble of the Constitution in saying that its purpose is "to establish justice," etc., is making a large preliminary declaration relating to the total aim of the instrument as a whole. If the question were about legislation reducing the duty on wool, and it should be argued in a judicial opinion that the law is contrary to the spirit of the Constitution, because it is the aim of that instrument "to form a more perfect union," while this law is necessarily unsatisfactory to the people of a certain section of the Union, and tends to alienate them from it, — that kind of reasoning would be instantly felt to be out of place. It seems, at best, to belong to legislative, rather than judicial discussion.

[1] 8 Wall., 622, per Chase, C. J.

An answer to this sort of argument may be collected from an important early case,[1] which held that Congress might constitutionally give the government priority over other creditors; and, therefore, that a law could not be held void which provided that where any revenue officer, or other person, should hereafter become indebted to the United States, and then insolvent, the debt due to the United States should be satisfied first, without limiting this postponement of private creditors to the case of such as should become creditors after the passage of the law. Mr. Justice Washington described this law, if interpreted as the Court did interpret and sustain it,[2] as "productive of the most cruel injustice to individuals," and tending "to destroy, more than any other act I can imagine, all confidence between man and man." He himself found it possible to interpret the law as applying only to persons accountable to the government, and so as not applicable to this case; and he therefore dissented from the opinion of the Court. But he admitted the power of Congress to go further if it saw fit: "The sovereign may in the exercise of his powers secure to himself this exclusive privilege of being preferred to the citizens; but this is no evidence that the claim is sanctioned by the claims of immutable justice. If the right is asserted individuals must submit," etc. And the Court (Marshall, C. J.), interpreting it to cover all debts, said: "The power is not prohibited. But it is said, and it is true, it must appear to be granted. It is so under the power to make all laws necessary and proper to carry into execution the powers vested. It need not be indispensable; Congress may use any means which are, in fact, conducive to the exercise of any powers granted by the Constitution. It has the power to pay the debts of the Union, and it must be authorized to use the means which appear to itself most eligible to effect that object."

But, again, apart from the phrases of the preamble of

[1] U. S. *v.* Fisher, 2 Cranch, 358 (1804).
[2] U. S. *v.* Fisher, 2 Cranch, p. 402.

the Constitution, it is said that the spirit of the Constitution as regards contracts is shown by the contemporaneous provisions which were made by the Congress of the Confederation sitting at the time of the convention, in framing the ordinance for the North-western Territory,[1] viz., that no law should be passed there which interfered with private contracts, and also by the provisions of the Constitution prohibiting States from impairing the obligations of contracts. And so the Court (Chase, C. J.) says: "A law not made in pursuance of an express power, for example, to pass bankruptcy laws which necessarily and by its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." Like arguments are drawn from the fifth amendment, prohibiting the taking of private property for public purposes without compensation, and the taking of property without due process of law. Indeed, this last provision is regarded as "a direct prohibition" of the legislation now in question; and so the reasoning, as regards this clause, is, that the legal-tender legislation is contrary not merely to the spirit of the Constitution, but to the letter of it.

This argument discriminates between laws made in pursuance of express powers and others. Why is this? If the argument is not good as regards express powers, which appears to be conceded, why should it be good as regards those that are implied or auxiliary? If the implied power be otherwise plain it is difficult to see why it should be treated any differently as regards the exercise of it, or its relation to the spirit of the Constitution, from any other power. As regards the existence of any alleged power, whether a main or auxiliary one, whether express, implied, constructive, inferential, or what not, the same questions are to be asked, viz.: Is it, upon the fair construction of the instrument, given? If it is given, how

[1] Chase, C. J., in Hepburn *v.* Griswold, 8 Wall. 622.

far, if at all, is it qualified?[1] In the preference case,[2] the Court saw no sufficient reason for denying the existence of an implied power on the ground of injustice in the exercise of it, as impairing the obligation of contracts or taking away private property without compensation or due process of law; although the direct and inevitable operation of the law was to deprive the debtor of the ability to pay a part of his debts, and so to deprive the creditor of his property. As regards the legal-tender law, it is not true, in any other sense than it was true in Fisher's case, that there is the direct and inevitable injury spoken of by the Chief Justice in Hepburn *v.* Griswold.[3] If the notes are convertible and sufficiently secured, the legal-tender quality need not produce injury; that is the case to-day with our legal-tender notes; there is no direct and inevitable injury.

IV. Leaving now the special consideration of arguments against the power in question, it is time to give, affirmatively, the reasons for believing that making the notes of the Government a legal tender for debts may fairly be held necessary and proper for the exercise of some of the powers granted in the Constitution.[4]

[1] Juilliard *v.* Greenman, 110 U. S., at p. 448; Legal Tender Cases, 12 Wall., at p. 550, per Strong, J.

[2] U. S. *v.* Fisher, 2 Cranch, 358.

[3] 8 Wall., at p. 623.

[4] It is not necessary to emphasize the point in regard to this question, but it is worth remarking, as we pass, that courts, in declining to pronounce a legislative act unconstitutional, are not, in reality, required to hold any distinct, affirmative opinion that the measure is constitutional. They are engaged in revising the action of another department of the government, and their duty is indicated in Cooley's phrase: "To be in doubt, therefore, is to be resolved, and the resolution must support the law." (Princ. Const. Law, 153.) It is still more plainly indicated by such a statement as that of Mr. Justice Thomas (Opinion of the Justices, 8 Gray, p. 21) when he sustains the constitutionality of an act of the legislature "upon the single ground that the act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void." It is not a difficult inference from these expressions that the judge's own opinion was, that this act was, in fact, not warranted by the Constitution. To the like effect is the very common expression of the judges that, in order to justify the judicial declaration that legislation is unconstitutional, the fact must be plain "beyond a reasonable doubt." Ogden *v.* Saunders, 12 Wheat., at

1. This power is really involved in the power of issuing or authorizing a paper currency. That power may be derived from the power to regulate commerce, as Hamilton seems to have derived it, in urging upon Washington the signing of the Bank Act, at the outset of the government.[1] "The bank," he says, "will be conducive to the creation of a medium of exchange between the States and the keeping up of a full circulation. . . . Money is the very hinge on which commerce turns." And he adds that the whole or the greatest part of the coin in the country may be carried out of it. Years before[2] Hamilton had condemned as visionary the notion that coin was adequate to the purposes of currency. This power of providing a paper currency is variously accounted for. In the Veazie Bank case,[3] the Court, while declaring it, did not state where it was found. Webster derived it from the coinage clauses of the Constitution, including the prohibition on the States.[4] Webster also found it in the power to regulate

p. 270, per Washington, J.; Sinking Fund Cases, 99 U. S., at p. 718, per Waite, C. J.; Wellington, Pet'r., 16 Pick., at p. 95, per Shaw, C. J.; People *v.* Sup. of Orange, 17 N. Y., at p. 241, per Harris, J.; Cooley, Const. Lim. 183. See Von Holst, Const. Law of U. S. 64, 65 (Chicago, 1887). The remark that the Constitution is a law, and, therefore, can have but one allowable interpretation, and that one the interpretation given to it by the Court, overlooks the essential peculiarity of that form of law which we call a Constitution. See a letter to the "Nation" of April 10, 1884, in which the present writer has enlarged upon this topic. One must not, to be sure, emphasize too heavily a single expression, like this of a "reasonable doubt." But an analysis of the reasons for the general principles adopted by courts in passing upon the constitutionality of legislation will be found to lead to very important conclusions; and these are well intimated by that expression and its connotation in other parts of the law.

[1] Lodge's Works of Hamilton, iii. 213.

[2] In 1781, Letter to R. Morris, *ib.* 102.

[3] 8 Wall. 533.

[4] "The exclusive power of regulating the metallic currency of the country would seem necessarily to imply, or, more properly, to include, as part of itself, a power to decide how far that currency should be exclusive, how far any substitute should interfere with it, and what that substitute should be." — Works, iii. 395. "Let me ask whether Congress, if it had not the power of coining money, and of regulating the value of foreign coins, could create a bank, with the power to circulate bills. For one, I think it would be difficult to make that out." *Ib.* 413. See Legal Tender Cases, 12 Wall., at p. 545, per Strong, J. Also "Observations on Mr. George Bancroft's Plea for the Constitution," by Richard C. McMurtrie (Philadelphia, 1886), pp. 16–24.

commerce.[1] Chase, C. J., in 12 Wall. 574, 575, puts the power to emit bills on the borrowing clause, and the power to regulate commerce; and as to the power to exclude from circulation all but government notes, he says that it "might perhaps be deduced from the power to regulate the value of coin"; and that "this was the doctrine of the Veazie Bank *v.* Fenno, although not fully elaborated in that case."

Now, in furnishing the currency what may the government do with it? Why may it not, as a question of legal power, make it do the full and usual office of money; that is, make the tender of it the legal equivalent of a tender of metallic money? If, as we see reason to believe, this was not prohibited, and not inconsistent with any provisions of the Constitution; and if, at the same time, it was a power which had been frequently exercised by those legislative bodies with which the framers of the instrument were most familiar, and was generally deemed by them to go along with that power of furnishing a paper currency, which they did confer upon Congress; if, like the power of conferring upon coin the legal-tender quality, it be a power which naturally, and according to the usage of nations, is included in that complete control over money and the currency which is given to Congress, then it cannot well be denied to our national government. Such legislation may or may not be highly objectionable. It may in a perilous time be useful, and even necessary, to the proper

[1] "It is clear that the power to regulate commerce between the States carries with it, not impliedly, but necessarily and directly, a full power of regulating the essential element of commerce, namely, the currency of the country, the money, which constitutes the life and soul of commerce. We live in an age when paper money is an essential element in all trade between the States; its use is inseparably connected with all commercial transactions. . . . I understand there are gentlemen who are opposed to all paper money, who would have no circulating medium whatever but gold and silver. . . . I would ask this plain question, whether any one imagines that all the duty of government, in respect to currency, is comprised in merely taking care that the gold and silver coin be not debased? . . . If government is bound to regulate commerce and trade, and, consequently, to exercise oversight and care over that which is the essential element of all the transactions of commerce, then government has done nothing, etc." Works, iv. 315, 316.

discharge of the duty of a government. Or it may in ordinary times be very immoral and even outrageous legislation. But it is not for a Court to act as the keeper of the legislative judgment or the legislative conscience on a legislative question. When, in the early part of the war that was carried on here twenty odd years ago, the State banks broke down, it was thought by Congress highly important, if not absolutely necessary, that the government should furnish a currency to the country; commerce could not go on without it; there was not coin enough to do the business of the country. The emission of government bills of credit was a natural and suitable method, not merely of doing other things, but of supplying a currency. And in the straits to which we were then reduced, the credit of the government being gravely in doubt, foreign nations expecting our downfall, and our own people fearful of the result, even the government promises could not command confidence.[1] At such a time a currency resting only on the government credit would not, it was thought, do the office

[1] Miller, J., in Hepburn *v.* Griswold, 8 Wall., at p. 632; Strong, J. (for the Court), in Legal Tender Cases, 12 Wall., at p. 540. ["It is instructive to recur to the expressions of the Chief Justice when the Act . . . declared unconstitutional [in Hepburn *v.* Griswold] was pending. At that time he was Secretary of the Treasury; and, on February 4, 1862, he wrote to William Cullen Bryant, then editor of the New York 'Evening Post,' as follows: 'Your feelings of repugnance to the legal tender clause can hardly be greater than my own; but I am convinced that, as a temporary measure, it is indispensably necessary. From various motives — some honorable, and some not honorable — a considerable number, though a small minority of the business men or people, are indisposed to sustain the United States notes by receiving and paying them as money. This minority, in the absence of any legal tender clause, may control the majority to all practical intents. To prevent this, which would at this time be disastrous in the extreme, I yield my general views for a particular exception. To yield does not violate any obligation to the people, for the great majority, willing now to receive and pay their notes, desire that the minority may not be allowed to reap special advantages from their refusal to do so; and our government is not only a government of the people, but is bound, in an exigency like the present, to act on the maxim: *Salus populi suprema est lex*.

"'It is only, however, on condition that a tax adequate to interest, reduction of debt, and ordinary expenditures, be provided, and that a uniform banking system be authorized, founded on United States securities, and, with proper safeguards for specie payments, securing at once a uniform and convertible currency for the people, and a demand for

of a medium of exchange, or would not do it reasonably well, without giving it the full usual and legal quality of money; with that quality it served the purpose. If it be said, as it has been said,[1] that it would have served the purpose as well, or better, if to each note had been annexed the right to ride in every railway car in the country, to enter places of public amusement and the like, the answer is, that it is true that such privileges would have helped; but these incidents would have been foreign to the purposes of a currency. To make the currency do the usual office of money more effectually and fully is legitimate regulation of the currency. To make it do the special office of theatre tickets or railroad tickets is superadding to its quality as currency, as money, or its equivalent, another and foreign quality.

2. Congress, having the power to furnish a paper currency, and to give to that currency such qualities as may make it do the full and usual office of money, may use its own currency, in any of its forms, in order to borrow money. And, in combining these functions of issuing a currency and borrowing money, if Congress give to its currency the quality of legal tender, wholly or mainly, because it will thus be a better instrument for borrowing purposes, it will not be in the power of a court to declare the legislation for that reason unconstitutional.

It will be convenient here to make a few discriminations. In order to supply a paper currency the government need not emit bills; it may charter a private bank to provide

national securities which will sustain their market value and facilitate loans. It is only on this condition, I say, I consent to the expedient of United States notes, in limited amount, made a legal tender.

"'In giving this consent, I feel that I am treading the path of duty, and shall cheerfully, as I have always done, abide the consequences. I dare not say that I care nothing for personal consequences, but I think I may say truly that I care little for them in comparison with my obligation to do whatever the safety of the country may require.' 2 Godwin's Life of Bryant, 165.

"See also Mr. Chase's statements to a committee of the House of Representatives, in 110 U. S., p. 423." 2 Thayer's Const. Cas. 2236, n.]

[1] [110 U. S., p. 461, by Field, J.]

a circulation, and may simply regulate its operations; and it may be itself a stockholder, as in the case of the United States Bank. Or it may avail itself of banks already established. In such cases there is no borrowing of money. On the continent of Europe, as I am informed, most of the cases where governments made the paper currency a legal tender, before the time of our Constitution, — and some of the instances since, but not all, — were those of giving this quality to the paper of private or *quasi* public institutions; not to government bills. Now, in such cases, the government does not necessarily borrow money. Again, even where it makes its own paper a currency, and a legal-tender currency, it does not necessarily raise money on it, except, of course, in so far as it may go on to pay its debts with it, and thus borrow by a forced loan; for it may, as the States sometimes did,[1] cause its paper to be given out by lending it on the security of other property. Or it may issue it to banks on their giving security for its redemption, and merely allow them to use it and issue it as a circulating medium. In such a case there is no borrowing by the government.

The case of the present National banks is not quite this; for they take notes furnished by the government and issue them as their own, and are fully and primarily responsible upon them; but the government is a sort of guarantor, and holds specific property of the banks, viz. government bonds, as security, to be applied to the redemption of the notes, being itself bound to redeem them on the failure of the banks to do so, and having the right to apply the bonds to reimburse itself. Now, there is here a remote element of borrowing; that is to say, the property of the banks which must be deposited consists of the securities of the United States; and, in order to get those securities, the banks, or somebody else, must have lent money to the United States. So that, under the existing system, the United

[1] Craig *v.* Mo., 4 Pet. 410.

States says: (1) there shall be a currency for the whole country; (2) it shall be furnished by the United States and guaranteed by it, but issued through private banks; (3) in receiving these printed notes the banks shall leave as security with the United States a certain quantity of bonds of the United States which are their own property; (4) they must return these notes to the United States before they can have their bonds again. This, of course, is uniting the operation of the two powers of borrowing and of issuing a currency. If the government, instead of this arrangement, were to issue its own currency directly, like the greenbacks, it need not necessarily borrow with it; for it might, as we have seen, lend it on security (which might or might not be its own bonds), to be used by others.

But, on the other hand, it may borrow money with it; and that is the natural and obvious way of giving out its currency. That was, in point of fact, done during our great rebellion. If this currency be one which is the full legal equivalent of money, a legal tender, the principle is still the same; the government may borrow with this currency as well as any other. When the government notes consist of promises to pay, the phrase of borrowing is, of course, strictly applicable. It is true we more commonly speak of this operation as that of the government selling its bonds or notes, as we speak of a man selling his own promissory notes. But it is, in fact, borrowing money on a promise to pay; and in the case of the government it is borrowing upon a kind of promise to pay, which is a part of the medium of exchange, and of that which is, in the full legal sense, money.

We perceive, then, a great difference between private borrowing and public borrowing.[1] When a nation borrows it may, as we see, borrow with its currency; and if its currency be made a legal tender it may borrow with that.

[1] And so Juilliard *v.* Greenman, 110 U. S., at p. 448, per Gray, J.

I do not say, if a government were denied the power of establishing a paper currency at all, that it could give to its paper the quality of legal tender in order to borrow with it. To do that would, indeed, help the borrowing process; but, on the supposition I am now making, viz., of a government with no power to establish a paper currency, it would be an evasion of the restriction put upon it, to say that it could, merely for facility of borrowing, annex to its security a quality which would be forbidden if it were not borrowing. It is not, then, as part of the mere, bare, simple process of borrowing that Congress is to be said to have the power of giving to the government paper the quality of money. But it is as part of the borrowing power *of a nation;*[1] of a body which has other governmental powers, such as the power of establishing a paper currency, and so of annexing to it the legal-tender quality; the power and duty of raising armies and providing for their support, and so of raising money suddenly and in vast quantities; and the like. Such a body may borrow with its currency and with its legal-tender currency.

If there be any exigency, as, for example, that of war, in which the government may make its own notes, or any other, a legal tender, it seems to be purely a legislative question when such an exigency has in point of fact arisen. This was the unanimous opinion of the court in Juilliard *v.* Greenman.

[1] Juilliard *v.* Greenman, 110 U. S. 421, 444–448. The pamphlet of Mr. Bancroft, called out by this case, proceeded upon singular misconceptions, and was unworthy of its author's fame. [See Borie *v.* Trott, 5 Phila. 366; 2 Hare, Am. Const. Law, 1232–1310.]

A PEOPLE WITHOUT LAW

[Professor Thayer was deeply interested in the Indian question. He felt keenly the evils of the "arbitrary methods unknown to our Constitution and our inherited system of law" by which the Indians are governed, and it was his strong belief "that this country has no duty towards the Indians so solemn and so instant as that of bringing these poor people under the protection and the control of the ordinary laws of the land." In the effort to bring this about he gave his time freely for years, addressing many public meetings, preparing memorials, and otherwise taking an active part in the efforts to secure just legislation. In March, 1888, soon after the passage of the General Allotment Act (then known as the "Dawes Bill"), he published in the "Atlantic Monthly" an article entitled "The Dawes Bill and the Indians," and in October and November, 1891, he published the more extended article which follows. After its publication in the "Atlantic Monthly" it was reprinted in pamphlet form by the Boston Indian Citizenship Committee as one of its documents.

Reference is made in the foot-notes to some of the statutes and decisions since the article was written which bear on the matters under discussion.]

I

In saying "A People without Law" I mean our Indians. He who tries to fix and express their legal status finds very soon that he is dealing chiefly with their political condition, so little of any legal status at all have Indians. But we must at once discriminate and remind ourselves that there are different sorts of Indians. What makes any of them peculiar, in a legal point of view, is the fact that they belong to a separate political body, and that our government mainly deals with them, not as individuals, as it does with you and me, but in a lump, as a people or tribe.[1]

[1] ["The condition of the Indians and Indian tribes within the limits of the United States is anomalous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations." Brewer, J., in Roff v. Burney, 168 U. S. 218, 221.]

When an Indian has detached himself from his own people, and adopted civilized ways of life, and resides among us, he at once becomes, by our present law, a citizen like the rest of us. There are many Indians in the country who have done this. We may set them one side. There are even many Indians in tribes who are our fellow-citizens. In the language of Judge Curtis in the Dred Scott case, "By solemn treaties large bodies of Mexican and North American Indians . . . have been admitted to citizenship of the United States." The Pueblo Indians, for instance, have been judicially declared by the courts of New Mexico to be, in this way, citizens of the United States, although, oddly enough, we keep agents among them. In such cases, the tribal relation, while it is of course a matter of much social importance, is of no legal significance at all; it is like being a Presbyterian, or a member of the Phi Beta Kappa, or a Freemason; and each Indian, however little he knows it, holds a direct relation of allegiance to the United States. Again, there are Indians in the separate States, as in Massachusetts, Maine, and New York, who, although in tribes, have never held any direct relations with the United States, but have been governed as subjects by these States.[1] The problem of this class of people has been slowly and quietly working out under the control of the separate States, without any interference from the general government, until, in some cases, politically and legally speaking, they are not Indians. In Massachusetts, in 1869, every Indian in the State was made a citizen of the State, and it is supposed,

[1] ["As to the status of tribal Indians in the different States, see Danzell *v.* Webquish, 108 Mass. 133; Seneca Nation *v.* Christie, 126 N. Y. 122; State *v.* Newell, 84 Me. 465; The Cherokee Trust Funds, 117 U. S. 288, 303. In the last-named case it is said of eleven or twelve hundred Cherokees who remained at the East when the 'Nation' was removed to the West, 'They ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided.' In State *v.* Newell, this language is quoted as applicable to all the Indians of Maine. In Massachusetts by a statute of 1869 (c. 463, s. 1) all Indians in the State were declared to be 'citizens of the Commonwealth.'" 1 Thayer's Const. Cas. 591, n.]

I rather think correctly, that they have thus become citizens of the United States. It would not have been so if the general government had entered into relations with them before this declaration. Then the assent of the United States would have been required to make them citizens of that government. But whether citizens of the United States or not, they are citizens and voters in Massachusetts, and might determine the election of a President of the United States by their votes. In the States of Maine and New York the courts still call them the "wards of the State," and as such the States govern them as they think proper, as being subjects, and not citizens.

Leaving these exceptional classes of Indians, what I propose to speak of is the legal status of that less than a quarter of a million of people with whom the United States government holds relations under the clause of the Constitution which gives to Congress the right to "regulate commerce . . . with the Indian tribes," — the people with whom we carry on war, and who live mainly on reservations secured to them by treaties or otherwise. There are, to be sure, some thousands of tribal Indians who wander about loosely over the plains, but in the main the class that I am to deal with, the class that is intimated when we talk of the "Indian question," may be shortly designated as the Reservation Indians. And yet here I must again discriminate. Out of these Reservation Indians we may conveniently set aside the seventy thousand or so who belong among the "civilized tribes" in the Indian Territory, — the Choctaws, Cherokees, and the rest. These are, to be sure, in strictness, Reservation Indians, and their legal status is highly interesting; a time is coming when it will require the close attention of statesmen, but it does not so much press upon public attention just now. These people govern themselves with a good degree of success; they have constitutions and laws closely modeled upon ours,[1] and have made much progress in the ways of

[1] [See Roff v. Burney, 168 U. S. 218.]

civilized life. As regards their political relation to us, they rest, so far, in a good deal of security on the peculiarly solemn guarantees with which our government accompanied its settlement of them on their lands. But, as I have intimated, the time will probably come when, with or without their consent, there must be a readjustment of our relations with them.[1] In looking ahead, we must contemplate an ultimate absorption of that region into the Union. Already, lately, there has taken place, in some measure, an extension over it of federal courts and federal law. If, then, we deduct these "civilized Indians," there remain somewhere between 130,000 and 180,000 others, whom I am calling Reservation Indians, either living on reservations or candidates for that sort of life; and it is these whose case I wish to consider. In this statement the Alaska Indians are not included. They are too little known, and their relations to the other inhabitants of that country and to our government too little ascertained, to make it practicable to consider them.

I am speaking of "Reservation Indians," but what are Indian reservations? They are tracts of land belonging to the United States which are set apart for the residence of Indians. This is done in various ways, — by treaty, by a law, by an executive order. Often the reservation is a region given to the Indians in exchange for their ancestral home and hunting-ground; sometimes it is a diminished part of this ancestral ground. The Indians, in most cases, are recognized as having a legal right to the occupation of this land. They do not generally own the fee of it; that is in the government. If the tribe should become extinct or abandon the land, the title would rest wholly in the United States. Their title is the same

[1] [See Act of March 3, 1893 (27 U. S. St. at Large, 645); Act of June 28, 1898 (30 U. S. St. at Large, 495); Act of March 3, 1901 (31 U. S. St. at Large, 1447); Act of Apr. 26, 1906 (34 U. S. St. at Large, 137); Act of June 16, 1906 (34 U. S. St. at Large, 267); Stephens *v.* Cherokee Nation, 174 U. S. 445; Cherokee Nation *v.* Hitchcock, 187 U. S. 294.]

that they were recognized as having in the soil which they originally occupied and ranged over when the Europeans came here, — a right of occupancy merely, yet a right recognized by the courts so long, at any rate, as it is recognized by the political department. This right is merely tribal; the individual does not own land or have any legal right in it. On these reservations the Indians keep up, in point of theory and in the main, their separate national housekeeping, make their own laws, govern themselves. They owe no allegiance to us; each Indian owes allegiance to his tribe and its chiefs.[1] With these separated people, as I said, we carry on war, and until lately

[1] ["It will help to bring out the fundamental peculiarity of the status of these people, if the conception of territorial sovereignty, which is ours, be contrasted with that old conception of 'tribe sovereignty' which is pretty nearly theirs. The two are inconsistent, and the attempts to reconcile our claims to the control of these people who live upon our soil, with the fiction that they are independent and govern themselves, has resulted in calamity to them and disgrace to us.

"Palgrave, in his 'English Commonwealth,' vol. i. 62, in speaking of the political conceptions which were at the bottom of the Anglo-Saxon States, says: 'We consider that the powers of government result from the right which the sovereign possesses over the land in which the people dwell; the allegiance of the subject arises from the spot of his domicile, or the accident of his birthplace; and the modern law of nations teaches us that the State is constituted by the arbitrary or geographical boundaries which determine its extent and limit its jurisdiction. This is the principle of the modern commonwealth; but the scheme of government adopted by ancient nations was essentially patriarchal. Kings were the leaders of the people, not the lords of the soil; and their authority was exerted in the first instance over the persons of their subjects, not over the territories which composed their dominion.'

"And Sir Henry Maine, in his 'Ancient Law,' c. iv., while remarking (9th ed. p. 106) that 'territorial sovereignty — the view which connects sovereignty with the possession of a limited portion of the earth's surface — was distinctly an offshoot, though a tardy one, of feudalism,' further says (*Ib.* p. 103): 'It is a consideration well worthy to be kept in view, that during a large part of what we usually term modern history no such conception was entertained as that of territorial sovereignty. Sovereignty was not associated with dominion over a portion or subdivision of the earth. . . . After the subsidence of the barbarian eruptions, the notion of sovereignty that prevailed seems to have been twofold. On the one hand it assumed the form of what may be called "*tribe*-sovereignty." The Franks, the Burgundians, the Vandal, the Lombards, and Visigoths were masters, of course, of the territories which they occupied, and to which some of them have given a geographical appellation; but they based no claim of right upon the fact of territorial possession, and indeed attached no importance to it whatever. . . . The alternative to this peculiar notion of sovereignty appears to have been . . . the idea of universal dominion.'" 2 Thayer's Const. Cas. 1912, n.]

we have concluded treaties. Such was the way, also, of our English ancestors.

It has turned out, however, for one reason and another, that they succeeded very poorly at making their own laws and governing themselves; and we did not quite let them alone. We found, for instance, that it would not do to let in outsiders to trade freely with them, and that we must keep ourselves advised as to what they were doing, and whether they were standing to their promises; and so we sent agents among them to represent us in delivering to them the goods and money we owed them, and to protect them against intrusion. We could not allow intoxicating liquors to be sold among them, or firearms. We must, in short, fully "regulate commerce" with them. In this way it came about that we really interfered a great deal with the theory of their separate national housekeeping. Yet, further, when wars came, and with them the upsetting of everything and the rearranging by new treaties, of course we interfered still more. As time went by it was perceived that the Indian self-government amounted to little, and we occasionally stepped in with laws to fill the gap. But it is only occasionally and in scraps that we have done this; for the most part, we still stand by and see them languishing under the decay of their own government, and give them nothing in its place, — no courts to appeal to, and no resort when they are wronged excepting to fight. We keep them in a state of dependence upon the arbitrary pleasure of executive and administrative officials, without the steady security of any system of law.

In such a state of things as this, with a wretched system in existence, and with the need of a change, two courses are open to a good citizen, not exclusive of each other, but yet quite different. One is to endeavor to procure an honest, righteous administration of the existing system while it lasts, the punishment of offenders, the securing of good officials, the dismissal of bad ones, redress for outrages, and the creation of a public sentiment that will help to these

ends. The other course is to displace that radically bad element of the existing system, the "lawlessness" of it, which poisons everything that is done, and disheartens the reformer by supplying new outrages as fast as he can correct the old ones. These two courses, as I said, are not exclusive of each other. He who would, first of all, abolish certain evil features of our present method of dealing with the Indians may well join in the endeavor to mitigate and mend the administration of the present system while it lasts. And yet a persuasion of the need and the possibility of a radical change will surely affect the judgment in determining the relative importance of things; it will settle the question of *emphasis,* that most important thing in thought and conduct. I desire at the outset to express a conviction that the chief thing to be done, the thing imperative now, the thing that must not wait, whatever else is postponed, is a radical change in the particular of giving to the Indians courts and a system of law upon their reservations; and also to express the conviction that this is not only a thing so much to be desired, but that it is practicable, if those who are interested in this subject will only insist upon it in this spirit.

(1) Let us now, in coming to closer quarters with this matter, run over certain facts of the legal and political history of our relation with the Indians. Of the more familiar matters I shall say little, but we will try to observe some of the leading points, — enough of them to come to a fair understanding of the situation.

When the Europeans came hither, in the fifteenth century and later, it was unavoidable that there should be conflicts between them and the people whom they found here. Not only the nature of the situation, but the European ideas of the relation to each other of white men and men of other colors, made it certain that there would be trouble. Had the new-comers all been saints and sages, this would still have happened, for they and the savages did not and could not understand each other. Their purposes crossed. Neces-

sity drove each to acts that seemed hostile to the other. How could the savages fail to regard as enemies the strange people who seized and carried away to an unknown fate their neighbors and friends; who carried off their stores of food, and stripped the graves of their families? How could they know what the Europeans were at? And if they did know, how could they help fearing for themselves and their household gods? The Europeans, however, were not saints and sages, but average men of their time; and the natives were savages. In war both were ferocious and brutal; and the savages were ferocious and brutal to the last degree. In that famous first letter of Columbus, — lately reprinted in the Latin version of 1493 by Professor Haynes, of Boston, with a scholarly translation, — telling of his earliest discoveries, we read these ominous words: "As soon as I had come into this sea I took by force some Indians from the first island." How did the Indians who remained like that? Somehow or other Columbus carried away nine of them to Spain. Was it likely to be any relief to their families to know that they were destined to be duly baptized at Barcelona? Columbus's plans contemplated the regular deportation of them as slaves. In the next century, the Spaniards, in their dealings with the Indians, did not at all improve upon Columbus. Of De Soto, in the fourth decade of the sixteenth century, we are told in Miss Fletcher's Report on Indian Education and Civilization, "De Soto's wanderings across the country might be traced by the groans of Indian captives, male and female, reduced to slavery and compelled to bear the burdens of the soldiers; by the flames of dwellings, the desolation of fields, and the heaps of slain, young and old."

The English were not so bad, yet the adventurers who sailed along these coasts continued the same work of spreading terror and hatred among the natives. The Englishman Waymouth, sailing up a river of the State of Maine in 1605, "kidnapped and carried away five of the natives." "We used little delay," he says, "but suddenly laid hands

upon them; and it was as much as five or six of us could do to get them into the (boat), for they were strong, and so naked as our best hold was by their long hair on their heads." Nine years later, Thomas Hunt, a shipmaster, carried away seven and twenty Indians from the coast of Massachusetts, and sold them in Spain as slaves. Six years later, in November, 1620, the Mayflower company began its dealing with Indian affairs (while exploring Cape Cod before landing at Plymouth) by repeatedly taking the Indian stores of corn and beans which they had laid away for their own supply; proposing to themselves, indeed, what the Indians must be pardoned for not appreciating, "so soon as they could meet with any of the inhabitants of that place, to make them large satisfaction." They seem also to have opened Indian graves, for we are told of the bowls, trays, dishes, knife, pack needle, the "little bow," and strings and bracelets of fine white beads that they found in one of them. They were now among the people whose neighbors had been kidnapped by Thomas Hunt. It is not strange, therefore, to read that when they saw some Indians a week later and tried to approach them, these ran away; and to find that the first actual intercourse between our New England ancestors and the natives was as follows, — I quote from Dr. Palfrey's History of New England: "The following morning (December 8), at daylight, they had just ended their prayers, and were preparing breakfast at their camp on the beach, when they heard a yell, and a flight of arrows fell among them. The assailants turned out to be thirty or forty Indians, who, being fired upon, retired."

Observe, I am not just now concerned in blaming either the Pilgrims or the natives. I am drawing attention to facts, and beg my reader to remember that, all things considered, such events were sure to happen. They help us to guess and forecast the relation of separation that was to take place between the new-comers and their neighbors. As time went on, and new Europeans swarmed in settle-

ments along the coast and on the rivers and meadows of the interior, — drawn often to the same points, to well-watered spots on the sea-coast, the fording-places of a river, the lower falls of a tidal stream, or some fine inland river bottom, by the same attraction which had gathered the natives there, — as these things happened, all men know how collisions came and frightful wars and devastation, how the savages were beaten and crowded back. The necessity of self-preservation was held to justify any atrocities. "The awful conditions of the case," says our grave historian, Dr. Palfrey, in speaking of the performances of Mason and Underhill in the Pequot war of 1637, "forbid being dainty about the means of winning a victory, or about using it in such a manner that the chance shall not have to be tried again."

Complications arose. Not only English, but French and Dutch had set foot on this continent, and they were rivals here. At home, also, these Europeans fought; this induced sympathetic fighting here; and this, again, drew in the savages, whose quarrels, as among themselves and with the colonists, were fomented for the advantage of the fighting Europeans. Whittier in his beautiful early poem of Pentucket (the Indian name of Haverhill) gives a picture of one of the incidents of these wars, when the allied French and Indians attacked that border town, his birthplace: —

> "Even now the villager can tell
> Where Rolfe beside his hearthstone fell,
> Still show the door of wasting oak,
> Through which the fatal death-shot broke,
> And point the curious stranger where
> De Rouville's corse lay grim and bare, —
> Whose hideous head, in death still feared,
> Bore not a trace of hair or beard."

Haverhill was my own birthplace, and I well recall the dreadful fear of Indians which the children of that town continued to cherish so late as fifty odd years ago, — a cen-

tury and a quarter after these events. I can remember coming home from school in mortal terror lest my family had all been carried away by the Indians during my absence.

As time went on, in some colonies the Indians were driven to the west, out further into the vast unknown wilderness, and were forbidden to cross the line of demarcation between them and the whites; and state reservations were established along the border, on which friendly Indians were induced to settle, acting at once as a precaution and a buffer against the shock of hostile attack. During this process other things had happened. Individual Indians had settled among the whites, and had sunk into the mass of the people, and were governed like the rest. To some extent, also, tribes of Indians had been caught and surrounded by the flood of the new civilization, and remained islanded permanently as a separate people in the midst of it, yet governed more or less under the laws of the colonies. It was such cases as these, probably, that were referred to in the first permanent statute of our present national government, passed in 1802, to regulate "commerce with the Indian tribes." The sixteenth section of that act begins, "Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States." It was owing, very likely, to this relegation to the States of the affairs of such Indians as are here described that we may trace the circumstance, often not understood, that some States, like New York, Massachusetts, and Maine, have continued to deal freely with Indian tribes within their borders. These tribes, in the language of the statute of 1802, had come to be "surrounded by settlements of the citizens of the United States, and . . . within the ordinary jurisdiction of the . . . States." As a dry question of power, Congress might at any time have taken control of them. But while Congress was staying its hand, it might happen, and has happened

in Massachusetts, that the tribal relation had been dissolved. It has happened in the case of individual Indians, whose separation from their tribe has been recognized by the States, and in the case of whole tribes. In such instances, the "Indian tribe," in the sense of the Constitution of the United States, that is in the sense of a separate political community, has ceased to exist before it was ever recognized by the general government; and therewith the power of Congress has gone, because, as regards these persons, there exists no longer the opportunity to exercise it.

(2) It will be observed that I have now brought the United States upon the scene. New problems have thus emerged. What are the relations between this new government and the Indians? How has their relation to the separate local governments been affected?

The new government had its immediate origin in a sense of danger from England, and in the need of protection from that peril, and the like. One of the first things that presented itself was the possibility of harm from the savages; for the colonies had had a direful experience of what an enemy might do who chose to ally himself with these people. Accordingly, in July, 1775, the Continental Congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies," and proceeded to adopt the first of our national arrangements for managing Indian affairs. Commissioners were appointed for each of the three departments (North, Middle, and South) into which all the Indians were divided. These commissioners were to have power to make treaties with the Indians, and to watch the operations of the British superintendents. "The commissioners," it was resolved, ". . . (are to) have power to take to their assistance gentlemen of influence among the Indians in whom they can confide, and to appoint agents residing near or among the Indians to watch the conduct of the (British) superintendents or their emissaries." There are many signs of the anxious

care of Congress in this matter. Treaties with the Indians were immediately made. Congress, in January, 1776, directed the importation of $200,000 worth of goods on public account, to be sold by the Indian commissioners to persons licensed to trade with the Indians, at cost and expenses and a commission of two and a half per cent. These traders were to sell only at fixed points and fixed prices. In the same year it was resolved that disputes between the whites and Indians should be determined (if the Indians would agree) by arbitrators chosen one by each party, and one by the commissioners. Many of the Indians took part against us. The anxiety that was felt and the magnitude of the "Indian question" of that day are shown by the way in which this figures in the Declaration of Independence in 1776, and in the Articles of Confederation in 1778–81. "He has endeavored," is the charge of the Declaration against the British king, "to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions." In the ninth of the Articles of Confederation, the separate States, which are forbidden to carry on war, may do this where a State "shall have received certain advice of a resolution being formed by some nation of Indians to invade" it; and these Articles entrust to the Union "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the States; *provided*, that the legislative right of any State within its own limits be not infringed or violated."

The Confederation proceeded, of course, like its predecessor the Continental Congress, to make treaties with the Indians as separate people; for example, the treaty with the Cherokees in 1785, at Hopewell, in which it was provided that if an outsider settled on Indian land he should forfeit the protection of the United States, and be subject to punishment by the Indians. In 1786 a formal ordinance was adopted for the regulation of Indian affairs in the

territory on the west, lately ceded by the States of the Atlantic margin. This region, divided into two departments, was assigned to superintendents acting under the Secretary of War, who were to attend to the regulation of trade with the Indians and the distribution of presents among them, and to report upon any signs of disaffection. Only licensed citizens of the United States could trade with the Indians; but any such citizen who brought a recommendation from the governor of his State, paid fifty dollars, and gave a bond had a right to be licensed.

Now came the organization of the new government, our present United States, in 1787–89. This, while preserving the old *names* of the "United States" and the "Union," was in reality, as we all know, a very different thing indeed. For certain great purposes it was a nation, gathering into one, for the accomplishment of these purposes, the combined power of all the colonies, and standing, as regards these ends, as a single state covering the entire country; to which, as being in these particulars the supreme state, every citizen had a direct relation and owed sole allegiance. This was not so before. Accordingly, now we not only find the general government endowed, as before, with the power of representing all the country in its relation to the Indian tribes, but we also find a dropping out of the old ambiguous and troublesome clauses about saving the legislative right of the separate colonies. The Constitution of the new government provided that Congress should have power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." Here, again, as in the two great documents before named, the Declaration of Independence thirteen years before, and the Articles of Confederation eight years before, we remark the importance of the "Indian question" of the period by the express and conspicuous mention of it, and by the circumstance that the handling of it is deemed matter of general concern. It was a dealing with separate nations; if not with a foreign people, yet a separate one.

(3) In starting now to take a brief survey of the legal position of the Indians under the new Constitution, and of the scope of the power which the nation has over them, let us stop a moment on the threshold and allow ourselves to conjecture what questions might present themselves and what answers would be given. Will the Indian tribes, our ancestors might have asked, remain permanently as separate political bodies? Or will they become broken up and absorbed into our own population? As regards the other anomalous element in our body politic, slaves, the word "slave" had been left out of the Constitution; it was expected that slavery would disappear, and there was an objection in some minds to having any permanent trace of it in the document. As to Indians it was not so; the insertion among the provisions for the basis of representation of the phrase "Indians not taxed" indicated perhaps not merely the recognition of the fact that there were then some Indians who had become embodied among our people, but also an expectation that such a process would go on. Assuming that it would, how long would it last? And meantime supposing there were war with the Indians and a conquest, what would happen? Was it thought that the Indians might be driven wholly out of our borders, — north, or south, or into the unfathomed west beyond the Mississippi? If they were subdued, how would they be governed? Would the United States have free and full power of governing them as it thought wise, as a subject people; or would it be restrained by the Constitution and its amendments, which secured trial by jury and other rights? Apart from war and conquest, would the Indians become enfeebled and lose their power of self-government? Would they ask, or, if they did not ask, would they need to be governed by us? Would they continue to occupy the great tracts which were then recognized as "Indian country," or would new States grow up, and the white people spread over into the Indian land?

Some of these questions undoubtedly presented them-

selves. Certainly the makers of the Constitution counted upon the growth of new States at the west. Was not the Ordinance of 1787, adopted while the Constitution was making, an express provision for that? Unquestionably they expected, except for the exigencies of war, that the Indians would long continue a separate people, and that so long as they did the right to occupy their lands would remain to them until it was parted with by their own consent. That the Indians were expected to be gradually more or less absorbed into our population we may believe, for that process had long gone on in the colonies. That our ancestors supposed that in one way or another the Indians would ultimately disappear as a separate element we may also believe, for they recognized them as capable of civilization, and laid plans for their education, training, and Christianizing. In July, 1775, Congress had voted money toward the education of certain Indians at "Dr. Wheelock's school," now Dartmouth College, and in the next year they had made provision for the residence of "ministers and schoolmasters" among the Indians, in order to promote "the propagation of the gospel and the cultivation of the civil arts" among them. And although the experience of the colonies was not calculated to encourage any confident expectation of working out a high form of civilization among the native tribes as a separate population, yet it might well lead to an expectation of a gradual fading out of the peculiarities of tribal life and tribal government, and a gradual subjection of them to the whites; for, as I said, it had been so in the colonies. We may believe, then, that the chance was not wholly overlooked that the general government might, for one reason or another, and for a longer or a shorter time, have to govern the Indians as subjects. If it conquered them in war, it could hardly be doubted that the power to govern them would be the same as if a foreign people were conquered; and if, in the gradual course of events, they should come to be surrounded by our people, and the tribal bond should be enfeebled and

tribal government ineffective and the people a source of danger to us, it may well have been expected that our government would take full control of them and govern them.

Our ancestors had themselves been witnesses to things that would suggest these possibilities. They, as well as we, had had experience of the shoving back of Indians as the whites crowded in, of the gradual surrounding of Indian settlements by whites and their submission to white legislation. They had witnessed in the separate colonies, for example in Virginia and Massachusetts, the same process which we in our day are witnessing on the continental scale. What happened in those colonies is happening now between the Mississippi and the Pacific. How had this matter been dealt with at the periods of which the framers of the Constitution had knowledge? In Massachusetts, as early as 1693–94, the legislature introduced law among the Indians. "To the intent that the Indians may be forwarded in civility and Christianity," they provided for the appointment of "one or more discreet persons within several parts of this Province to have the inspection and more particular care and government of the Indians in their respective plantations, . . . to have . . . the power of a justice of the peace over them" in civil and criminal cases "according to the . . . laws of the Province," etc. And in January, 1789, just before the United States Constitution went into operation, a statute of Massachusetts established a board of five overseers of the Marshpee Indians, "with full power . . . to regulate the police of the said plantation, to establish rules . . . for the well ordering and managing the affairs . . . of the said Indians, . . . and the said overseers . . . may . . . appoint . . . a guardian or guardians to the said Indian and other proprietors to carry into execution their said regulations and orders." These overseers or guardians were authorized to pass upon all contracts, leases, and the like made with the Indians, and to bring actions in their behalf and adjust controversies between them and the whites. They were also to render

legal accounts regularly to the governor and council. Under these and like statutes the Indians of Massachusetts were governed entirely, governed not as citizens, but as a subject population; being, in the language of the Supreme Court of Massachusetts, speaking through Mr. Justice Gray in 1871, "not subjected to taxation, *nor endowed with the ordinary civil and political rights of citizens,* but . . . treated as the wards of the commonwealth." [1] In Virginia, also, before and after the making of the Constitution of the United States, where Indian tribes had become reduced to very small numbers, trustees were appointed to sell their land and apply the proceeds for their benefit, while the survivors appear to have sunk into the mass of the free population of the colony.

There is a hint in these things, for, as the reader will observe, I have been speaking of the purposes and expectations of those who framed the Constitution of the United States; of what they meant when they spoke of "Indians not taxed," and of regulating commerce "with the Indian tribes"; and of what they meant by their silence when they said nothing more. In view of the historical facts now mentioned, of the nature of the government which was then created and the powers conferred upon it, we must conclude, I think, that while the United States might, if it saw fit, keep on in the old method of dealing with the Indians as a separate people, it also might, in various contingencies easily possible to foresee, change the plan, and govern the Indians as a subject population in methods suited to their stage of development.

(4) Let us now turn from the attitude of conjecture and forecast, and trace what has happened in point of fact. In the first place, very many treaties [2] were made, mainly

[1] Danzell *v.* Webquish, 108 Mass. 133, 134.

[2] [Of these treaties Mr. Justice Gray says in Jones *v.* Meehan, 175 U. S. 1, 10: "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of

for the purpose of getting and exchanging land.[1] The number, down to 1871, when the making of Indian treaties was abandoned, was a little under four hundred. One

a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."]

[1] ["It has long been perceived that the key to the solution of the Indian question lies in a just arrangement about their land, — one which should abolish the tribal title, give to individuals the ownership of reasonable quantities, and throw open to settlement all the rest. In general, as it is well known, our law has mainly dealt with the Indians by tribes, and not as individuals, and has not recognized, even in the tribes, ownership of the land they occupied, in any strict sense of the word. England, like the other states of Europe, claimed the lands of the New World by the right of discovery. Had these lands, when found, been occupied by 'Christian people,' their title to the land would have been respected; but barbarous races were at that period dealt with in a very different way. The Indians were perceived to be human beings, and so capable of rights; and they were allowed a right of occupancy in the land, in such reasonable amounts, at any rate, as they actually inhabited and used. They were not quite on a footing with the wolves and wild-cats that also tenanted this country; for, unlike them, they did have their right of occupancy. But when they went away the right was gone; and it has been repeatedly laid down by the Supreme Court of the United States that the 'Indian title,' as it is sometimes called, was not inconsistent with the fee simple, the absolute ownership, being in other persons. So that it is not too much to say that the soil of this country was granted by the Europeans, and has since passed from hand to hand, upon a theory which, as regards *ownership* of the soil, placed the Indians and the wild animals that roamed over it upon the same footing.(*a*)

"But there came the inevitable process of adjustment, of fixing the boundaries of the 'Indian country,' and taking a cession of their claims to all the rest; and then, further cessions and treaty arrangements, and removals of the Indians to new and remoter regions. In this way their slender rights to the land became modified; some tribes acquired an absolute title, and others a smaller right than that, but greater, or at least securer, than before. We moved most of them to the West, and were fain to forget them. But that was not so easily done. The country grew; and in recent years, instead of their being isolated and far beyond our settlements, it has come to pass that they are in the midst of them. The tide of our population has crept in and around and behind their reservations, and swept far beyond them. People look

(*a*) "The whole continent was divided and parceled out and granted by the governments of Europe as if it had been vacant and unoccupied land." (Taney, C. J., in U. S. *v.* Rogers, 4 Howard, at page 572.) For a brief statement as to the "Indian title" see U. S. *v.* Cook, 19 Wall. 591.

tenth of these were made before this century. Passing by these, the details of which are very numerous, I confine myself to the general laws. Our present United States took its first permanent step in general legislation about the Indians in the statute of March 30, 1802:[1] "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Its provisions are largely continued in all later laws. I will give a brief abstract of it, and the reader will notice how closely this statute follows the theory of regarding the Indians as a separate and self-governing people. After providing for marking certain extensive boundary lines previously fixed by treaty between "the United States and various Indian tribes," it forbids our citizens and others from going into this Indian country without a passport, and committing any act against the person or property of Indians in their own country which would be a crime if committed against a citizen of the United States within any State. The offender, if property were taken, was to restore to the Indians twofold. If he could not pay at least the full value, it should be paid out of the treasury of the United States, but only on condition that the Indians abstained from violence in righting themselves. Settlement on Indian lands, and trading without a license from the superintendent appointed by the United States for the particular Indian department, were forbidden; but anybody (limited, by a later statute, to citizens of the United States) giving bond

over into the fertile Indian tracts from which they are shut out, and covet them; and they begin to break through and steal.

"It has long been seen that these regions must be opened; that the ownership or control of great tracts of country by tribes — tribal control, that strong bulwark of the power of the chiefs — must be broken up; that individual Indians should be allowed the immense stimulus towards a civilized life which comes with the separate ownership of land; and last, but by no means least, that the clamor of outsiders for a chance at the Indians' unused and wide-stretching fields must, in some honest way, be met." The Dawes Bill and the Indians, J. B. Thayer, 61 Atlantic Monthly, 316, 317.]

[1] Re-enacting the temporary statutes of 1790, 1793, 1796, and 1799, passed for two and three years, which covered more or less of the same ground.

with sureties was to be licensed. The sale of the Indian title to land, except under a treaty or agreement with the United States, was forbidden. In order to promote civilization among friendly tribes, and to secure their continued friendship, the President was authorized to supply them, to a specified amount, with useful domestic animals and implements of husbandry, and goods or money, and to appoint "persons from time to time as temporary agents to reside among the Indians." If Indians should cross the line into any State or Territory of the United States and commit crime or outrage, the injured party or his representatives were to apply to the Indian superintendent or other designated officer and furnish proofs, and this officer was to make demand upon the Indian's nation or tribe for satisfaction. If this satisfaction were neglected or refused for a year, the President was to be informed, and was to take further steps to secure it. The individual injured was ultimately to be paid by the United States, unless otherwise indemnified; but if he should take the remedy into his own hands by violence, he forfeited this right. Outside territorial courts and United States courts were to have jurisdiction of offenses, under this act. The military might turn out anybody who was unlawfully in the Indian country.

So far no attempt was made to govern the Indians, or to administer justice on their land. Of course the theory was that of a people who did all this for themselves. But in a statute of March, 1817, we see something new. The doing in the Indian country of any act which would be punishable if committed in any place under the exclusive jurisdiction of the United States is made punishable as it would be if committed there, and jurisdiction is given to the superior court of the Territory, or the United States court of the district, into which the offender should first be brought. But offenses of Indians upon Indians are excepted. Here is a beginning of governing the Indian country, for this covers offenses between whites and between

Indians and whites. And then comes another recognition of the Indian weakness. By a statute of 1819, "for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization," the President, with the Indians' consent, may employ among them persons to teach them in the mode of agriculture suited to their situation, and their children in reading, writing, and arithmetic. Soon afterwards we find in the statutes a reflection of that terrible pressure of the whites upon the Indians of certain Southern States which led to driving them across the Mississippi. By a statute of 1830 the sum of $500,000 was appropriated to carry out the plan for removing all Indians, with their consent, from the existing States or organized Territories to the unorganized region west of the Mississippi, with authority solemnly to assure the Indians making the exchange that the United States will forever secure and guarantee to them the country thus given, and, if preferred, will give them a patent for it, the land to revert to the United States if the tribes become extinct or abandon the land.

On June 30, 1834, a revision was passed of the important statute of 1802, already summarized, superseding the chief of the laws above named. It first gave a definition of what was meant by "Indian country," in clumsy phrases which were interpreted by the Supreme Court of the United States in 1877[1] to mean all the land west of the Mississippi outside of the States of Louisiana and Missouri and the Territory of Arkansas, and the lands east of the Mississippi which now constitute the States of Michigan and Wisconsin. The definition was dropped in the Revised Statutes of 1874, and no other was substituted. The definition of "Indian country" now accepted by the Supreme Court of the United States[2] is "all the country to which

[1] Bates *v.* Clark, 95 U. S. 204.
[2] *Ex parte* Crow Dog, 109 U. S. 561.

the Indian title has not been extinguished, anywhere within the limits of the United States." This includes the country acquired by the United States since 1834, and does not except what is within the boundary of the States unless, as in Colorado, it may have been otherwise provided when they were admitted into the Union. The statute of 1834, after defining the Indian country, re-enacted, with modifications, the previous provisions regulating trade and intercourse. There is the same clear theory of recognizing the Indians as a separate people, but we find one or two more of those striking changes which mark the inroads upon this theory. Instead of trusting wholly to the Indians to extradite an offending member, we find now that the superintendents, agents, and sub-agents are to endeavor, by such means as the President may authorize, to arrest and bring to trial (before the outside courts) any Indians committing crimes on the reservation. That is a large discretion. The reader will remember that some crimes on the reservations were forbidden by the statute of 1817. The President may also employ the military in seizing such Indians. The superintendents, agents, and sub-agents are empowered to search for and destroy spirituous liquors, by whomsoever introduced, and to destroy any distillery, though set up by an Indian. The provision of 1817 for extending to the Indian country the criminal code of the United States for places under the exclusive jurisdiction of the United States is continued, but excludes, as before, the act of one Indian against another.

In 1849 the progress of ideas about the Indians was further marked by transferring the management of Indian affairs from the War Department, where hitherto it had lain, to the newly created Department of the Interior. The care of the Indians was ceasing to be thought of as a matter incidental to foreign affairs or to war. Vast tracts of country and great numbers of Indians had been added to our country by the ending of the Mexican war, and many of these Indians were made citizens by the treaty. People

had been flocking to California and the Western plains, and complicating Indian administration still further. After the war of secession, in 1866, provision was made for the enlistment of Indians in our armies as scouts, — an excellent step lately followed up by the present administration. Other changes were caused by the Pacific Railroad; for as General Walker says, "In 1867–68 the great plough of industrial civilization drew its deep furrow across the continent, from the Missouri to the Pacific, . . . (bringing changes) which without it would have been delayed for half a century." The Revised Statutes of the United States, compiled in 1874, reveal the still increasing complexity of Indian affairs. The "peace policy" had been adopted, and we find now not merely the regular Indian commissioner authorized in 1832, but an additional board of commissioners, not exceeding ten (serving without pay), to supervise contracts and purchases for Indians, and for other purposes; also five salaried inspectors to visit, examine, and report on the different superintendencies and agencies, and see to enforcing the due performance of their duty by the superintendents, agents, and other employees. The old provisions for authority to the President to employ teachers among the Indians, "with their own consent," are retained. In general we mark an increase of interference with the Indians and of discretionary power over them in the executive department, as in allowing the President to distribute the money or goods due to a tribe to the heads of families (instead of the tribal authorities), and directly to the individuals who are entitled to participate. Agents are required to protect in the enjoyment of their lands those Indians who have received lands in severalty, and are desirous to adopt the habits of civilized life. This draws attention to a process which had been going on by treaty, of dividing up tribal lands to the individual Indians. If any other Indian molest a land-owner, the tribal annuities are to be cut down; and if the trespasser be a chief, the local superintendent of Indian affairs *may depose him*

from his office of chief for three months. Think of that, — the deposing of the sacred ruler of a separate "nation" by a small United States official! This is indeed a bold inroad on the theory of Indian self-government. The sale of ardent spirits to any Indian under the charge of a superintendent, *anywhere in the country*,[1] is forbidden, — a restraint upon Indians which does not apply to any other class of human beings. The general laws of the United States defining and punishing forgery and depredations on the mails are also extended to the Indian country, by a statute of 1855.

Meantime, the practices of the agents and of the Indian Department generally had more than kept pace in this direction with the course of legislation. "Under the traditional policy of the United States," says General Walker,[2] "the Indian agent was a minister resident to a domestic dependent nation." But in actual fact he had grown long ago to be a ruler over them. "All offenses," wrote an Indian agent to the commissioner in September, 1890, "are punished *as I deem expedient*, and the Indians offer no resistance."

It remains to speak more particularly of three recent statutes, and then to consider the duty of our government.

II

Three important laws regarding the Indians remain to be mentioned, one of which was incorporated in the Revised Statutes.

(*a*) A statute of March 3, 1871, reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," — saving, however, the obligation of previous treaties. This was enacted twenty years ago. Did it abolish

[1] So construed in United States *v.* Holliday, 3 Wallace, 407.
[2] The Indian Question, 117.

the existence of these separate political powers, nations, or tribes? No, we all know that they have continued and been recognized just as before. Did it abolish the carrying on of war with the Indians? No, we remember the horrible events of last winter, and a recent judicial decision in South Dakota, that the Indian known as "Plenty Horses" was not guilty of homicide in killing a white man during those troubles, because it was an act of war. Do we then carry on war with Indians and not make treaties with them? Yes. A strange and absurd situation, is it not? Yet we do make "agreements" with them as with a separate people; and the chief result of this law is, and was intended to be, that it is no longer the President and Senate (the treaty-making power) that conclude these measures, but the legislative body, Congress. This statute was the result of a struggle on the part of the House of Representatives to share in these proceedings, and was forced upon the Senate on the last day of a session by putting it into an appropriation bill. It was thought at the time by so competent an observer as General Walker, formerly Commissioner of Indian Affairs, to be "a deadly blow at the tribal autonomy"; and so it was, in the logic of it. But the step was not then followed up, for it did not represent any clear determination of Congress to end the old methods; and this strange notion of refusing to make treaties with a people with whom we continue to go to war has remained on our statute book as another of the many anomalies that mark our Indian policy. Is it not plain, however, that if we abandon the policy of treaties with Indians we should give up the practice of war with them? Our arrangements with them are now called agreements; but this gives them no added sanction; they are still to be dealt with on the analogy of treaties.

(*b*) The second statute to which I refer is that of March 3, 1885. It followed up timidly the logic of the law of 1871, though for only a step or two; but it marked the greatest advance yet reached in the process of assuming the direct government of the Indians. The law provides that

thereafter Indians should be punished for committing upon Indians or others any one of seven leading crimes (murder, manslaughter, assault with intent to kill, rape, arson, burglary, or larceny): if in a Territory (whether on or off a reservation), under the territorial laws and in the territorial courts; and if in a State and on a reservation, then under the same laws and in the same courts as if the act were done in a place within the exclusive jurisdiction of the United States. This is a very important statute. In principle it claims for the United States full jurisdiction over the Indians upon their reservations, whether in a State or Territory. Heretofore, the laws, for example the statute of 1817 and the renewals of it, had excepted the acts of Indians committed upon their fellows within the Indian country. The acts of Indians against white persons or of whites against Indians had been dealt with, but the internal economy of Indian government was not invaded in its dealing or refusing to deal with the relations of members of the tribe to one another. The constitutionality, even, of such legislation as this of 1885 had been denied. Judges had been careful to avoid asserting this full power in cases where the reservation was in a State. Thus the Supreme Court of the United States, in 1845, in holding good the law of 1817, which punished (in this particular case) the act of a white man against a white man in the Indian country, among the Cherokees, said: "Where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."[1] In 1834 Mr. Justice McLean had denied the power of Congress to legislate in this way for an Indian reservation in a State, while admitting it in a Territory;[2] and in December, 1870, the judiciary committee of the Senate of the United States even went so far as to say, "An act of Congress which

[1] [U. S. *v.* Rogers, 4 How. 567, 572.]
[2] [U. S. *v.* Bailey, 1 McLean, 234.]

should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void." [1] But the air was at last cleared in 1886, when the Supreme Court of the United States had to deal with the indictment, under this statute, of one Indian for the murder of another Indian on a reservation in the State of California.[2] It was laid down in this case, one of the landmarks of our Indian law, that the government of the United States has full power, under the Constitution, to govern the Indians as its own subjects, if it sees fit to do so, and to such partial or full extent as it sees fit; that nothing in the tribal relation or in any previous recognition of it by the United States cuts down this legislative power; that this is so not merely in the Territories, but on reservations within the States. The case, as I said, arose on a reservation in the State of California. "This proposition itself," said the court, with no dissent, speaking through Mr. Justice Miller (that is, the proposition to punish under the laws of a Territory and by its courts a tribal Indian who commits a crime upon another tribal Indian on a reservation in a Territory), "is new in legislation of Congress. . . . The second, which applies solely to offenses . . . committed within the limits of a State and . . . of a reservation, . . . is a still further advance as asserting this jurisdiction over the Indians within the limits of the States of the Union. . . . After an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure, — to govern them by acts of Congress. . . . It seems to us that this is within the competency of Congress." [3]

Not less important than the decision itself is the principle on which it is put. In supporting the statute the government counsel had relied on the clause in the Constitution which gives Congress power "to regulate commerce

[1] Walker, The Indian Question, 125.
[2] United States *v.* Kagama, 118 U. S. 375.
[3] [See also Talton *v.* Mayes, 163 U. S. 376; Our New Possessions, *infra*, p. 153, note p. 171.]

with . . . the Indian tribes." But the court boldly rejected this as "a very strained construction of this clause," and rested its decision upon no specific provision of the Constitution, but upon the just inferences to be drawn from the nature of the situation, namely, that the Indians are a decayed power, residing upon our soil and under the protection of the general government, — a people who must be governed by somebody, and whom, so long as their separate political existence is recognized by the United States, nobody but the United States has any right to govern. "The Constitution," says the court, "is almost silent in regard to the relations of the government . . . to the numerous tribes of Indians within its borders. . . . While we are not able to see in either of these clauses of the Constitution" (namely, the one relating to the basis of representation, "excluding Indians not taxed," or the clause giving Congress power to regulate commerce with the Indian tribes) "any delegation of power to enact a code of criminal law, . . . (yet) these Indians are within the geographical limits of the United States. The soil and the people within those limits are under the political control (either) of the government of the United States or of the States of the Union. There exist . . . but these two. The territorial governments owe all their power to the statutes of the United States. . . . (But) Congress has defined a crime committed within the State and made it punishable in the courts of the United States. . . . Congress has done it. It can do it with regard to all offenses to which the federal authority extends. . . . This is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are . . . *dependent*[1] on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States

[1] The italics are those of the court. There is a tacit reference to the famous phrases of an earlier opinion.

where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised them, arises the duty of protection, and with it the power. . . . The power of the general government . . . is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it never has been denied, and because it alone can enforce its laws on all the tribes."

Here, it will be noticed, is a comprehensive and statesmanlike declaration. It covers the entire ground; the government, if it pleases, can go on to extend its law fully over the Indians while they are still a separate people. Observe, now, one thing. The existence of this right and power, and the clear and authoritative declaration of it by the Supreme Court of the United States for the first time in 1886, have brought home to the Congress of the United States and to us all, now within these recent years, a great weight of responsibility. It may have been thought possible before to deny the legal power fully to govern the Indians. It cannot be denied now.[1] Under such circumstances, the mere neglect or refusal to act is itself action, and action of the worst kind.

(*c*) The third and last of these statutes — and the last upon which I shall comment — is the General Land in Severalty Law (often known as the Dawes Bill).[2] This was passed in February, 1887, within nine months of the great decision upon which I have just been remarking: the dates are May 10, 1886, and February 8, 1887. But it was pending in Congress at the time of that decision, and had long been pending there under bitter opposition.

[1] [As to the extent of this power of Congress, see also the important case of Lone Wolf *v.* Hitchcock, 187 U. S. 553.]

[2] [Act of Feb. 8, 1887, c. 119 (24 U. S. St. at Large, 388), now referred to by the court as the General Allotment Act.]

This great enactment opens the way, within a generation or two, to settle the whole Indian question. Whether it is to be regarded as a good law or a bad one, however, depends on the moderation with which it is administered. The peculiarity of it is not that its methods are new, for similar arrangements had repeatedly been made, for a score of years before, in the case of particular tribes, as the Winnebagoes in 1863, the Stockbridge Munsee Indians in 1871, the Utes in 1880, and the Omahas in 1882. But now, by a general law applicable to all reservations, the President is given power to make almost every Reservation Indian outside the civilized tribes a landowner in severalty and a citizen of the United States *against his will*. The right of citizenship is made to follow the ownership of land.

The scheme of the act is this: Whenever the President thinks that any Indian reservation, or any part of one, is advantageous for agricultural or grazing purposes, he may cause the whole or any part of the reservation to be surveyed and allotted in severalty, in specified amounts, among all the heads of families, single persons, and orphan children of the tribe or band. The Indian heads of families may select for their children, and the Indian agents for the orphans. If in four years from the ordering of an allotment no selection is made in any given case, it may be made by an agent on the order of the Secretary of the Interior. Patents (that is, deeds) are to be issued by the Secretary of the Interior on his approval of the allotments, setting forth that the United States will hold the land in trust for the allottee for twenty-five years, and then convey in fee to him or his heirs, free of all encumbrances. Meantime the allottee cannot convey or encumber the land, and, as it seems, it is not taxable.[1] When these allotments and patents are all made (and perhaps sooner) the Indians are said by the terms of the

[1] [United States *v.* Rickert, 188 U. S. 432 (1903), decides that neither the land nor the permanent improvements made on it by the Indian, nor the horses, cattle, or other personal property furnished to him by the Government for use on the land are taxable.]

statute to pass at once from the jurisdiction of the United States to that of the Territory or State in which the reservation is situated, and to become at once citizens of the United States. The construction of the law is doubtful, but it is the view, I believe, of the Indian Bureau at Washington that these results happen not merely when all is done, but man by man, as each has his allotment and his patent. I venture to question the soundness of that view.[1] This statute also provides for allotments, with like results, to tribal Indians not on reservations who may settle upon the public lands. It makes citizens at once of all Indians who leave their tribe and voluntarily live apart from it, adopting the habits of civilized life. This last class of persons had been declared by the Supreme Court of the United States, in November, 1884,[2] not to be citizens of the United States, in the absence of such legislation.[3] It is important, also, to notice that Indians

[1] [See Matter of Heff, 197 U. S. 488; Goudy *v.* Meath, 203 U. S. 146; The Dawes Bill and the Indians, J. B. Thayer, 61 Atlantic Monthly, 318–320.]

[2] [Elk *v.* Wilkins, 112 U. S. 94.]

[3] ["It is interesting to notice that these words 'citizen' and 'citizenship,' which we use so freely and familiarly to-day as indicating membership of a self-governing State, did not have that meaning in English speech until a little more than a hundred years ago; and it is we, on this side of the water, who have given them this sense, as it is we who have given prominence to the thing for which these words now stand. The words, indeed, are very old in English usage, as one may see by his Blackstone; but they imported merely membership of a burgh or local municipal corporation. [See 5 Seld. Soc. Pub. xxxvii, lxxxv–lxxxvii, 40, 43, 55, for *concivis* in 13th and 14th centuries.] The word 'subject' was the English representative of our present term 'citizen.' Our sense of it seems to have been a Gallicism; in French use (*teste* Rousseau) it was common enough to speak of one's countrymen as *citoyens* and *concitoyens*. In the Declaration of Independence we read it once: 'He has constrained our fellow-citizens,' etc.; and once in 1781, in the Articles of Confederation. In the treaty with France of 1778, the usual phrase is 'subjects,' 'people,' or 'inhabitants,' but 'citizens' does occur as applicable to the United States. In the treaty with Great Britain of 1782, it is used in a marked way: 'There shall be a . . . peace between his British majesty and the said States, and between the subjects of the one and the citizens of the other.' There was evidently felt to be an awkwardness in calling these newly emancipated republican 'sovereigns' of America by the old phrase of 'subjects.' Of course, as all know, the word was freely used in the national Constitution in 1789; and so, but less freely, in the Massachusetts constitution of 1780; but it does not occur in the rejected constitution of 1778. I believe that it is not to be found in any of the ten state constitutions that were adopted before that of Massachusetts. In the ninth decade it seems to

are stimulated to take their allotments by a clause that this shall be a ground of preference in appointments on the Indian police and other public offices.

But the allotment may leave a surplus of land still belonging to the Indians. The Severalty Act provides that after the lands have been allotted to all the tribe, or sooner if the President thinks it for the interest of the tribe, such portion as they will consent to sell may be purchased by the United States, for the sole purpose of selling it again (in tracts of not over one hundred and sixty acres to any one person) to actual settlers, who are not to have a deed until after five years of occupancy. The money

have become a familiar phrase. There are, however, interesting little signs, in the correspondence of the period, of a certain perplexity that was felt by foreigners at our use of the word. See, for example, in 1784, John Adams's Works, viii. 213." The Dawes Bill and the Indians, J. B. Thayer, 61 Atlantic Monthly, 318, n.

" In the usage of English-speaking people, the word 'citizen,' in the sense of membership of the State, is quite modern. 'The term "citizen,"' said Mr. Justice Daniel, in a dissenting opinion in Rundle *v.* Delaware Canal Co., 14 Howard, 80, 97 (1852), 'will be found rarely occurring in the writers of English law.' The word is, indeed, familiar enough in our older reports, law-books, and general literature as designating the member of a borough. For instance, in R. *v.* Hanger, 1 Rolle, 138 (1614–15), the rights of '*un cittizen de London*,' are elaborately considered by Coke, C. J., with many references to the Year Books. '*Sont 5 sorts de Citizens*,' he says, etc. So Blackstone (1 Com. 174): 'As for the (parliamentary) electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of the kingdom.' And in Shakespeare (*As You Like It*, Act II., sc. 1), when the banished Duke, having proposed to 'go and kill us venison,' adds, —

" 'And yet it irks me the poor dappled fools,
Being native burghers in this desert city,
Should in their own confines,' etc., —

we hear just afterwards of Jaques moralizing in the forest over a wounded deer, 'left and abandoned of his velvet friends': —

" 'Ay, quoth Jaques,
Sweep on, you fat and greasy citizens.'

" The proper English meaning of the term 'citizen' imported membership of a borough or local municipal corporation. The usual word for a man's political relation to the monarch or the State was 'subject.' In France, the corresponding phrase *citoyen, concitoyen*, seems to have long been familiar, in the modern sense of the word 'citizen.' . . .

" In the Massachusetts Constitution (1780), the word occurs, but more sparingly than would be expected in a similar document now. In the Federal Constitution, prepared in 1787, it is freely used.

" It seems, then, to have been the events which happened in this country in the eighth and ninth decades of the last century which first brought the word 'citizen,' in our modern sense of it, into familiar English speech. See Minor *v.* Happersett, 21 Wall. 162, 166.

" Compare 1 Blackstone's Com. 366." 1 Thayer's Const. Cas. 459, n.]

is to be held by the United States for the benefit of the Indians. One observes that this last provision for obtaining the surplus land requires the consent of the tribe; the allotment does not. What happens, then, if this consent is not given? Evidently the tribe and tribal ownership of land may continue for some purposes after all the allotments are made. There are other difficulties in the construction of the act; but these need not detain us.[1]

Now this statute puts it in the power of the President to forward rapidly the absorption of the Indians into our body politic. It does not compel him to do it. How fast he will move we cannot tell; but it is manifestly possible for him to move a great deal faster than is wise. It cannot be well to incorporate into our Western Territories and States the bulk of the Reservation Indians as citizens within any short time. Observe what Senator Dawes said at the Mohonk Conference in October, 1887, soon after the passing of this law: "President Cleveland said that he did not intend, when he signed this bill, to apply it to more than one reservation at first, and so on, which I thought was very wise. But you see he has been led to apply it to half a dozen. The bill provides for capitalizing the remainder of the land for the benefit of the Indian, but the greed

[1] [An important amendment to the Severalty Act is the Act of April 23, 1904 (33 U. S. St. at Large, 297), making the titles of Indians to their allotments indefeasible except in certain cases of mistake in the allotment. Of this Act the executive committee of the Indian Rights Association said in its 22d annual report, page 21: "It was supposed that the Dawes Severalty Act fully protected the holdings of Indians, but four years ago the Secretary of the Interior decided that he had authority to cancel an allotment at any time prior to the expiration of a twenty-five-year trust period. When this claim was supported by a decision of the United States Supreme Court [*i. e.*, if it should be so supported; there was no such decision], the allotment of every Indian under the Severalty Act of 1887 was virtually subject to cancelation at the pleasure of the Secretary of the Interior. Not only would this permit unscrupulous men to resort to schemes to have a desirable holding canceled, but the insecurity of the title was also likely to destroy all incentive to the Indians to make permanent improvements on their allotments. The far-reaching effect for good of this measure can hardly be overestimated."

An Act of March 2, 1907 (34 U. S. St. at Large, 1221), permits the Secretary of the Interior in his discretion to pay to any individual Indian upon his application his *pro rata* share of any tribal funds on deposit in the treasury of the United States.]

of the land-grabber is such as to press the application of this bill to the utmost. There is no danger but this will come most rapidly, — too rapidly, I think. The greed and hunger and thirst of the white man for the Indian's land are almost equal to his 'hunger and thirst for righteousness.' That is going to be the difficulty in the application of this bill. He is going to press it forward too fast." And the Senator added this advice: "Say that no Indian shall be put upon a homestead, under this act, until he realizes what is meant by it, and until he has such material round about him as will enable him to maintain himself there, and then let him work out his own destiny." That was wisely said.[1]

In order to guard against this danger, there ought to be an amendment to the Severalty Law, requiring for many years to come the sort of evidence of fitness which has heretofore been demanded in several cases of allotments authorized by treaty or special law, as in that of certain Wisconsin Indians in 1865, and certain Kansas Indians in 1873. In the last-named case the provision was this: "If any adult member of said tribe shall desire to become a citizen of the United States, shall prove by at least two competent witnesses, to the satisfaction of the Circuit Court of the United States for the State of Kansas,

[1] [The able and devoted agent of the Indian Rights Association at Washington, S. M. Brosius, Esq., writes as follows on June 10, 1907: "As to the results of allotting the lands in severalty, it may be said that considerable hardship has resulted and will yet result in the division of these large tribal estates, and the Indians need the care and sympathy of those interested in their welfare. Where the allotted lands are valuable for farming purposes but little privation necessarily follows, but in the division of semi-arid reservations upon which an allottee cannot support himself, the results, I fear, will be that as soon as the allottee is enabled under the law to dispose of the allotment, this will no doubt be done in a large degree, and the Indians for the most part become homeless and more or less a charge upon the State.

"It is to be hoped that the better sentiment of the community will insist that a sufficiently large tract of these poorer reservation lands will be reserved for the use of the allottees in common, where their small herds may continue to graze. When it is understood that forty acres of the lands of the Standing Rock and other reservations are considered necessary to sustain one animal, the importance of reserving a large tract of unallotted land for the use of the stock of allottees will be realized."]

that he or she is sufficiently intelligent and prudent to manage his or her own affairs, and has for the period of five years been able to maintain himself or herself and family, and has adopted the habits of civilized life, and shall take an oath of allegiance to the United States, as provided by law for the naturalization of aliens, he or she shall be declared by said court to be a citizen of the United States, which shall be entered of record, and a certificate thereof given to said party." This sort of provision, in the case of an adult, is a reasonable and fit one. Without it there is no sufficient assurance that the Indians will not be crowded out into the world much too fast. I notice that our excellent Indian commissioner, General Morgan, who will remain in his present office, I trust, until he is promoted to a higher one, expresses the very sensible opinion, in his last report, that the surplus land ought not to be negotiated for until the allotments are all made. Now consider what the pressure to get hold of these lands is going to be. "The greed of the land-grabber," like a strong mainspring, will be forever operating to secure the surplus land. If, as seems wise, the allotments must first be made, then it will be forever operating to secure allotments; and if, as the law is now interpreted, the Indians cannot have their allotments and patents without being thereby made citizens and subject to state and territorial law, the pressure of this dangerous and constant mainspring will be transferred to that point, and will be felt in a most serious way in hurrying them out from under the protection of the general government long before they should go. Consider what the condition of a vast proportion of them still is. "I wish," said the agent at the Santee Agency in Nebraska, in his report to the commissioner in August last, "to impress upon the department that these Indians are yet as overgrown children. But very few of the adults are able to speak English, and during this generation will need more or less encouragement and training." Remember the Messiah craze, and the

state of advancement in civilization that it indicated. An agent on the Sac and Fox Reservation in Iowa reported to the commissioner last August: "I have lived near these people twenty years, and I can see but very little improvement among them during that time as a whole. . . . (Their) general appearance . . . to-day is one of filth, ignorance, laziness, and poverty."

Again, if it be true, as it is thought to be in some quarters (although I do not believe it), that the Indians, as fast as they get their allotments, are taken by this law wholly out from the possibility of control by such courts as may be constitutionally provided on the reservations for the tribal Indians who have not yet had allotments, then in that respect the law should be changed. They should not be so taken out. They should be held under the protection of the United States, as regulated through courts of its own upon the reservations, for a considerable period.[1]

Still further, since the Indian land cannot be taxed for twenty-five years, the United States government should pay the local taxes; otherwise these poor people, when enlarged, cannot get any proper help from the authorities of their counties or States. What an undesirable neighbor will he be who pays no taxes, and expects other people to tax themselves to support him in the matter of roads, schools, and courts! This mischief has already been bitterly felt among the Omahas and others. Read, for instance,

[1] [In Matter of Heff, 197 U. S. 488, it was decided that Congress could not constitutionally forbid the sale of liquor to an Indian who had received his allotment, on the ground that he had thereby become subject to the laws of the State, and had been placed "outside the reach of police regulations on the part of Congress." Soon after this decision, and presumably in consequence of it, the Act of May 8, 1906 (34 U. S. St. at Large, 182), was passed providing that Indians receiving allotments shall not become citizens until the trust period expires and the land is conveyed to the Indian in fee. The Secretary of the Interior is authorized, however, to issue patents in fee simple at any time to allottees whom he deems capable of managing their affairs. This Act further expressly provides that "until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."]

what the agent at the Sisseton Reservation in South Dakota says, in his report of September 29, 1890, to Commissioner Morgan. He is speaking of Indians who have lately been made citizens. "In this connection I will state that although the law of Congress and the department authorities direct these Indians to the county courts for the settlement of all minor crimes and civil cases, still it is apparent that this course at present is impracticable. The authorities of the counties decline to audit any expenses of prisoners, paupers, or litigants who hold lands under the allotment act. All the information I have upon this subject convinces me that Indians and mixed bloods who hold lands under the allotment act will not have the same privileges as the white man in the county courts. Nor will prisoners', paupers', and litigants' expenses be paid." Under the law as it now stands this result is almost unavoidable. Of course, also, education must be provided for, and we may well second and applaud the far-seeing plans of General Morgan to that end. I only wish that he would insist more upon one point, namely, that no education can be better for these Indians, as a preparation for the condition of citizenship, than practice in political usages and duties, — a chance, for instance, to vote in town meeting and serve on a jury, a chance to spend their own money and earn their own living, with the ordinary security and restraints of legal obligation and legal right, the ordinary stimulus of competition, and the ordinary hope of gain. There is no education, there is no civilizing agency, so important as this for the present generation of Indians who are beyond childhood, and so for all of them as they pass that line.

While, then, this great measure, the Severalty Law, in course of time is going to put an end to the strange anomaly of the Indian situation, in that form of it which now presses upon our attention, — that is, as touching the bulk of the tribal Indians outside the so-called civilized tribes, — the process must inevitably take many years. How

many? The Commissioner of Indian Affairs informed me recently that in the four years and a half (nearly) since the Severalty Law was passed about 12,752 allotments have been made under its provisions, and about 1437 patents have been issued, — say at the average of 2800 allotments a year, and 300 patents. Patents, it will be remembered, are issued upon the approval of allotments by the Secretary of the Interior. That leaves about thirteen times as many more allotments to be made, and the time required for winding up the reservations, at that rate, would be nearly sixty years.[1] Suppose it to be

[1] ["But even if we assume that the law will be rapidly put in force, it will take a considerable number of years before it accomplishes its purposes. What will be the situation in the interval? In order to answer that question, it must be observed what it is that the law does not do.

"1. It does not cover the case of all the tribal Indians. Ten or eleven tribes are excepted, including the so-called 'civilized tribes' in the Indian Territory. Very likely this may have been a wise omission, — at any rate in the main; but the fact continues, and should be kept in mind, that many thousands of Indians, perhaps a quarter or a third of them all, are not touched by the severalty law.

"2. While it provides for the gradual picking off of members of the tribes, and planting them, here and there, on the reservations as citizens and land-owners, it provides them with no courts there, no means whatever of enforcing their rights there, and no system of law. There is little or no law on the reservations now except the vanishing traditions of tribal authority.(a) Certainly an Indian lacks much who is set up in the middle of a reservation which may be several times as large as Massachusetts; endowed, to be sure, with citizenship and land, but with no courts to appeal to, and no organized political society about him. He has lost his old surroundings, and has not yet acquired any new ones; he has passed into a sort of *limbo*.

'As far from help as limbo is from bliss.'

"3. It leaves these land-owners with little power to use their land. They cannot let it on shares, or let it at all, or make any contract about it, or make an exchange.

"4. There is no arrangement for securing to these new citizens the

(a) If one were to speak with minute accuracy, he would have to except a certain amount of criminal jurisdiction in the United States, and in one or two States a claim, at least on their part, to something more than that; but such laws are only enforcible by traveling to courts outside the reservation. Mention would also have to be made of the good and sensible endeavors on some reservations to administer a rude justice through the agents. But such attempts have no fixed basis of law. Indians, when off their reservation, are as fully protected by and amenable to the laws, and as fully entitled to sue in the courts, as any other class of persons who are not citizens of the United States: for example, as a newly landed Englishman or any Chinaman. The present writer may be permitted to refer to a fuller consideration of this question in the Harvard Law Review, I. 140.

half that time, — this is quite too long to allow us to yield to the arguments of those who say: "Let the matter alone; it is a vanishing state of things; all will have passed away before you can mend matters." During this process of "vanishing," such bloody fruits of our present system are showing themselves, and will continue to show themselves, as the dreadful outbreak and slaughter of last winter. How soon we can mend matters depends on ourselves and our representatives at Washington. Matters can be mended at the next session of Congress if the people sternly demand it.

What then shall we do? (1) We must not leave things alone for one or two generations, to be worked out by the Severalty Law unaided. We cannot do that. See what General Morgan says of the existing system, in his last report: "The entire system of dealing with them (the Indians) is vicious, involving as it does the installing of agents with semi-despotic power over ignorant, superstitious, and helpless subjects; the keeping of thousands of them on reservations practically as prisoners, isolated from civilized life, and dominated by fear and force; the issue of rations and annuities, which inevitably tends to breed

laying out of roads, or any other public improvements. Since their land is inalienable for a quarter of a century and untaxable, there is small inducement to any State or county to do much for them. Trouble has already arisen on this score, in the case of lands allotted under previous laws.

"5. The law makes no provision for the education of these new citizens or their children.

"6. It leaves the whole reservation system untouched. Outsiders are still to be kept out; only the agents and political officials from Washington and such as they admit may come in. Only the licensed Indian trader can do business there. The new citizens will, indeed, be in the same position on the reservation as any of us would be if we were to go out and live there. But what would that be? We should be full citizens, to be sure, with liberty to move away if we liked. But while we chose to stay there we should find the air not very invigorating; we should be subject to all the restraints and limitations upon our full rights which are incidental to maintaining a non-intercourse reservation system; we should find there the same prevailing barbarism, the same sickly, stunted, abortive civilization, the same absence of trade or commerce, the same mischievous and unfettered political control, denying civil and political rights to the tribal Indians who have not become citizens, and making beggars of them." The Dawes Bill and the Indians, J. B. Thayer, 61 Atlantic Monthly, 320, 321.]

pauperism; the disbursement of millions of dollars' worth of supplies by contract, which invites fraud; the maintenance of a system of licensed trade, which stimulates cupidity and extortion."

If it be thought that a wise and steady administration of the present system will answer well enough, I reply that we cannot have, under such a government as ours, a steady, firm, uniform administration of the merely political sort, in the case of so complicated a matter as our Indian affairs. Good administration is the weak point in our form of government; for the proof of that it is enough to appeal to the record of a hundred years. We may mend and patch, but the result will be bad oftener than good.

(2) If it be said, "Very well, let us hurry through the allotments; let us do as was done with the slaves after the war, remove all civil disabilities at once and set up the Indians forthwith as citizens," I have already dealt with that sort of suggestion. But let me say a word or two more. This is, indeed, the kind of short cut which suits a democratic people when it is once aroused to the necessity of having a change; then the tendency is to go straight to the mark. One reason for this is the instinctive apprehension, in such a community, of its own weakness in administering any complicated system or adhering long and steadily to a purpose. The slow method (it says to itself), the method of gradual approach, is not safe. Accordingly, we all know that this sort of swift despatch has been urged. It is the way which preoccupied and impatient minds are apt to recommend; and some others also. It was the one preferred by that excellent soldier and friend of the Indians, General Crook. Undoubtedly it has its advantages. To give the Indians the ballot at once would do for them what was done for the slaves; it would put into their hands a weapon which would powerfully help them in working out their political salvation among their neighbors. Whatever temporary disturbances

may take place, the ultimate result is certain, that he who has the ballot is one who will be protected from abuse. Such was General Crook's reasoning about it.

But this course, as I have said, has insuperable objections. The great body of the tribal Indians are totally unfit for the ballot, and it would be inexcusable to force such a body of voters suddenly upon the States where they live. It was bad enough, although politically necessary, to do this sort of thing at the end of the war, in communities which had revolted, staked all upon war, and lost. It would be inexcusable to do it in the midst of a loyal population, who are entitled to have their wishes consulted by the government. And above all, it would be an abandonment by the government of its highest present duty to the red men, that of governing and sheltering them. In view of what has happened at the South with the negroes, and of the well-known local hostility to the Indians at the West, it cannot be doubted that they would suffer much. Remember that with the giving of full citizenship there would take place a loss of all power in the federal government to legislate specially for them. Nothing is clearer than that they need, and will need for a good while, the very careful and exceptional protection of the nation. The power to give this special and exceptional protection exists now, growing out of the strange political situation which I have expounded; and it is the one best thing there is about the present state of things. We must seize upon this and use it.

(3) How shall we use it? That is the question that still recurs. We use our power now in dealing with the Indians by this vile process which pretends to leave them to govern themselves, and yet, in its actual application, denies them liberty and shuts them up on reservations; pauperizes them; insults and breaks down all of law, custom, and religion that they have inherited from their fathers and have been taught to venerate; excludes civilization, trade, law; and subjects them to the unsteady

tyranny of the politicians. This way of using our power should be at once abandoned. But there is a wise way to use it, and I am glad to say that while Congress has lagged the Indian commissioners have made, since 1882, a slight but useful beginning in the right direction. Upon some agencies the agent is directed to appoint Indians to hear and judge the complaints of their fellows against one another, subject to the revision of the agent himself, and ultimately of the commissioner. The testimony is uniform, I think, as to the salutary and steadying effect of these "courts." Of course they are not courts in our ordinary sense, for they do not administer law, but merely certain rules of the Indian Department. They bear about the same relation to courts, in the proper sense of the term, that courts-martial do; they are really a branch of the executive department. But their effect in educating the Indians and assisting the department in its heavy burden of government has been such as to point clearly to the wisdom of following up this good beginning (the suggestion of Commissioner Hiram Price, I believe) and giving the Indians real courts and real law. This is what we must do, — extend law and courts of justice to the reservations.

A simple thing, indeed, is it not? Does this seem to my reader, I wonder, as it does to me, obviously just, obviously wise, obviously expedient? Yet our legislators at Washington let it linger year after year, and we cannot get it done. We must demand of them that they no longer neglect it, — that they abandon any attitude of obstruction upon this subject, any mistaken fancy that the Severalty Law has actually done all that has been made possible by it. I express the conviction not merely of one person, but of a vast number of the friends of the Indians, in declaring that the one most pressing and vital necessity to-day, in this matter, is that of bringing the Indians and all their affairs under the steady operation of law and courts. This is saying no new thing. Many of us who

had the honor of advocating the Severalty Law before it was passed always coupled it with the demand for extending law to the Indians. This necessity has long been obvious; indeed, it sickens one to look back and see how uniform and how pressing has been the cry for this, during many years, as the thing most needful.

Let me repeat some of these utterances. Nearly twenty years ago, in 1873, the Indian commissioner urged this matter in his report, and again, in 1874, pressed it, with careful specific recommendations for establishing a system of law among the Indians. In 1876 the Indian commissioner (J. Q. Smith) said in his annual report: "My predecessors have frequently called attention to the startling fact that we have within our midst 275,000 people, the least intelligent portion of our population, for whom we provide no law, either for their protection or for the punishment of crime committed among themselves. . . . Our Indians are remitted by a great civilized government to the control, if control it can be called, of the rude regulations of petty ignorant tribes. Year after year we expend millions of dollars for these people, in the faint hope that, without law, we can civilize them. That hope has been to a great degree a long disappointment, and year after year we repeat the folly of the past. That the benevolent efforts and purposes of the government have proved so largely fruitless is, in my judgment, due more to its failure to make these people amenable to our laws than to any other cause, or to all other causes combined. I believe it to be the duty of Congress at once to extend over Indian reservations the jurisdiction of United States courts, and to declare that each Indian in the United States shall occupy the same relation to law that a white man does. . . . I regard this suggestion as by far the most important which I have to make in this report."

In 1877 the wise and devoted Bishop Hare said, in a passage which was quoted at length by the Indian commissioner in his report of 1883 with renewed recommenda-

tions: "Civilization has loosened, in some places broken, the bonds which regulate and hold together Indian society in its wild state, and has failed to give the people law and officers of justice in their place. This evil still continues unabated. Women are brutally beaten and outraged; men are murdered in cold blood; the Indians who are friendly to schools and churches are intimidated and preyed upon by the evil-disposed; children are molested on their way to school, and schools are dispersed by bands of vagabonds: but there is no redress. This accursed condition of things is an outrage upon the one Lawgiver. It is a disgrace to our land. It should make every man who sits in the national halls of legislation blush. And, wish well to the Indians as we may, and do for them what we will, the efforts of civil agents, teachers, and missionaries are like the struggles of drowning men weighted with lead as long as, by the absence of law, Indian society is left without a base." In that same year (1877) Indian agents declared over and over again that a system of law on the reservations was the great need. "By far the greatest need of this agency," said one of them, "is civil law. Give us civil law and power to execute it." In 1878 the Indian commissioner in his report quoted Joseph, the famous and very able Nez Percé chief, as saying that "the greatest want of the Indians is a system of law by which controversies between Indians and between Indians and white men can be settled without appealing to physical force. . . . Indians . . . understand the operation of laws, and if there were any statutes the Indians would be perfectly content to place themselves in the hands of a proper tribunal, and would not take the righting of their wrongs into their own hands or retaliate, as they now do, without the law."

How many of my readers have ever read that wonderful, most moving story of this same Chief Joseph, sent by Bishop Hare to the "North American Review," and published there in April, 1879? In introducing it the bishop

expressed his own appreciation of it by saying, "I wish that I had words at command in which to express adequately the interest with which I have read the extraordinary narrative which follows." The emphasis that Joseph lays upon the need of law is striking. "There need be no trouble," he declares. "Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. . . . I only ask of the government to be treated as all other men are treated. . . . I know that my race must change. We cannot hold our own with the white race as we are. We only ask an even chance to live as other men live. . . . We ask that the same law shall work alike on all men. If the Indian breaks the law, punish him by the law. If the white man breaks the law, punish him also." Bishop Hare enforces this request. "Indian chiefs," he says, "however able and influential, are really without power, and for this reason, as well as others, the Indians . . . should at the earliest practicable moment be given the support and protection of our government and of our law." In March of the same year (1879) General Miles printed an article on The Indian Problem in the "North American Review," in which he pressed the need of establishing law and courts of justice among the Indians. He quoted Chief Joseph's words that "the greatest want of the Indians is a system of law," etc., and added, "Do we need a savage to inform us of the necessity that has existed for a century?"

In 1881 General Crook, General Miles, and others, as commissioners appointed by the President to investigate certain matters relating to the Ponca tribe, closed their report as follows: "In conclusion we desire to give expression to the conviction forced upon us by our investigation of this case that it is of the utmost importance to white and red men alike that all Indians should have an opportunity of appealing to the courts for the protection and vindication of the rights of person and property. Indians cannot be expected to understand the duties of men

living under the forms of civilization until they know, by being subject to it, the authority of stable law as administered by the courts, and are relieved from the uncertainties and oppression frequently attending subjection to arbitrary personal authority."

In 1884 Miss Alice Fletcher said, in a public address wholly devoted to the need of law on the Indian reservations: "Were the Indians as keen for crime as many believe them to be, not a human being could be safe in their midst during the present hiatus between the old tribal law and our failure to give the protection of the courts. Although matters are not at their worst, they are bad indeed, and it is almost futile to try to build up a people when the very stay and supports of industry and morality are lacking." These remarks were accompanied by convincing illustrations of their truth drawn from her experience among the Omahas. In Miss Fletcher's learned and thorough Special Report to the Bureau of Education on Indian Education and Civilization, published as a Senate Document by the United States in 1888 (page 142), she comments again upon "the need for recasting the entire legal position of Indians towards the state and towards each other, and of permitting the laws of the land to be fully extended over all the various reservations and tribes."

For many years that admirable association in Philadelphia of which Mr. Herbert Welsh is secretary has urged this matter, and as early as eight or ten years ago had prepared a bill which embodied it. In a report of Mr. Herbert Welsh to his society, made in 1885, he presses (to quote his own words) "the immediate introduction of law upon the reservations." For years, also, the Boston Indian Citizenship Committee has devoted itself to efforts for accomplishing this purpose. In February last it issued a memorial, in which the following language was used: "The Boston Indian Citizenship Committee, in view of recent events at the West, renews its solemn appeal to Congress and the country for the immediate

extension of the ordinary laws of the land over the Indian reservations. . . . We desire to record our belief that this country has no duty towards the Indians so solemn and so instant as that of bringing these poor people under the protection and the control of the ordinary laws of the land." Year after year the same appeal has come from the Mohonk Conference.[1]

So long, so uniform, so weighty, so urgent, has been this appeal for a government of law for the Indians, and yet the thing is not done. Why? Perhaps the chief reasons are three: (1) That there has been no one man in Congress who was deeply impressed with the importance of this particular step. Some men there appear to think the Severalty Law a finality, instead of one great step to be followed by others. (2) That the whole Indian question gets little hold on public men, and is crowded aside by tariffs and silver and President-making and office-jobbing and pension-giving. (3) That so far as questions of Indian policy get any attention, this is spent on matters of detail, and in administering and patching the present system. But, I may be asked, do you call all this effort for the education of the Indians and their religious teaching, and the improvement of the civil service among them, — all these things matters of detail? Well, it would be an extravagance to say that, and yet sometimes one can best convey his meaning and best intimate the truth by an extravagance. I am almost ready to answer, *Yes, I do.* This, at any rate, I will say: It is as true now as it was fifteen years ago, when Indian Commissioner J. Q. Smith put it on record in his annual report: "That the benevolent efforts and purposes of the government have proved so largely fruitless is . . . due more to

[1] And, finally, since this article was written, the American Bar Association, after listening to a valuable paper on this subject by Mr. William B. Hornblower, of New York, and after a debate in which the leaders of that body participated, on August 26 last unanimously resolved: "It is the opinion of this association that the United States should provide, at the earliest possible moment, courts and a system of law for the Indian reservations."

its failure to make these people amenable to our laws than to any other cause, or to all other causes combined." It is as true to-day as it was fourteen years ago when Bishop Hare said it first, and as it was eight years ago when the Indian commissioner quoted it with approval in his annual report, and seven years ago when Miss Fletcher quoted and indorsed it, that, "Wish well to the Indians as we may, and do for them what we will, the efforts of civil agents, teachers, and missionaries are like the struggles of drowning men weighted with lead as long as, by the absence of law, Indian society is left without a base." It is as true now as it was thirteen years ago, when the Indian commissioner quoted it from one of the ablest of the Indian chiefs, that "the greatest want of the Indians is a system of law by which controversies between Indians and between Indians and white men can be settled without an appeal to physical force."

Will not my reader agree with me, then, in saying that the time has come when all causes of obstruction and delay must give way; when (1) we must find or place some men at Washington who *are* profoundly impressed with the necessity of a government of law for the Indians; when (2) we must cause it to be understood that this matter is no longer to be shoved aside by any question whatever; and when (3), in dealing with the Indian question, this matter of establishing law among the Indians must take precedence for the time being of all other aspects of the subject? The Indian associations of the country and all individual friends of the Indian should now gather themselves together and concentrate their efforts for a time upon this single point. They have very great influence when they unite; they can, if they please, make such an appeal to Congress and the Executive as will speedily be heeded.

Since the spring of 1888 a carefully prepared bill for accomplishing the objects I have named has been pending in the Senate of the United States. It has the support

of some of the best lawyers in the country. It was prepared by a committee of the Mohonk Conference, and has been steadily supported by the leading Indian associations. That bill, or something better, should be passed at the next session of Congress.

GELPCKE *v.* DUBUQUE; FEDERAL AND STATE DECISIONS

[This article appeared in 1891 in the Harvard Law Review (4 Harv. Law Rev. 311), and is best explained by the following note which accompanied it. "In assenting to a request to furnish the following paper for publication, the writer is aware that the form of it requires a word of explanation. In examining a disputed or obscure case it is sometimes found convenient, at Law Schools, to give the case out for argument at a Moot Court, as if upon a rehearing. Such a proceeding often involves anachronisms, *e. g.*, in the citation of later cases; but it has its advantages. The case of Gelpcke *v.* Dubuque (1 Wall. 175) was thus given out lately, here at Cambridge, and what follows was read, last June, as the opinion of the court in deciding that case. The writer is the more willing to have it printed, because, in sustaining the doctrine of the court, as an original question, he found himself arriving at an unexpected result, and also because the opinion here given makes one or two suggestions which appear to him important, and, at the same time, to be less insisted upon in the discussion of this case than they should be. Probably the general judgment of the legal profession would be that the opinion in Gelpcke *v.* Dubuque was a very inadequate one. Certainly it was a great while before the Supreme Court, in its steady adherence to the rule laid down in that case, succeeded in commending it to the approval of the profession. Among the many keen and able criticisms of this rule, reference may be made to those of Mr. Justice Holmes, in his notes to the twelfth edition of Kent's Commentaries; to an article by Hon. Henry Reed, in 9 American Law Review, 381; to Mr. G. W. Pepper's 'Border Land of Federal and State Decisions;' and to Mr. W. M. Meigs's articles in 29 Central Law Journal, 465, 485, on certain questions growing out of what he designates as 'the Federal doctrine of "General Principles of Jurisprudence."' — J. B. T."]

THIS case came up on error to the District Court of the United States for Iowa, where a demurrer to the defendant's answer was overruled and judgment given for the

defendant. The suit was brought to recover the amount of coupons on certain bonds of the defendant city, issued under color of authority from an act of the Legislature of Iowa. It was brought in the United States court by the plaintiffs, who were not citizens of Iowa, under those provisions of the Constitution and laws of the United States, by which persons who are not citizens of a State where they wish to sue one who is such a citizen, are permitted to avoid the danger of a possible bias and prejudice in the State courts in favor of their own people, by proceeding in a national tribunal sitting within that State. The defence was that the bonds were unlawfully issued, in that the Constitution of Iowa forbade the Legislature to create debts exceeding one hundred thousand dollars; and it was alleged that at the time of the statute authorizing these bonds, the indebtedness of the State and of the municipalities of the State exceeded this amount. There were other grounds of this alleged unconstitutionality, but it is not needful to mention them.

The bonds were issued in 1857, in aid of a railroad company, and were payable to bearer, in New York, with a series of half-yearly coupons. The city was authorized to lay special taxes to pay the interest. For several years before they were issued, the Supreme Court of Iowa, in deciding other litigated cases like the present one, had upheld the constitutionality of similar issues of bonds. There were other statutes and other decisions of a similar character during several years after the bonds now in question were issued. At the time of bringing the present action, and long after the issue and negotiation of these bonds, namely, in 1862, the Supreme Court of Iowa had reversed its previous course of decision, and had held that the bonds were invalid, as being forbidden by the State constitution. In 1863 the present case came up to the Supreme Court of the United States, on error, and the judgment of the District Court overruling the plaintiff's demurrer and holding for the defendant was reversed, Mr. Justice Miller alone

dissenting. The main struggle in the case, as it was argued in the Supreme Court, was over the question of following the State court in its decisions interpreting its own constitution. It was insisted, on behalf of the defendant, that the United States courts, in exercising their jurisdiction founded on the citizenship of parties, only administer the law of the State; and that in determining what the law of the State is, the United States courts are bound to follow the settled construction of the State courts, whether on a point of statute law or of common law. On the other side, it was urged that the law upon this matter now in issue was not settled in Iowa, or if it were settled, that the settled law was that of the earlier decisions; that so recent a decision as this of 1862, reversing the others, could not be held to have settled the law the other way; and the court was invited to examine the question anew and settle it for itself. But the court, speaking through Mr. Justice Swayne, while plainly indicating its approval of the older decisions, and its disapproval of the last one, and while stating its own view that the new opinion had not settled the law, nevertheless declined to go into the question of whether the earlier decisions were right, or to examine the question at all, or to follow any rule which required them, in such a case as the present, to adhere to the decision of the State courts; and they proceeded to lay down the important principle that where the law of the State was settled, at the time the bonds were issued, in favor of the legal validity of the bonds, they could not afterwards be held invalid, even by a court which should be of opinion that the former construction of the constitution was wrong. This proposition, first established in the present case, has since, against much opposition and criticism, been steadily followed in the Supreme Court. Indeed, within a few years after the decision of the present case, which was at the December term, 1863, the Supreme Court declared that the question was no longer open to controversy before them. . . .

Is this proposition, in the case of Gelpcke *v.* Dubuque, a sound one and rightly applied? In order to determine that question we must first take several matters clearly into account.

There is a well-known difference in the way in which cases may be brought into the United States courts. (*a*) They may come there because the case involves a question under the Constitution, treaties, or laws of the United States. In such cases the United States Supreme Court is the ultimate tribunal of appeal, whether the case has come up from a State court or from an inferior court of the United States. It has no duty of following the laws of the States, for it is now administering the law of its own government. If, in such a case, there be a question of impairing the obligation of a contract, and the State court has held that there is no contract to be impaired, the Supreme Court may re-examine that question with entire freedom, although it involve the construction of the constitution or statutes of the State; it is not in any way bound to follow the decision of the State court. Such an unfettered power is necessary in order to the full exercise of the jurisdiction of the Supreme Court. In the case of the Ohio Company *v.* Debolt, 16 How., at p. 432, on error to the Supreme Court of Ohio, Chief Justice Taney, speaking, probably, for a majority of the court, remarked: "The duty imposed upon this court to enforce contracts . . . would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a State court would be no protection to a contract if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for revision here." (*b*) But there is another ground for coming into the courts of the United States. A case may come there, as this one did, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens

of different States or countries. In such a case the court is administering the law of the State. In this sort of case the general rule is, that, since the court is applying the law of the State, it will follow, in determining what that law is and in construing it, the decisions of its highest court. If the question has not ever come up in the State court, or if there be no settled rule there, the United States court must, of course, decide for itself. But, even after such an independent decision has been made, if the highest court of the State should arrive at a different conclusion, the United States court will, in general, change from its own previous decision, and will adopt that of the State courts.[1] Nothing could more plainly mark the secondary character of the jurisdiction of United States courts in this region of it.

But there are various qualifications of these doctrines. The most conspicuous of them is the principle of Swift *v.* Tyson, 16 Pet. 1 (1842), in which the novel and much-contested doctrine was laid down, that upon questions of what is called general commercial law, the courts of the United States did not undertake to follow the State courts.[2] This declaration was not required for the decision of that case, but it has been followed, and is an established rule of the United States jurisprudence. Its soundness in point of principle is, possibly, open to question; at any rate, it is undergoing much criticism at the present day. The same principle is laid down as regards the construction of ordinary language (Lane *v.* Vick, 3 How. 464, 476); but in that case there was a strong dissenting opinion of McKinley, J., concurred in by Taney, C. J. Again, when the United States court has already decided a question, and a later

[1] Green *v.* Neal's Lessee, 6 Pet. 291; Carroll County Supervisors *v.* United States, 18 Wall. 71.

[2] [Not at all a doctrine that they will not conform to the *statutes* of the State. Watson *v.* Tarpley, 18 How. 517, seems to be clearly bad. Observe how considerable a modification it is, of the doctrine often attributed to the Federal courts, that they recognize the right of the State to end all controversy by legislation. See Lake Shore Ry. Co. *v.* Prentice, 147 U. S. 101, 106.]

decision of the State differs from this, the United States court may at least wait awhile before changing its own decision.[1] And, finally, it was long ago intimated that a United States court would not follow the State decisions where these were regarded as biased, and unjust to citizens of other States. It will easily appear that in some sense and to some extent there should be a recognition of such a principle as the one just named; all State courts must keep within the line of reason in order to make it just that the United States courts should follow them. Yet, notwithstanding all these qualifications, it is still true, and is recognized as the sound general principle in the class of cases now under discussion, that the courts of the United States will follow the decisions of the State courts in ascertaining and construing their own law. The declarations to this effect are many and emphatic.[2]

It is with one of the qualifications of this rule that we are concerned in this case, namely, the one arising out of the danger to citizens of other States from local prejudice. I have said that some power of varying from the decisions of the States must necessarily exist, as regards this sort of case; that, at least, the local courts must keep within the limits of reason. Shall the range of the United States court, in differing from the local tribunals, go farther than that, and how much farther?

In Rowan *v.* Runnels, 5 How. 139 (a case coming up from the Circuit Court of the United States for Mississippi), Chief Justice Taney remarks: "We ought not to give to them (the decisions of State courts) a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For if such a rule were adopted . . . it is evident that the provision in the Constitution of the United States which secures to the citizens

[1] Shelby *v.* Guy, 11 Wheat. 361.

[2] Elmendorf *v.* Taylor, 10 Wheat. 152, 159–60; Webster *v.* Cooper, 14 How. 488, 502–5; Nesmith *v.* Sheldon, 7 How. 812; Williamson *v.* Berry, 8 How. 495, 558; Leffingwell *v.* Warren, 2 Black, 599.

of another State the right to sue in the courts of the United States, might become utterly useless and nugatory." This is the assertion of a right, which is, indeed, an obvious one, to depart from the State court's construction of the local law, in so far as is necessary to prevent the annulling of that protection for citizens of other States which the Constitution was intended to secure. For, although the courts of the United States in this sort of case have to apply the State law, it is to be remarked that they *are* courts of the United States, and not courts of the State. Why is it that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it? It was because, in controversies between its own citizens and those of other States or countries, it might be expected that the courts of any given State would not be free from bias. Accordingly we read, in No. 80 of the "Federalist," the very striking statement of Hamilton as regards the danger that might come from unjust decisions of the several States as against foreigners and citizens of other States, and the importance of that jurisdiction of the Federal courts which we are now considering: —

"The responsibility for an injury," he says, "ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This

was a court invested with authority to decide finally all differences among the members of the Germanic body. . . . It may be esteemed the basis of the Union that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

To come back now to the question how far the United States courts may go in refusing to follow the decisions of the State courts. Shall they be limited merely to the prevention of results which would be absurd and irrational, or may they properly go farther? As I have already said, in this class of cases, as in all others, whenever a question develops which involves the law of the United States, the United States court must, as touching that, act independently, although its ground of jurisdiction over the case was originally merely the citizenship of the parties. But suppose no question of that kind to arise. That is the fact in the present case; this case, if originally brought in a State court, could not have been carried up to the Supreme Court of the United States, because it does not involve any question of a "law" impairing the obligation of contracts.[1] The lower United States courts, as we have seen, deal with such cases, because they have concurrent jurisdiction with

[1] Railroad Company *v.* McClure, 10 Wall. 511. [Central Land Co. *v.* Laidley, 159 U. S. 103; Bacon *v.* Texas, 163 U. S. 207; McCullough *v.* Virginia, 172 U. S. 102; Turner *v.* Wilkes County Commissioners, 173 U. S. 461.]

the State courts on the ground of the citizenship of the parties; and, having regard to the reason that they are given this concurrent jurisdiction, namely, the danger of injury to citizens of other States or countries, by reason of the bias of the State courts, it may be laid down that wherever State courts are likely to be under a local bias, adverse to the citizens of other States or countries, the United States courts must hold themselves at liberty to depart from the decisions of the local courts in construing and applying the local law and the local constitution, to look into the question for themselves, and to adopt their own rules of administration. This appears to be only a just assertion of the power intended to be given to these courts by the Constitution of the United States, in dealing with the class of cases now under consideration. To this effect is the reasoning of Mr. Justice Bradley, speaking for the court, in Burgess *v.* Seligman, 107 U. S. 20 (1882).[1]

Assuming this to be so, we have thus far only determined that the United States courts will look into such questions for themselves. The statement of Chief Justice Taney in the case of Rowan *v.* Runnels, above quoted, did not go beyond this. But in the case of Gelpcke *v.* Dubuque, the Supreme Court flatly refused to look into the merits of the question at all; and, in declining to follow the later decision of the Iowa court, a rule was laid down which established the validity of the bonds, irrespective of any opinion whether, as an original question, they were lawfully and constitutionally issued or not. The Supreme Court, quoting substantially an *obiter* remark of Taney, C. J., in Ohio Co. *v.* Debolt, 16 How., at p. 432, put forward this proposition: —

"The sound and true rule is that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its

[1] [See also Stanly County *v.* Coler, 190 U. S. 437.]

validity cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law." [1]

Has the United States court any right to say this — to announce that it will not look into the question, whether the bonds were originally authorized by the State constitution or not? Any right to say that although, in this court's judgment, it may be true, as an original question, that they were issued in violation of the State constitution, the court will still hold them to be valid?

With a certain qualification, I think that it has. The laying down of some rule of administration is legitimate, for the court, as we see, has the right to look into the question for itself; and all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation. If this rule in Gelpcke *v.* Dubuque be understood, as it was probably meant, as being subject to a certain qualification, it appears to me good. It will not do, of course, to allow the United States courts, through the medium of any principle of presumption or judicial administration, or anything else, to sanction a violation of the State constitution or the State laws. There might be a case wherein the violation of the constitution was gross and palpable, and such that those who took part in it, whether in making contracts or doing anything else, must be held to have known what they were doing; and in such a case no court would be justified in laying down a rule that would protect these parties. But courts often have to recognize, especially in the region of constitutional law, that there is more than one reasonable and allowable interpretation of a thing. It is familiar that they will not set aside the interpretation put upon the constitution by a co-ordinate legislature, in enacting a law,

[1] 1 Wall. 206.

unless the mistake be very plain indeed, — so plain (in the ordinary phrase used in such cases) as to be beyond reasonable doubt. If the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, *and which came within a permissible interpretation of the State constitution and law,* will be sustained in the United States courts, I think that it is a sound one, and should be upheld. It is a rule which the State court should accept; and if the adoption of it by the United States court lead to resistance on the part of the State authorities, that is a result which must be submitted to and dealt with as may be possible. Such temporary consequences were probably anticipated when the constitution was formed. But it may be confidently expected that so just a rule will ultimately commend itself to all courts.[1] It will be observed that the rule is one regulating the administration of a particular jurisdiction of the United States courts. It does not necessarily follow that this same rule should be applied in any other class of cases.

Since the rule must be attended with the qualification above named, the question next arises whether the doctrine which was laid down in the earlier decisions in Iowa gives a construction to the constitution of that State which is a rational, a permissible one. I have no doubt that it does. Indeed, it appears to me that the Supreme Court of the United States is right in saying that this view was the just and sound interpretation of that constitution. And it may now be added also that the Supreme Court of Iowa, within seven or eight years after the decision of the Supreme Court of the United States in the present case, came back again to the doctrine of the earlier cases, and that this is now the

[1] [It is adopted in Haskett v. Maxey, 134 Ind. 182 (1892), and in Farrier v. N. Eng. Mortg. Sec. Co., 88 Ala. 275, and 92 *ib.* 176; s. c. Wambaugh's Study of Cases, 308; affirmed in Jones v. Iron Co., 95 Ala. 551, 563 (1891); Vt. & Can. R. R. Co. v. Vt. Cent. R. R. Co., 63 Vt. 1 (1890); Harris v. Jex, 55 N. Y. 421 (1874). See also St. Louis Ry. Co. v. Fowler, 142 Mo. 670.]

fixed law of the State.[1] It is enough, however, to say that the view was one which might reasonably he held.

It will be observed that the decision of this case does not at all turn upon the clause of the Constitution of the United States relating to impairing the obligation of contracts; and it should be added that it does not in any degree turn upon a theory that the United States courts have any special rights conferred upon them by the fact that the case relates to a contract. These courts are not the special protectors of contracts, excepting under the clause in the Constitution of the United States forbidding State *legislation* which impairs their obligation. The true ground is that the courts of the United States are charged with a special duty, in litigation between citizens of different States; that the nature of this special duty requires these courts sometimes to exercise a perfectly independent judgment in construing and applying the laws and constitutions of the States; and that the rule of administration applicable to the exercise of this function, laid down by the Supreme Court of the United States in Gelpcke *v.* Dubuque, is a just and wholesome one.[2]

[1] Stewart *v.* Supervisors, 30 Iowa, 193.

[2] ["As regards the very interesting topic involved in the case of Gelpcke *v.* Dubuque, see Holland's Jurisp. (6th ed.) 61; Bigelow's note in 1 Story's Eq. Jur. (13th ed.) 523; Wambaugh's Study of Cases, 78 and 315, n.; and the various articles called out by the case, such as those by Hon. Henry Reed, in 9 Am. Law Rev. 381; by Hon. J. B. Heiskell, in 22 Am. Law Rev. 190; by Mr. Conrad Reno, in 23 Am. Law Rev. 190; and by Mr. Wm. H. Rand, Jr., in 8 Harv. Law Rev. 328." 2 Thayer's Const. Cas. 1551, n.

See also the important case of Muhlker *v.* Harlem Railroad, 197 U. S. 544, in which the majority of the court held that one who had bought property in New York on the faith of the earlier elevated railroad cases acquired rights which could not be affected by a change of view in the State Court, and Mr. Justice Holmes, dissenting, said: "That seems to me a great, unwarranted, and undesirable extension of a doctrine which it took this court a good while to explain."]

OUR NEW POSSESSIONS

[This paper was written for a small dining club, at each meeting of which it was the custom for some member to read a paper on a topic connected with his own profession or calling. Afterwards, in February, 1899, it was published in the Harvard Law Review (12 Harv. Law Rev. 464), accompanied by the following note: "This paper was prepared for a non-professional audience, to which it was read on January 9 last. The writer has hesitated about submitting to the learned readers of this Review a paper somewhat too slight, perhaps, for their consideration, and in danger, moreover, of becoming antiquated before it can be published. In assenting to this use of it he is influenced by the important nature of some of the suggestions here made, — as they appear to him, — and by the fact that he cannot undertake to remodel it."

In connection with this article the fact is of interest that in February, 1900, Professor Thayer was asked by President McKinley to serve on the Philippine Commission. Professor Thayer would have accepted this appointment but for his age. Although in good health, he did not think it wise to face so great a change both in climate and in the conditions of his work.]

On the part of many who are dealing with the important questions now agitating the country there is to be observed, in the newspapers and elsewhere, a great deal of two things, which may be called, in homely phrase, crying over spilled milk, and jumping before you reach the stile; a great deal also of bad constitutional law, bad political theory, and ill-understood history.

When we elect persons to office, they have the power of committing us to courses of conduct and to policies which may be very unacceptable to us. Perhaps war may be made, when we personally abhor it; perhaps peace may be made on terms very repugnant to us; perhaps the whole traditional policy of the country may be reversed, contrary to our wishes; schemes may be forwarded which we have

always opposed as fraught with the utmost danger. Whether we like it or not, the accomplishment of such results is often fully in the power of our public servants. It is we ourselves that have given them the power; they hold our commission, and we are bound by their acts. When such results have actually been accomplished, what are we to do? We may abandon the country and go elsewhere. We may sit down and cry over the calamity. We may quarrel with the facts, and refuse to recognize them. I think it is better to face them, however unwelcome, and seek to shape the future as best we may.

Let me make a preliminary application of these remarks, so as to leave entirely clear my own point of view on one subject, and to get it behind us, in this discussion. Doubtless this Spanish war has brought about a great benefit to mankind, by ending the misrule of Spain in her American colonies, and almost ending it in her Asiatic ones. That these regions will themselves be much better off under any probable government that now awaits them, we must all believe. Doubtless also noble exhibitions of courage and skill have illustrated the war. Always, thank God, the human creature of our blood, in such emergencies, can be counted on for these things. Doubtless also it was the distinction of our own nation to bring about these great results. But let us not too quickly exult in that. It does not at all follow that we have anything to be proud of. It may still be true that our real place in this business is a discreditable one. Personally I think it is.

> "God moves in a mysterious way
> His wonders to perform."

He makes the wrath of man to praise him. Not seldom great and beneficent ends come about through the folly, the moral weakness, the thoughtlessness, the wickedness of nations, — through their lack of noble qualities, as well as through the conscious exercise of virtue and self-restraint. I think that history will find this to be true in the case of

the late war; for, to say no worse of it, it was a war, with all its awful concomitants, which we, a strong nation, forced upon a feeble one while it was on its knees, ready to surrender everything of substance, if only it might save its pride.

But the events of last year, of this hell of war, "as in the best it is," have slipped by into the vast cavern of the past, and it is useless to lament them. There they stand, fixed forever and unchangeable.

> "Not the gods can shake the past.
> Flies-to the adamantine door,
> Bolted down for evermore.
> None can re-enter there, . . .
> To bind or unbind, add what lacked, . . .
> Alter or mend eternal fact."

It is not the war, then, that is to be the subject for our reflections to-night, whatever we may think of it, but the portentous consequences of the war; these great and unwelcome questions about the treaty and the island dependencies.

In speaking of these questions, we must again recognize accomplished facts. No longer can we claim our old good fortune of being able to work out a great destiny by ourselves, here in this western world. In my judgment it was a bad mistake to throw away our wonderful inherited felicity, in being removed from endless complications with the politics of other continents. Had we appreciated our great opportunity and been worthy of it, we might have worked out here that separate, peculiar, high destiny which our ancestors seemed to foresee for us, and which with all its grave drawbacks and moral dangers, might have done more for mankind than anything we may hope to accomplish now by taking a leading part in the politics of the world. "Let not England," said John Milton to the Parliament in 1645, "forget her precedence of teaching nations how to live." So to the United States of America, before this Spanish war, — possessed as she was of this fortunate isolation, of free yet guarded institutions, of vast, unpeopled

areas, of an opportunity to illustrate how nations may be governed without wars and without waste, and how the great mass of men's earnings may be applied, not to the machinery of government, or the rewarding of office-holders, or the wasteful activities and enginery of war, but to the comforts and charities of life and to all the nobler ends of human existence, — so, I say, to our country as she was before the war, that same solemn warning of Milton, "God-gifted organ-voice of England," might well have come: "Let not America forget her precedence of teaching nations how to live."

But now we are no longer where we were. The war has broken down the old barriers. First it brought us Hawaii, a colony two thousand miles away, in the Pacific Ocean. In point of distance this was much as if we should sail out over the Atlantic and annex the Azores. And now the end of the war is bringing us Puerto Rico, Cuba, and the Philippine Islands. All these strange tropical countries are likely to be on our hands. Hawaii is already actually a part of our territory. From the other islands we have driven out their sovereign, and we have loaded ourselves with great responsibilities and hazards in supplying them with government, maintaining order, and determining what shall be their fate in the future. What are we to do? That the situation is full of peril for us there is no doubt; that it is certain to involve us in great outlays and perplexities, and in constant hazard of war is clear enough.

I have spoken of accomplished facts. Let us take account of these a little more accurately. First, technically speaking, the war is not yet over. But as practical men we may as well be assured that it will not be renewed. Let us accept that, with all its consequences, as an accomplished fact, and let us no longer cry over the war. Second, the negotiation of the treaty of peace is another accomplished fact. We might have preferred something very different. But the President whom we have charged with responsibility has seen fit to put it in the shape which has been unofficially

disclosed in our newspapers. The negotiation of the treaty; I do not say that the treaty itself is an accomplished fact. That is now pending in the Senate. Perhaps, it may be amended in some respects. For one, I am disposed to believe that it should be. But I think we shall find that it will soon be ratified, substantially in its present shape. Let us, then, assume that we are to have the governing of Cuba for a considerable time, if not forever, and that we are to possess Puerto Rico and more or less of the Philippine archipelago, with the duty of furnishing a government to them. Third, the full annexation of Hawaii is an accomplished fact; that, like the other islands, has come to us as a consequence of this war.

Now observe, what is often forgotten, that we have actually turned a corner. We are no longer considering the expediency of entering upon a foreign colonial policy; we have already begun upon it. All the elements of the problem of governing distant tropical dependencies are found in the case of Hawaii; and Hawaii was definitely made a territory on July 7th, 1898. All the rest of our possessions involve merely a question of more or less. And the questions that confront us are simply these: Having these islands on our hands, (1) What can we do with them? (2) What should we do with them? In other words, (1) What constitutional power have we in the matter; and (2) What is our true policy?

I. In the first place, as to our constitutional power, that is a question of constitutional law. Let me at once and shortly say that, in my judgment, there is no lack of power in our nation, — of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them; that we have the same power that other nations have; and that we may, subject to the agreements of the treaty, sell them, if we wish, or abandon them, or set up native governments in them, with or without a protectorate, or govern them ourselves. I take it for granted that we shall not sell them or abandon them; that we shall

hold them and govern them, or provide governments for them.

In considering this matter of constitutional power, it is necessary, in view of what we are reading in the newspapers nowadays, to discriminate a little. Our papers and magazines and even the discourses of distinguished public men, are sometimes a little confused. We must disentangle views of political theory, political morals, constitutional policy, and doctrines as to that convenient refuge for loose thinking which is vaguely called the "spirit" of the Constitution, from doctrines of constitutional law. Very often this is not carefully and consistently done. And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution, — of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union from territory not belonging originally to it; that it was unconstitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it a legal tender, to enact a protective tariff, — that these and a hundred other things were a violation of the Constitution has been solemnly and passionately asserted by statesmen and lawyers. Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its spirit, and sought thus, when the question was one of mere power, to restrict its great liberty. That instrument, astonishingly well adapted for the purposes of a great, developing nation, shows its wisdom mainly in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations. As it

survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country.

As regards the Constitution, let me say one or two things more. A great deal is said, and rightly said, as to the limitations in the grants of power to the general government. Doubtless this Constitution is essentially different from those of the States, in that the provisions of the latter affect a government which has all power, except so far as the State has parted with any of it to the United States, or as it is withheld by the State constitution itself. On the other hand, the United States did not begin with any such reservoir of power; it had and has only what is granted in the Federal Constitution for the general purposes. But these

granted powers, while limited in number, are supreme, full, and absolute in their reach, subject only to any specific abatements made in the Constitution itself. The situation brought about by the remarkable transaction of a century ago, when our States combined to create the United States, may be truly conceived of as the setting up of a single great power which, for certain general ends should be, to each one of the States, its other half. In each State, if you look about for the total contents of sovereign power, you find a part of it, the local part, in the State, and the rest of it in the general government. Each holds the same relation to this common government; each has contributed to it the same proportion of its total stock; so that at the end of your search you find, as regards certain of the chief governmental functions — for example the war power and the power of dealing with foreign nations — that there is but one government in the country, and that, so far as these particular functions are concerned, it is as sovereign as each State was before it parted with its powers; just as sovereign, as regards these immense and far-reaching functions and for all the purposes that they involve, as any one of the great nations of the world. If you ask what this nation may do in prosecuting the ends for which it was created, the answer is, It may do what other sovereign nations may do. In creating this new nation, it was not intended by the States, except as they have said so in the Constitution, to diminish the scope of the great powers they parted with. Their aim was merely to secure greater efficiency by putting the power in stronger hands, hands that could strike with the undiminished strength of all. No part of sovereignty vanished in this process of transferring it. Of course, the general government was submitted to some restraints in the national Constitution, and whatever these are, they are an abatement from the fulness of absolute power in the particulars to which they relate. But, speaking generally, it is true that while one, two, six or eight specific powers only are given to the general government,

yet as regards these it is the fulness of power that is given. So far as the general welfare and the other great ends mentioned in the preamble to the Constitution can be secured by intercourse with foreign nations, peaceful or warlike, by the post-office, or by the regulation of interstate commerce, these matters are intrusted to the general government in their fulness. In these particulars, as Chief Justice Marshall said, "America has chosen to be a nation." "In war," said that great judge in 1821, "we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one. . . . America has chosen to be in many respects and to many purposes a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme." [1] When, a few years ago, it was denied, as it has often been, that Congress could forbid the transmission of objectionable matter through the mails, distinguished counsel urged before the Supreme Court that since the express powers given in the Constitution were limited in their exercise to the objects for which they were intrusted, the power to establish post-offices and post-roads was restricted to the furnishing of mail facilities. But the court replied: The States could have excluded this mail matter before the Union was formed; and "when the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that grant effective." [2] Many times has this doctrine been reasserted by our highest court, that when a great sovereign power, like those referred to by the Chief Justice, has been conferred, in however few words, all of it was given, unless

[1] [Cohens *v.* Virginia, 6 Wheat. 264, 413, 414. "These states are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate." 6 Wheat. 414.]

[2] *In re* Rapier, 143 U. S. 110.

some qualification was to be found in the Constitution itself; and that the general limitations of the Constitution related rather to the number of the powers than to the reach of them. They are intrusted to the general government, to be used as absolutely as the States themselves could have used them, in handling those general interests which they confided to the nation.[1]

The power of acquiring colonies is an incident to the function of representing the whole country in dealing with other nations and states, whether in peace or war. The power of holding and governing them follows, necessarily, from that of gaining them. As regards the power of acquiring colonies the Constitution has no restraint upon the sound judgment of the political department of the United States.

Now let us observe an important point: when a new region is acquired it does not at once and necessarily become a part of what we call the "territory" of the United States. Or, to speak more exactly, the people in such regions do not necessarily hold the same relation to the nation which the occupants of the territories hold. It is for the political department of the government, that is, Congress or the treaty-making power, to determine what the political relation of the new people shall be. Neither they, nor their children born within the newly acquired region, necessarily become citizens of the United States. Take, for illustration, the case of our tribal Indians. Always many of them have lived within the territories of the United States. Our government has mainly followed the example of our English ancestors in recognizing them as tribes rather than individuals. Congress and the treaty-making power have dealt with them as a separate people, who have their own rules,

[1] ["Whenever an object occurs to the direction of which no particular State is competent, the management of it must of necessity belong to the United States in Congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence, and the government, of lands and countries not within any State, are all included under this description." 1 Wilson's Works (Andrews ed.), 558, 559. See also Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. 187–189.]

customs and laws, although living on our land. While regulating "commerce with the Indian tribes," to use the phrase of the Constitution, and so laying down rules for governing the intercourse between Indians and others, and punishing crimes committed by tribal Indians on whites, or *vice versa,* Congress has never yet, by any wholesale provision, undertaken to bring them fully under subjection to us. That Congress might do this at any time, is settled. It has done it partly and by steps and degrees, as much as it pleased, all along. It has ended the business of making treaties with them, and has begun to punish crimes committed by one tribal Indian on another in the Indians' own country. And yet the Supreme Court has held that the Fourteenth Amendment did not make tribal Indians citizens of the United States. That Amendment, coming into effect in July, 1868, provided that "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are citizens of the United States. Distinguished persons used to think that all tribal Indians born in our country, like the Chinese, as recently held, were thus made citizens of the United States. That was the publicly expressed opinion of Senator Hoar and of Senator Morgan. But fifteen years ago the contrary was decided by the Supreme Court of the United States.[1] Since they are born, said the Court, "members of and owing immediate allegiance to one of the Indian tribes, an alien though dependent power, although in a geographical sense born in the United States," they are in the same case with children of a foreign ambassador born here. Yet, remember, we hold these people, the Indians, in the hollow of our hand; it is in our power, and has been from the beginning, and not in theirs, to say whether they shall continue to hold this relation. We can reduce them at any moment to full subjection; so that we are to observe that the question of whether, while living and being born here, they shall become citizens, is

[1] Elk *v.* Wilkins, 112 U. S. 94.

a question to be determined by the mere will and pleasure of Congress. Long ago, more than fifty years ago, in affirming the right of the United States to exercise its jurisdiction in the "Indian country," Chief Justice Taney, giving the opinion of the Supreme Court, said, "But . . . were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political power of the government and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."[1] We may take it, then, as settled, that it is for Congress or the treaty-making power to say what shall be the permanent political position of the new people. As to no one of them is it yet determined, except in the case of Hawaii, that it is a "territory."

The Spanish possessions are held now and will continue to be held, as we held the southern states after the War of the Rebellion, under military government. Such a government may continue as long as the political department finds it desirable; and it should continue long enough to allow of the most deliberate attention to the problems involved. There is an instance, as a learned friend informs me, in South America, still continuing, of a region taken from Bolivia by Chili and held under military government, pending negotiations, for the past fifteen years. As regards permanent arrangements, we may, if we please, set up a native government, with or without a protectorate, or we may perhaps establish some other status of partial allegiance analogous to that of our tribal Indians, or we may govern them precisely as we have governed our territories heretofore.

And this brings us to the question of the government of these territories, — a great, important, and ill-understood

[1] [U. S. *v.* Rogers, 4 How. 567, 572.]

topic. Hawaii, as I said, has become a "territory." The other islands have not. What is it, to be a "territory" of the United States? It is this: It is to be a region of country belonging to the nation, and under its absolute jurisdiction and control, except as the fulness of this control may be qualified in a few particulars by the Constitution. As regards self-government and political power, a territory has no constitutional guaranties; its rights, in these respects, are what Congress or the treaty-making power thinks it well to allow. It has no right to become a State unless it shall have been so stipulated with the former owner when ceding it. The opinion that we can only hold territory for the purpose of nursing it into a State is merely a political theory. We have the constitutional power to do what it seems wise to do; that matter is left wholly open to the political department. A territory may be governed directly by Congress, as the District of Columbia, formerly called the Territory of Columbia, now is; or it may have such portion of self-government as Congress chooses to allow it. But if any is allowed, it may all be taken away at any moment. We send out from Washington to the territories, and always have sent to them, their governors, secretaries, marshals, and judges. Their whole executive and judicial power is imposed upon them by the United States. They have not, always, even had legislative power; and we may and do abolish and change their laws when we please.

Now observe, this is exactly the process of governing a colony. In fact these territories are, and always have been, colonies, dependencies. There is no essential difference between them and the leading colonies of England, except that England does not, and would not dare to exercise as full a control over her chief colonies as we do over ours. I observe in a recent magazine ("Harper's Monthly," for January, 1899) a valuable and accurate statement on this subject by Professor Hart, our learned and indefatigable professor of history at Harvard. He remarks truly that the United States, for more than a century, "has been a great

colonial power without suspecting it"; and he points out that the conception of a colony is that of a "tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region." Great distance, he remarks, is not necessarily involved, nor physical separation from the home country, nor the exercise of arbitrary control, nor the presence of an alien and inferior race. "The important thing about colonies is the co-existence of two kinds of government, with an ultimate control in one geographical region, and dependence in the other; and since 1784 there has never been a year when in the United States there has not been, side by side, such a ruling nation and such subject colonies; only we choose to call them 'territories.'"

When people permit themselves to talk, then, of "vassal states and subject peoples," as if the necessary condition of colonies, say of Canada or Australia, or our territories, were one of slavery; when they talk of the holding of colonies as contrary to the spirit of our free institutions, of its being un-American, and having a tendency to degrade our national character; when they quote and pervert the large utterances of the Declaration of Independence, and remind us, as if it were pertinent to any questions now up, that government derives its just powers from the consent of the governed, — let them be reminded of our own national experience. Has it been "un-American" to govern the territories and the District of Columbia as we have? Has it been contrary to the fundamental principles of free government or the Declaration of Independence? Has it tended to the degradation of our national character? Has England suffered in her national character by governing Canada and Australia as she does? Or have England and the United States done sensibly and well in so doing? England had learned, and taught, the lesson of where the just powers of government come from, as long ago, to say the least, as 1688, when she gave the death blow to the doctrine

of the divine right of kings. Ninety years later we had to remind her of that great doctrine, when she was making us suffer from a stupid and oppressive form of colonial policy. But the entire recent history of England and of the United States shows that a wise and free colonial administration, as regards the people who are governed, is one of the most admirable contrivances for the improvement of the human race and their advancement in happiness and self-government, that has ever been vouchsafed to men.

On this head let me say one or two things more. We are going to have many perils and to commit many blunders in our new career; and yet we shall have some great gains. Not the least of the benefits will be found in the reflex effect of colonial administration upon the home government, and its people and public men. These new duties will tend to enlarge men's ideas of government and the ends of government. Our own experiments in the territories have been comparatively simple; so that already, in discussing our larger problems, we are finding good from having them forced upon us. The follies of the silver agitation and of much of our policy as to revenue, navigation, and trade; and the childish literalness which has crept into our notions of the principles of government, as if all men, however savage and however unfit to govern themselves, were oppressed when other people governed them; as if self-government were not often a curse; and as if a great nation does not often owe to its people, or some part of them, as its chief duty, that of governing them from the outside, instead of giving them immediate control of themselves; — these things are taking their proper place in the wholesome education of the discussions that are now going forward. There is good ground to expect, I think, that among the incidental advantages of our new policy may come to us a larger and juster style of political thinking, and I may add, of judicial thinking, on constitutional questions, and a soberer type of political administration. Even the nettle danger is to help us in these respects.

I have something more to say of our territories. And first let me shortly trace their history. Before the Revolutionary War was over, and several years before the Constitution of the United States took effect, the Confederation had begun to receive cessions of territory from the original States. The process continued after the present government came into existence; and by the year 1802, the United States held, under these cessions, besides the District of Columbia, a vast region now represented by nine States, namely, by a part of Minnesota and by the States of Wisconsin, Michigan, Ohio, Indiana, Illinois, Tennessee, Alabama, and Mississippi. These regions now belonged to the nation. They were not States, but they had been accepted by the national government under a guaranty that eventually they might become States. It was not necessary to make such a guaranty; the Constitution did not require it; it was purely an arrangement of policy. Then, in 1803, came that enormous accession, by purchase from France for $15,000,000, of a tract reaching (as we afterwards insisted in the Oregon controversy) from the mouth of the Mississippi to the Pacific at Vancouver, a region vastly larger than the original country east of the Mississippi.[1] These great regions, all together, composed what Marshall called in 1820 the "American Empire." The new tract included what now makes up fifteen States and two territories; namely, the States of Washington, Oregon, Montana, Idaho, Wyoming, the two Dakotas, Nebraska, a part of Minnesota, Colorado, and Kansas, the States of Iowa, Missouri, Arkansas, and Louisiana, the territory of Oklahoma and the Indian Territory. At the end of the next decade, in 1819, this example of purchasing territory was followed by gaining from Spain the territory of Florida, at an outlay of $5,000,000. Then, in 1845, came a joint resolution of Congress, not a treaty, by which the republic of Texas was added directly to the Union, as Vermont and Kentucky

[1] It is well known that our claim went farther, — both as regards the grounds of it, and the region it covered.

had been in 1791 and 1792, without ever passing through the pupilage of a separate dependency of the nation. Then followed war with Mexico, on a question of the true boundary of Texas; and as our neighbor, Mr. John Fiske, tells us, in his valuable history of the United States, "When peace was made with Mexico in February, 1848, it added to the United States an enormous territory, equal in area to Germany, France, and Spain added together." This was supplemented by a purchase from Mexico in 1853. The whole region is now occupied by five States and two territories, namely, by the States of California, Nevada, and Utah, a part of the States of Colorado and Kansas, and the territories of Arizona and New Mexico.

Then in 1867 came the purchase of Alaska from Russia for $7,000,000. This was a novel accession; for it was no longer contiguous territory that was brought in, but a region separated from us by a breadth of foreign country covering several degrees of latitude. Alaska stretches towards the north for more than fifteen degrees, and away up into the Arctic Ocean. It reaches westward until its mainland is only separated from Asia by about fifty miles of water, at Behring Straits. And then our Aleutian archipelago continues out under the continent of Asia, into the longitude of New Zealand. This acquisition shifted the geographical middle of our country so as to place it some way out in the Pacific Ocean.

And now we reach the recent and pending cessions. The Hawaiian Islands have now, six months ago, been added to our territories. They are 2100 miles out in the ocean, southwesterly from San Francisco, in the latitude of Puerto Rico and Cuba, and in the longitude of the western mainland of Alaska. Having failed in accomplishing this annexation by a treaty, the promoters of it secured the result, after the example of Texas, by a joint resolution, during the war with Spain and as an incident to it. The resolution is simply the acceptance of an unconditional offer from Hawaii. In the language of the resolution,

"Said cession is accepted; . . . the said Hawaiian Islands and their dependencies are hereby annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof." Till Congress provides for their government they are under the President's supreme control. A few temporary provisions only, as to customs, treaties, and immigration, are made in the resolution. No promise of becoming a State has been made, and no assurance as to the status or control of the population.

The proposition now pending in Congress for the establishment of a territorial government in Hawaii gives these islands the full status of a territory of the United States, under a governor and territorial secretary appointed by the President, with power in the governor to appoint the judges and other officers, with the consent of the territorial senate. The legislature is to be composed of a house of representatives elected by the people who are male citizens of the United States twenty-one years of age; that is, as it is rather oddly expressed, "all white persons, including Portuguese and persons of African descent," and all of the Hawaiian race who were citizens of the Hawaiian Republic just before the transfer of the sovereignty to the United States; and of a senate, elected by such persons as could vote for representatives, being also owners in their own right of real property in the territory of not less than $1000, and paying taxes for the last year, or being in receipt during that year of a money income not less than $600.

The commissioners who have prepared a form of government for Hawaii intimate an opinion that it cannot form a precedent for the other islands now acquired or coming in. They suggest the need of more outside control for the new possessions. "The underlying theory of our government," they say, "is the right of self-government, and a people must be fitted for self-government before they can be trusted with the responsibilities and duties attaching to free government." And again they say that "the American idea of universal suffrage presupposes that the body

of citizens who are to exercise it in a free and independent manner have by inheritance or education such knowledge and appreciation of the responsibilities of free suffrage, and of a full participation in the sovereignty of the country, as to be able to maintain a republican government."

What I have said, so far, tends to show that there is no constitutional difficulty in our acquiring, holding, and permanently governing territory of any sort and situated anywhere. Whatever restraints may be imposed on our congress and the executive by the Constitution of the United States, they have not made impossible a firm and vigorous administration of government in the territories. Witness especially the case of the District of Columbia and the Territory of Utah. It is not to be anticipated that they will have any such effect in our island dependencies.

But what exactly is the operation of the Constitution in the territories? A difficult question, and very fit to be deliberately and fully considered by Congress and by the Supreme Court: a question never yet satisfactorily disposed of; perhaps one not to be answered finally by a court. It would be easy to cite dicta and even decisions that extend the Constitution and what we call its bill of rights to the territories; but no judicial decision yet made has thoroughly dealt with the matter, or can be regarded as at all final on a question so very grave.[1]

It is sometimes supposed that the effect of the early amendments and other parts of the Constitution which make up what is called its bill of rights, is that of absolutely withholding power from the nation to govern in the for-

[1] [See Downes *v.* Bidwell, 182 U. S. 244; Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* United States, 195 U. S. 138; Rassmussen *v.* United States, 197 U. S. 516; 1 Kent's Com. *385.

"Compare the doctrine of U. S. *v.* Kagama, 118 U. S. 375 (1886), deciding that the United States has full legislative power over tribal Indians, on reservations in the States as well as the Territories, — and the grounds on which it is put. . . . In dealing with the tribal Indians, the United States government has never proceeded on the theory that its action was restrained by the amendments, or by other like clauses in the body of the Federal Constitution." 1 Thayer's Const. Cas. 363, n. So Talton *v.* Mayes, 163 U. S. 376.]

bidden way; not merely within the States, but within the territories, and anywhere and everywhere, and under all circumstances whatever; so that, for instance, no criminal trial could proceed anywhere under the authority of the United States without those safeguards of a grand jury and petit jury, which would be necessary within the States. But that is not so.[1]

Let me explain what I mean by an illustration. Nineteen years ago, a seaman upon an American vessel, charged with murder committed in the waters of Japan, was tried in that country before the American consul and four associates. Against his objection that he was entitled to be accused by a grand jury and tried by a petit jury, he was found guilty by the consular tribunal and sentenced to death. The President of the United States commuted his sentence to imprisonment for life in the State prison at Albany. Ten years later the convict sought by a writ of habeas corpus for a discharge on the ground that he was held in violation of the Constitution, in that he was entitled to a jury and a grand jury; and that the legislation of Congress, under the treaty, providing for the consular tribunal

[1] ["1. As to the political catch which we have been hearing so much, about the Constitution following the flag or not following it, we may collect from all the opinions [in Downes *v.* Bidwell, 182 U. S. 244], including (as to this matter) those of the minority, that wherever the flag is rightfully carried the Constitution attends it. To be sure that is obvious enough. That is to say, no rightful power can ever be exerted under the authority of the United States, which is not founded on the Constitution. But all parts of that instrument are not relevant to all inquiries, or applicable to all situations. And, moreover, the silence of the Constitution and its tacit references and implications, pointing steadily to the usages of other nations, — these go with it, as well as its expressions. The Constitution is not a code of detailed precepts.

"2. The United States may acquire territory as the result of war and treaties, without any qualification as to kind or quantity, or as to the character of its population. It may be Canada, or a cannibal island, or an island of slaves and slave owners.

"3. The mere acquisition or cession of a region does not 'incorporate' it into the United States so as to subject it generally to those clauses of the Constitution which restrain and prohibit certain action by the Congress of the United States; but such regions may be temporarily governed, in some respects, at least, as seems most suitable for their own interests and those of the United States.

"4. The question of when these regions shall be 'incorporated' into the United States is for Congress." The Insular Tariff Cases, J. B. Thayer, 15 Harv. Law Rev. 164.]

which tried him, was unconstitutional. But he was remanded, and the court declared, by the mouth of Mr. Justice Field, that the Constitution had established a government "for the United States of America, and not for countries outside their limits. The guaranties it affords," they went on to say, ". . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad." [1]

We observe in such a case that our Congress may constitutionally authorize a capital trial without either jury or grand jury, notwithstanding the express provisions of the Constitution and its amendments. The reason is that these provisions are not applicable to this sort of case. The Constitution has to be read side by side with the customs and laws of nations. The operation of our Constitution is not to create a legislative body which is wholly bereaved of power to do anywhere the things which are forbidden within the United States. It is not stricken with inability, destitute of power, as if paralyzed, on these subjects, anywhere and everywhere and under all circumstances. The prohibitions, although they do not say it, deal only with certain circumstances and persons and places.

But to return to the specific question as to the situation of the territories. Hawaii, as I have said, is now a "territory"; and other islands, although not made "territories" by the treaty, may become such by Act of Congress. It is probably the prevailing legal opinion to-day that a citizen of a territory is a citizen of the United States, and that children born in the territories and subject to our national jurisdiction are citizens of the United States. Probably, also, it is the prevailing legal opinion, supported by some judicial decisions, that the territories are a part of the United States, not merely in the eye of international law, as all agree, but in the sense of our municipal law; so that,

[1] *In re* Ross, 140 U. S. 453.

e. g., as judges have said, taxes must be uniform there and in the States. There is also judicial authority for the opinion, and I suppose it is the more common opinion, that those parts of the Constitution securing trial by jury and other personal rights are applicable to the territories.

There is, however, little in the text of the Constitution itself, and little, in point of intrinsic reason, in the judicial opinions and dicta on these subjects, to prevent us from holding that the Constitution does not cover the territories, and that the power of the United States in governing them, except as to one or two particulars, is to be measured only by the terms of the cessions which it has accepted, or of the treaty under which a territory may have come in. It may be observed that States and foreign countries in making their cessions inserted such conditions and guaranties of right as they thought necessary. Beyond these restraints it may well be thought that the territories are subject to the absolute power of Congress.

I will not go into detail in discussing these matters now. It would take too much time, and would require much too technical a discussion to be appropriate to this time and place. But let me refer to a single head of the Constitution, in its relation to the territories, on which the law is perfectly settled, and which furnishes a clear suggestion for a right solution of some at least of the questions in hand.

The great difficulty when the United States Constitution was made, was the adjustment between the power of the States and of the United States. The territories played no part at all. They were disposed of in the Constitution, so far as anything was said of them, by placing them wholly under the control of Congress. Article IV., Section 3: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." In Article I., Section 8, Congress is also given power of exclusive legislation in all cases whatever over the district, not exceeding ten miles square, where the seat of govern-

ment should be fixed, and over places purchased by consent of the States for forts and the like. Congress might admit new States; and these, no doubt, might be made out of the territories, because Congress had already promised to admit States out of the Northwest Territory. The territories of that period had belonged to the States, and whatever privileges the States wished to secure they could and did secure in the terms on which they were ceded. The great anxiety was to make a strong enough central government and yet prevent the United States from encroaching on the rights of the States or of the people of the States. One sees no sign of any anxiety on the part of the makers of the Constitution as to the status of people belonging to regions then ceded to the national government or thereafter to be ceded. That was a matter which had been attended to in the cessions actually made by the parties who made them; and it might fairly be presumed that it would be attended to in future cessions, so far as might be desired and found convenient between the parties concerned. What was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other.

It was perfectly natural, therefore, and to be expected, when in dealing with the third article of the Constitution providing for the distribution of "the judicial power of the United States" and the tenure of the judges, that it should be treated as having no application to the territories. The Constitution provides that all its judges shall hold office during good behavior. But in regulating the judicial system of the territories Congress has always appointed the judges for a term of years, and not during good behavior. Seventy years ago, Chief Justice Marshall said: "These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of re-

ceiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is conferred in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."[1] This doctrine has always been acted on. In 1871 the court said, through Chief Justice Chase: "There is no supreme court of the United States nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are not appointed for the same term, nor is the jurisdiction . . . part of the judicial power conferred by the Constitution on the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territory belonging to the United States."[2]

But now observe, if the restraints of this part of the Constitution do not operate in the territories, why should those of the rest of it reach them? If the judicial system of the United States was meant only for the United States in the narrower sense, as including the States themselves, the conclusion seems, as I am inclined to believe it, a just one, that the Constitution generally was not meant for the territories, except as it may in any place expressly or plainly indicate otherwise; and that its provisions committing the territories to that full control of Congress which is expressly mentioned, and to its implied authority to govern, involved in the power to acquire, carry an absolute authority over them, except as there may be any plain expression of restraints. Such was the opinion of Chancellor Kent as

[1] Am. Ins. Co. *v.* Canter, 1 Peters, 511.
[2] Clinton *v.* Englebrecht, 13 Wall. 434.

expressed in his Commentaries in 1826, and never changed. He said: "If . . . the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River to the west of the Rocky Mountains, it would afford a subject of grave consideration what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into independent States; and in the mean time, upon the doctrine taught by the Acts of Congress and even by the judicial decisions of the Supreme Court, the colonies would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever."

Let me refer to a valuable paper on this particular question in a magazine called the "Review of Reviews," for January, 1899, by Professor Judson of Chicago. He examines the subject carefully and with references to some of the decisions, and reaches the conclusion that only in an international sense can it be said that the territories are a part of the United States, as that phrase is used in the Constitution.[1]

II. So far I have pointed out two things: First, that we no longer have before us the question of whether we will take on extra-continental colonies or not. We actually have them now. Our real question is what to do with them. And, second, as preliminary to the question what we shall do with them, I have been considering what is the compass of our power. I have pointed out that after the ratification of the treaty, we shall still have absolute power to determine what the political relation of the Spanish islands to us shall be, and so the scope of our governmental control over

[1] See also the very valuable investigation of the text of the Constitution, by Professor Langdell [12 Harv. Law Rev. 365], leading up to the same conclusion.

them; and that if they should be annexed, so as to be identified, in status, with the territories, we shall still have full power to deal with them, subject only to any applicable restraints of the Constitution of the United States; so that we may govern these extra-continental dependencies as we have in fact, ever since the beginning of our nation, governed our continental colonies, namely, the territories and the District of Columbia. And I have shown how it is that we have acquired and governed these, namely, in a manner which nearly corresponds to the method of England in governing her freest colonies; only more stringent and less free.

I may add that the restraints of the Constitution would probably be found less embarrassing in governing a barbarous or semi-barbarous people than might at first sight be thought; just as they have been found not seriously to interfere with the carrying on of war with rebellious States. That instrument was made, and is to be read and applied, in the atmosphere of the common law and of the law of nations; and with a constant tacit reference to that accumulation of principles and maxims of sound reason and good sense which temper all applications of it to actual affairs. When our own people, owing allegiance, will not be governed as they should be, they may still be governed somehow; and under the Constitution they may be governed as it is necessary to govern them, according to the actual circumstances of the case. They cannot throw off the authority of the nation; they must accept it in such form as is practicable under the circumstances that they themselves create. Let me add in order to prevent a possible misunderstanding, that in matters of substance the restraints of the Constitution will not often be felt as restraints in the government of colonies by a civilized nation in modern times. Such a nation, like England, is likely to restrain itself within narrower lines than the Constitution requires, for mere policy, and from its own sense of humanity and justice.

And now let me very briefly and very summarily speak of our policy and of our duty. I will not enlarge here.

1. In the first place, we must face and take up the new and unavoidable duties of the new colonial administration, however unwelcome they may be, handsomely and firmly. There is no question now of any choice as to whether we will have a colonial policy.

2. The case of Hawaii should await the settlement of the general problems now coming into view, arising out of these new dependencies. The case of all the islands will be in many respects the same. They should all be dealt with together.

3. We should ratify the treaty; and then determine the fate of the Philippines after very full and careful consideration. The treaty simply detaches these islands from Spain and secures for us the opportunity to do this. As things now stand, the policy of throwing them back upon Spain or upon themselves, merely because we individually do not want them, and because it is easier to defeat the treaty than it is to accomplish afterwards a particular disposition of them that one may himself prefer, seems to me unworthy of the nation and of the subject in hand. It is dealing too hastily with a great and serious problem; and it is discrediting our own capacity to handle it with wise deliberation.

4. Having ratified the treaty, let us be in no hurry to close the grave questions that will present themselves as to the permanent status of the islands. These should all continue, for the present, to be governed under executive and military control; and meantime with the utmost possible care we should study the true settlement of these questions.

5. Let us beware, at every step, of promising to the islands, not excepting Hawaii, any place in the Union. Here, as elsewhere, we shall find England's sensible policy our best guide. We cannot imagine Great Britain's letting in her colonies to share the responsibility of governing the home country and all the rest of the empire. In France,

indeed, that mistake has partly been committed; but we are hearing now the solemn warnings of the French against such a policy. Never should we admit any extra-continental State into the Union; it is an intolerable suggestion. I am glad to observe that it is proposed in Congress to insert in the statute for the settlement of the Hawaiian government the express declaration that it is not to be admitted into the Union. The same thing should be done with all the other islands. The remark attributed to a judge of the Supreme Court of the United States in presiding, lately, over a popular meeting in Washington, that we have no power to hold colonies except for the purpose of preparing them to come in as States, has no judicial quality whatever. It is simply, as I have already said, a political theory entertained by some persons, but resting upon no ground of constitutional law.

6. Furthermore, considering the danger which attends a close division of parties, and our unfortunate experience of recent years in admitting States ill-prepared to become members of the Union, we ought to guard against the excesses of party spirit on so grave a subject, by amending the Constitution and limiting the States of the Union to the continent. After the great convulsion of thirty odd years ago we found it necessary to amend the Constitution before settling down again. Equally after this war, attended by such momentous results, we have abundant reason to proceed in the same way. Such amendments are difficult, but they are not impossible; nor are they necessarily so very long in being accomplished. The Twelfth amendment was in force in about nine months after it was proposed.

Guarded by such an amendment it appears to me that we might enter upon the new and inevitable career which this Spanish war has marked out for us, with a good hope of advancing the honor and prosperity of our country and the welfare of mankind.

INTERNATIONAL USAGES. — A STEP FORWARD

[This essay appeared in September, 1895, in the University Law Review (edited by Austin Abbott, Dean of the Law School of the University of the City of New York, and published by Frederick M. Crossett).]

In an impressive passage at the end of his address,[1] last summer, before the Harvard Law School Association, Sir Frederick Pollock, in speaking of the "Vocation of the Common Law," imagined the time when the highest courts of Great Britain and of this country should co-operate in the settlement of great and difficult questions of common concern. Alluding to the practice, on the part of the House of Lords, of consulting the English judges, he suggests a similar reciprocal consultation between the House of Lords or the Privy Council, on one side, and the Supreme Court of the United States, on the other. "Such a proceeding," he adds, "could not, in any event, be common. It might happen twice or thrice in a generation, in a great and dubious case touching fundamental principles, like that of Dalton *v.* Angus. . . . Could the precedent be made once or twice in an informal and semi-official manner, it might safely be left to posterity to devise the means of turning a laudable occasional usage into a custom clothed with adequate form. As for the difficulties," he goes on, "they are of the kind that can be made to look formidable by persons unwilling to move, and can be made to vanish by active good-will."

This is a dream, he says, but he looks to see it come true. If one ask when, — his answer is, "I cannot tell. . . . Dreams are not versed in issuable matter and have no

[1] Law Quar. Rev., XI, 323; Harv. Grad. Mag. IV, 1.

dates. Only, I feel that this one looks forward, and will be seen as waking light some day." The suggestion is ventured, then, as a bit of poetry, an utterance of the legal imagination. Of such things we have only a right to ask that they keep within the legitimate realms of the lawyer's imagination. Wordsworth says of the poet that "he will follow wherever he can find an atmosphere of sensation in which to move his wings." Those are his limits; he cannot pass outside of that region. And so of the flight of our legal poet; it must keep within the legal sky.

What analogies are there, then, and what basis in existing legal facts and conceptions to bear up Sir Frederick in his flight? Is the legal air thick enough to hold him? Is what he puts forward legally possible, conceivable, capable of being hoped for? What is there in our existing procedure which may be availed of as a foundation for the purpose which is suggested?

I. The orator mentioned, as was just said, the ancient practice by which the House of Lords calls for legal opinions from the judges of England. For his purposes, it was a just and fit allusion; nor was it quite adequately met, when Mr. Justice Gray, at the dinner, after the address, recalled the fact that the judges of the Supreme Court of the United States had refused to answer a question put to them by President Washington, on the ground that this was not a judicial duty. If it be admitted, as it must be, that the giving of such responses is not the exercise of the judicial function, that they do not bind anyone as authority,[1] yet it is also true that they have been and still are a highly valued instrument in the conduct of government or judicature, both in England and this country. To say that a court is not obliged to answer, and cannot be obliged to answer by the action of the other departments, is not to say that they cannot answer if they see fit.

What do we know of this practice? It runs far back.

[1] See the citations in Thayer's Cases on Constitutional Law, i. 156, 175, 183; also *ib.* 177, 180, 181.

We find the judges acting as assistants to the Chancellor in Edward the Third's time, and the practice is upheld against remonstrances as being an established one.[1] They are found giving answers to the King himself, Richard II., half a century later;[2] to Richard III., a hundred years later than that;[3] to George II., in 1760;[4] and often meanwhile. While the king has not called for such answers since 1760, the ancient practice as regards the House of Lords continues still. We see it in the famous instance of Thomas Thorpe, the imprisoned Speaker of the House of Commons, in 1454,[5] and in many and many a case before and since. As regards the king the judges were reckoned his deputies and servants. To the House of Lords they have always been counted as regular, constitutional assistants, and still they are summoned by writ to every new parliament. This writ, after reciting as the occasion of the summons the existence of "certain arduous and urgent affairs concerning us, the state and defence of our said United Kingdom and the Church," requires the judges to "be personally present with us and with the rest of our Council to treat and give your advice upon the affairs aforesaid." There is no exception here as to the subjects which may come up; and their duties are, in fact, miscellaneous.[6] They have been the Lords' assistants for six centuries.[7] It used to be thought the duty of the judges, one or more, to be in attendance all the time; and two hundred years ago they were reprimanded and disciplined for failures to perform this duty,[8] but that theory has been abandoned. In the language of one who was recently of their number, and the language of whose commission has just been quoted, "The judges have, I believe, a right to sit on the woolsack

[1] Y. B., 12 & 13 Edw. III., Introduction, cl–cv.
[2] 2 St. Realm, 102 (1387).
[3] Y. B., 2 Rich. III. 9, 22.
[4] Sackville's Case, 2 Eden, 371.
[5] Rot. Parl. v. 239, b., Cotton's Abridg. 651.
[6] Macqueen, Practice of the House of Lords, 47, 51, 52.
[7] 2 Stubbs Const. Hist. 253; 3 *ib.* 393.
[8] Macqueen, Practice of the House of Lords, 37–40.

at any time, but, as there is a standing order of the House that they are not to speak till they are spoken to, they do not go unless required to give their legal advice."

It is sometimes thought that the function of the judges is limited to assisting the Lords by advice in litigated cases. I have already said that this is not so. In the Queen's Case[1] the Lords were listening to evidence incidentally to determining a legislative question merely, viz., whether they should pass a bill of pains and penalties against Queen Caroline, and yet the judges were kept in steady attendance to answer questions. These questions did, indeed, relate to the practices of courts, and the judges' answers have taken their place in our books as if they were judicial opinions, although, undoubtedly, they were merely learned advice.[2] A more conspicuous illustration of summoning the judges to assist in a non-judicial proceeding is found in M'Naghten's Case,[3] where the Lords had no question up, either judicial or legislative, but desired to know how the rule of law stood on a point relating to criminal liability in case of insanity. On the objection being made that there was no business pending before the Lords, that House gave expression to the unanimous opinion that it had the right, nevertheless, to call on the judges for their opinions.

This usage, on the part of a legislative body or the executive, of calling on the judges for their advice as to questions of law, crossed the water to our side. There is reason to think that it existed here in the Colonial period. The Massachusetts Constitutional Convention in February, 1780, called in the judges in a manner which suggests no thought of its being a strange practice. In Rhode Island, in 1786, in Trevett *v.* Weeden, Howell, J., acknowledges that the judges, as assistants to the legislature, are "ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislature in framing new or repealing former laws." And at the same period in

[1] 2 Brod. & Bing. 284. [2] Best Evid. s. 474.
[3] 10 Clark & Fin. 200.

Pennsylvania the judges are shown to have been in the habit of furnishing such assistance to the executive.[1] As a fixed part of our constitutional machinery, it exists here to-day in seven States. It was first introduced in Massachusetts in 1780, and from that State spread successively to New Hampshire in 1784, Maine (*continuing* there when it separated from Massachusetts), in 1820, Rhode Island, in 1842, Missouri, in 1865 (abandoned in 1875), Florida, in 1868, Colorado, in 1886, and South Dakota, in 1889. In all these States, except Missouri, it is now planted in the fundamental instrument of government in forms more or less like that of the Massachusetts constitution,[2] which reads thus: "Each branch of the Legislature, as well as the Governor and Council shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law, and upon solemn occasions."

Since these opinions are advisory, "consultative," non-judicial utterances, it has been very reasonably held, in some quarters, that the judges cannot, in the absence of a constitutional requirement, be required by the other departments to give them.[3] But in other jurisdictions they have, in point of fact, been given when not required by the constitution, — sometimes in pursuance of a legislative provision and sometimes without it.[4] It seems clear that the judges may answer, if they choose to. The precedents referred to indicate only that they need not if they do not choose; and, perhaps also, that it is generally inexpedient to answer when not required by the constitution. The refusal, therefore, referred to by Mr. Justice Gray, where Chief Justice Jay and his associates on the bench of the Supreme Court of the United States declined, in 1793, to

[1] For the authorities on this and other points relating to this subject see Thayer's Cases on Constitutional Law, *ubi supra*. [See also *supra*, pp. 42–59.]

[2] Pt. II, c. 3, s. 2.

[3] *In re* Senate's Application, 10 Minn. 78; Marshall's "Life of George Washington," v. 441 (ed. Phil., 1807).

[4] *In re* Governor's Power, 79 Ky. 621; People *v.* Greene, 1 Denio, 614. For other instances see 1 Thayer's Const. Cas. 183, n.

answer the questions put to them by President Washington need present no serious difficulty. It may well enough be supposed that a formal request for assistance from the highest legal tribunal in England would receive the desired consideration and response from our own highest national court, although they would not be acting in a strictly judicial character, and although they would not think of departing from the wise course of abstaining to act the part of legal adviser to their co-ordinate departments at home. And then, of course, in forecasting the fate of Sir Frederick's dream, it is conceivable that such a duty might be imposed on the judges by an amendment to the National Constitution.

Of course, the only tribunal which our Supreme Court could properly address would be the House of Lords itself, and possibly the Judicial Committee of the Privy Council — not the judges. Whether the Lords should call on the judges would be a question for them. But the House of Lords and the Privy Council alone could correspond in rank to our own Supreme Court.

The questions that are answered by the judges in this country cover a very wide range of subjects, including the respective privileges of the legislative chambers, and the inquiry which among competing claimants constitutes the true legislature.[1]

So far, the existing usages which we have been considering are limited within the orbit of a single political system. And the question is whether this procedure may be extended, and may come to have an international application. It would seem not impossible, when once the need of it is deeply felt.

[1] An enumeration of these is found in a valuable note to Mr. H. A. Dubuque's "Duty of Judges as Constitutional Advisers," 24 Am. Law Rev. 369, 378, n. For the formidable list of twenty-nine questions, relating to points in maritime and international law and our treaty relations with France, which President Washington sent in to the judges of the Supreme Court in July, 1793, see Sparks's "Life of Washington," x. 542. For a letter of Washington to the judges on this subject dated July, 1793, see *ib.* 359.

II. But what have we in our existing international usages and procedure, which may furnish any analogy for such an extension?

The whole long development of international intercourse might be appealed to as furnishing such analogies. Let us mention only one thing, the use of what are called letters rogatory and letters of request, when there is occasion to obtain evidence in a foreign country. Greenleaf (Ev. i, s. 320) tells us of letters rogatory, and quotes from one of our Federal reports [1] the form of them as follows:

"The President of the United States, to any Judge or Tribunal, having jurisdiction of civil causes at Havana,

"GREETING: Whereas a certain suit is pending before us in which John D. Nelson, Henry Abbott and Joseph E. Tatem are the claimants of the schooner Perseverance and cargo, and the United States of America are the defendants; and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties. We, therefore, request you, that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses, as shall be named or pointed out to you by the said parties, or either of them, to appear before you or some competent person, by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required. Witness, etc."

These are what are called in our old books, as well as in modern English practice,[2] "letters of request." They are found in the Register.[3] The king asks some foreign prince to aid an injured party to obtain justice, with a promise to

[1] Nelson *v.* U. S., Peters C. C. R. 235.
[2] Annual Practice, 1895, p. 733.
[3] P. 129 (ed. 1553). See to the same effect many of Milton's letters to foreign governments, when acting as Latin Secretary to the Council of State during the Commonwealth.

reciprocate the favor, adding, perhaps, a suggestion of the king's being obliged to provide some other remedy if this be not done.

Wier's Case, on habeas corpus, in 1607,[1] is that of a Frieslander recovering in Friesland against an Englishman. The Englishman came home without having satisfied the judgment, whereupon *le Governor la* sent letters missive to England, *omnes magistratus infra regnum Angliæ rogans de faire execution del dit* judgment. It was held, in remanding the Englishman, that the Admiralty might execute this judgment by imprisonment and that he should not be released by a common law court; that the law of nations required one nation to aid the justice of another, and execute the judgments of another, and that the Admiralty judge was the proper one for this purpose.

In another very early case, at the end of the thirteenth century, in an action of trespass by a Dutch merchant respecting a ship from Holland laden with merchandise, it did not appear what was aboard when the vessel left Holland; whereupon a commission was sent to the ruler of Holland (*comiti Hollandiæ*), to ascertain *per probos et legales homines et mercatores terre sue,* what goods were aboard when the vessel put to sea. This old case is interesting enough to justify inserting in a note the substance of the record as it is preserved in the Parliamentary Rolls.[2] The case ends the same year by the appearance in

[1] 1 Rolle's Abr. 530; s. c. 2 D'Anvers Abr. 265.

[2] Rot. Parl. 1, 137 *a* (A.D. 1295, 23 Edw. I.), Hugo Mulard, mercator de Holland, alias coram ipso Domino Rege, questus fuit de Waltero Hobbe de hoc quod prefatus Walterus infra mensam post bellum in mari inter Anglicos et Normannos habitum, vi cepit ab eo quandam navem suam, diversis marcandisis carcatam, etc. Walter pleaded the general issue, and a Gloucester jury was summoned. But Walter, on one ground after another, vexatiously delayed matters. The record, after reciting that the king understood this state of things and that the plaintiff was greatly damaged by it, goes on thus: Et si homines de Holland' et Brabantia hiis diebus de dampnis et injur' sibi factis per homines de regno isto sic, sine remedio, per dilationes and procurationes adversariorum suorum factas sine remedio recederent, de facili posset regno majus periculum iminere ratione guerre mote. And since Walter admits that he had the ship itself and fails to show how he came by it, and since it is not likely that a foreign merchant came here without any-

court of one Christian, a Dutch Knight, who produces a letter of attorney from Hugh and in his name personally acknowledges satisfaction of his claim; and the defendant is then discharged. This is cited by Greenleaf (Ev. i, s. 320, n.) as an early instance of letters rogatory.

Such letters, as was said before, are in use in our own time. Obviously this or some like process, is necessary in regions where an oath is not allowed to be administered by anyone but a magistrate of the country.[1] "In certain foreign countries," says a writer in the "Solicitor's Journal" in 1891,[2] notably Germany, only an officer of the foreign court is entitled to administer an oath. The appointment of commissioners or of a special examiner to take evidence in such countries is both useless and dangerous, for the *læsa majestas* of a foreign State is apt to be resentful. To meet this difficulty order 37, rule 6a, provides that "if in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission."[3] In the case in Peters, from which Greenleaf quotes the form of letters rogatory Spanish Law had made them necessary.

Of course, all this falls short of any direct precedent for a bench of judges in one country asking the aid of another in a foreign country, in determining questions of law. But is the difference other than a superficial one? We do have

thing at all in his ship, it is adjudged that Walter be imprisoned till he satisfies the plaintiff; and further, as regards the amount which is chargeable, "Quia dubitatur que bona fuerunt in nave predicta Hugonis quando de partibus Holland' versus regnum istud iter suum arripuit, mandatum est Comiti Holand', quod per probos et legales homines et mercatores terre sue ubi predictus Hugo in marise posuit, inquirat diligenter que mercimonia et bona ipsius Hugonis in nave predicta, carcata fuerunt, quando iter suum versus regnum istud arripuit, et inquisitionem aperte et fideliter factam remandet Domino Regi, etc. And Walter was allowed to send over anyone whom he wished to represent him at the taking of this inquisition.

[1] Froude *v.* Froude, 3 N. Y. Supreme Ct. Rep. (Thompson & Cook) 79; 1 Greenl. Ev. s. 320; Annual Practice 1895, p. 733; 35 Sol. Journ. 790.

[2] *Ubi supra.*

[3] It is added in a note: "This rule was made on October 1, 1884. The notes on letters of request, in the Annual Practice for 1891, p. 648, are exceedingly good."

the general situation of an appeal by the judiciary of one country, to the judiciary of another, for aid in the work of administering justice. And the general maxim is fundamental in international law that the justice of one nation should aid that of another; or, as Rolle's Abridgment has it in Weir's Case, *car ceo est per la ley de Nations que le Justice dun Nation serra aidant al Justice d'auter Nation.*

If this new suggestion should seem to any one to have a certain *transcendental* air, as if imputing to judges at the common law an attitude and an aim in deciding cases, not really belonging to them, perhaps he need not be frightened at that. We are talking of what seems desirable, and what after a few steps more in civilization will perhaps seem less strange. Sir Frederick himself seems to refer us to the coming on of a distant time, a time "when the Federated navies of the English-speaking nations keep the peace of the ocean under the Northern lights and under the Southern cross, from Vancouver to Sydney and from the Channel to the Gulf of Mexico; when an indestructible union of even wider grasp and higher potency than the federal bond of these states has knit our descendants into an invincible and indestructible concord." In saying this he is thinking probably of a perfected form of the sort of international conferences which he suggests. As to the informal beginnings of such an interchange of judicial counsel, they might conceivably enough come about at any time, — as the speaker intimated, — needing only good-will and the perception of some common advantage to be gained by it. They might take place to-morrow. Whether this would ever ripen into a settled practice of international communication is a subject of hope rather than conviction. We may well believe that such a course of informal conference would be found to produce good results, and that it might develop into something solid and fixed, of the happiest augury.

DICEY'S LAW OF THE ENGLISH CONSTITUTION[1]

[The following article appeared as a book review in two issues of the New York "Nation" (December 24 and 31, 1885), to which paper Professor Thayer contributed many notices of law books. While the purpose of these notices was in its nature temporary rather than permanent, it has seemed desirable to preserve this one for its own sake not less than for the high character of the book which was its subject. Professor Thayer had a warm admiration for the author, and no comments on the Preliminary Treatise on Evidence gratified him more than Professor Dicey's. (13 Harv. Law Rev. 430, 431.)]

I. When one scrutinizes the English Constitution, it is like looking at the nests of birds or at the curious and intricate work of beavers and insects; its strange contrivances seem not so much the ordered and foreseen result of human wisdom as a marvellous outcome of instinct, of a singular political sense and apprehension, feeling its sure way for centuries, amid all sorts of obstacles, through and around and over them, with the busy persistence of a tribe of ants. England, in emerging from the Middle Ages, has brought along its old forms and institutions — king and lords and all the phraseology of feudal subjection — but it has harnessed all these stately mediæval appearances into the service of freedom. Through the extraordinary energy of the English political genius, the old institutions have grown elastic and significant of new thought. "I, the writer," says the author of the Ottimo Commento, "heard Dante say that never a rhyme had led him to say other than he would, but that many a time and oft he had made words say in his rhymes what they were not wont to express for other poets." In like manner the English have forced their

[1] "Lectures Introductory to the Study of the Law of the Constitution." By A. V. Dicey. Macmillan & Co. 1885.

familiar institutions to express their highest political conceptions. Never an institution has led them to say other than they would; and, indeed, they have said through these institutions things that other nations have not known how to express. The other day a writer in the "Spectator" proposed as an amendment to a scheme for the reform of the House of Lords that, instead of having, as had been suggested, a hundred working peers, chosen by the Crown from among the Lords at the beginning of each session, the choice should be made by ballot by the Commons. The "Spectator," in a footnote to the communication, remarked: "What is the difference? The Crown is only another name for a majority in the House of Commons."[1] That is substantially true: but what a remarkable statement it is! How has this come about?

"The leaders of the English people," says Professor Dicey, "in their contests with royal power never attempted, except in periods of revolutionary violence, to destroy or dissipate the authority of the Crown as head of the State. Their policy, continued through centuries, was to leave the power of the King untouched, but to bind down the action of the Crown to recognized modes of procedure which, if observed, would secure first the supremacy of the law, and ultimately the sovereignty of the nation. The King was acknowledged to be supreme judge, but it was early established that he could act judicially only in and through his courts; the King was recognized as the only legislator, but he could enact no valid law except as King in Parliament; the King held in his hands all the prerogatives of the executive government; but, as was after long struggles determined, he could legally exercise these prerogatives only through ministers who were members of his council, and incurred responsibility for his acts. Thus the personal will of the King was gradually identified with and transformed into the lawful and legally expressed will of the Crown."

So that to-day:

"The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these priv-

[1] "'The Crown! it is the House of Commons!' said an English statesman in 1858." Dillon, Munic. Corp. (3d ed.), 12, n.

ileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which, in its turn, obeys the behests of the electors."

We have been quoting Professor Dicey's "Law of the Constitution," a new and first-rate addition to the literature of this subject. There is nothing, so far as we know, which answers so neatly, so briefly, and with such fit and accurate discriminations the sort of questions which one asks himself at the present day about the English Constitution. Historical matter we have had before, and of the best; Professor Dicey does not go much into that. General exposition, after the methods of the essayist and the political philosopher, we have had, and that also very good. But Dicey, in discharging his new duties at Oxford, has aimed at a different thing and has accomplished it with great success. He deals with *the law* of the Constitution and not primarily with its conventions, or merely political and moral arrangements. And in rejoicing over some recent judicial expositions of this law of the Constitution, he pays a cheerful page of tribute in an unexpected quarter which we quote in passing:

"Teachers of law enjoy at this moment the aid of one invaluable though unrecognized coadjutor. Mr. Charles Bradlaugh is doing more for the law outside the House of Commons than he could by any possibility do for it when (if ever) he is admitted to a quiet seat in the House. He has rediscovered the law of maintenance; he has elucidated the law of blasphemy; he has explained the character of a penal action; he has enabled us to define with precision the relation between the House of Commons and the courts of the land; he has gone far to make intelligible the legal character and solemnity of an oath. Should he live and flourish, or perhaps one should rather say, should he live and not flourish, there is no saying what secrets of the Constitution

he may not unveil to the public gaze. His failure or success is from this point of view at least equally advantageous to the nation, and will, one may reflect with satisfaction, equally ensure to him his appropriate reward. He will obtain, or rather he has obtained, legal immortality. While Calvin's Case, while Bates's Case, while the Case of Ship-money, while the Banker's Case are held in remembrance, Mr. Bradlaugh will survive in Bradlaugh *v.* Gossett side by side with Stockdale *v.* Hansard."

Let us give some account of the contents of Professor Dicey's book, before proceeding to comment upon certain parts of it which relate to this country. Two great principles, as he puts it, have been worked out all through English history. "The first is the omnipotence or undisputed supremacy throughout the whole country of the central Government," "the sovereignty of Parliament, which means in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation." "The second, . . . which is very closely connected with the first, is the rule or supremacy of law." The first of these principles he illustrates in an instructive manner by a consideration of the non-sovereign legislatures of the colonies, and of like bodies on the continent of Europe and here. Of the rule (*i. e.*, the supremacy) of law it is said that it "is as marked a feature of the United States as of England"; and again that it "is a conception which in the United States . . . has received a development beyond that which it has reached in England; but it is an idea not so much unknown to as deliberately rejected by the constitution-makers of France and of other Continental countries which have followed French guidance." It is described thus:

". . . That 'rule of law,' then, which forms a fundamental principle of the Constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide dis-

cretionary authority on the part of the Government. Englishmen are ruled by the law and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. The 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens, or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts, and must be dealt with by special and more or less official bodies (*tribunaux administratifs*), is utterly unknown to the law of England, and, indeed, is fundamentally inconsistent with our traditions and customs. The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been, by the action of the courts and Parliament, so extended as to determine the position of the Crown and of its servants. Thus the Constitution is the result of the ordinary law of the land."

Professor Dicey's principal consideration of the rule of law is devoted to showing the application of it — "the manner in which the law of England deals with . . . the right to personal freedom, the right to (so-called) freedom of discussion, the right of public meeting, the use of martial law, the rights and duties of the army, the collection and expenditure of the public revenue, and the responsibility of Ministers." This part of the book is full of interest, but we cannot dwell upon it, further than to remark the curious fact that English law appears to have furnished no definite answer as yet to some pretty obvious questions. It subjects a soldier, or rather it leaves him subject, to the special rigors of military law; he may be shot if he does

not obey the order of his officer to fire on a mob. On the other hand, it also subjects him to the ordinary law of the land; if he does fire on the mob when ordered, he may be hanged. "What," asks our author, "is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided." But a test is cited from Mr. Justice Stephen, which, as Dicey guardedly remarks, "is, it may be fairly assumed, as nearly correct a reply as the state of the authorities makes it possible to provide" — the test, namely, of whether the soldiers "might fairly suppose their superior officer to have good reasons" for issuing the order.

The last of the eight lectures which make up this volume discusses "the connection between the law of the Constitution and the conventions of the Constitution." The real sanction of these conventions, which are happily described as "the constitutional morality of the day," is found to lie, after all, in the force of law, in "the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the law of the land." If Parliament were not assembled in any given year, the Mutiny Act would expire, and with it "all means of controlling the army without a breach of law"; large parts of the revenue, also, would cease to come in. If the Ministry should refuse to resign or to dissolve Parliament after it had lost the confidence of that body, it would soon be imperilled by a refusal to pass the Mutiny Act or the Appropriation Act. "The conventions of the Constitution are not law, but in so far as they really possess binding force they derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker." "The general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons, is one of the best established maxims of modern constitutional ethics. . . . On any matter upon which the electors are firmly resolved, a Premier, who is in effect the representa-

tive of the House of Commons, has the means of coercion — namely, by the creation of peers." The doctrine here given appears to be in substance this: that the conventions of the Constitution are heeded because there are legal means, although indirect means, of enforcing them. It is difficult to see that the refractory Lords would ever incur the penalty of being law-breakers by continuing to be refractory.

So brief a summary as is here made of this very instructive volume must needs do it injustice; but Professor Dicey is already well known as a legal writer of a very high class, and lawyers will easily anticipate the insight, the clear and precise handling of the subject, the lucid statement, the wit, and the quite perfect legal style that mark these lectures. To students who are familiar only with our constitutional law, that which is here called "the law of the Constitution," as indeed the whole English "Constitution itself," will very likely seem but an emasculated sort of thing — since all is, at best, but mere statute or common law, subject to repeal by ordinary legislation. The phrase itself will seem to many an odd one; but it is not unknown in English courts; *e. g.*, in the Admiralty Court a few years ago Sir Robert Phillimore declared a certain treaty made by "the Crown" to be invalid as being "contrary to the laws of the Constitution."[1] But although the conceptions of constitutional law in this book are in some respects radically different from ours, there could hardly be a better introduction to the study of our own law than it offers; its constant reference to our methods and to those of France, Belgium, and Switzerland, bring out the significance and flavor of much in all those systems which would otherwise be only half understood or but feebly grasped.

II. For American readers the fourth lecture will probably have the greatest interest; it is this which deals with "Parliamentary Sovereignty and Federalism," illustrating

[1] [The Parlement Belge, L. R. 4 P. D. 129.]

the latter mainly by the case of our general Government. The author shows in the main a strikingly good understanding of our system, and he points out with keen perception certain characteristics of federal government which we are apt to pass by. And yet, from an American point of view, this chapter has the defect of appearing to find in the necessities of a federal system the cause of much which really existed in our States before the federal government had an existence. Historically, it seems to be true that the doctrine of "the supremacy of the Constitution" — *i. e.*, its supremacy as *law* and all that this necessarily involves — had been bred in the bone on this side of the water. Relatively to our colonies their charters had always been unchangeable law — law for the legislatures as well as the courts and private citizens. Just as Riel's case [1] has within a month or two been before the Privy Council in England to determine whether certain legislation in Canada was *ultra vires*, and just as Indian legislation is now submitted to English judicial supervision, so it was with our colonial legislation. Accordingly, when our Revolution came, consisting as it did simply in cutting loose from Great Britain and substituting the sovereignty of "the people," the colonies turned immediately, as the General Congress recommended, to the adoption of a written charter of government in which the new sovereign should declare his will. More than a dozen of these constitutions (seventeen, we believe) had been adopted before the Federal instrument was framed, several of the states having tried their hand at them repeatedly. Historically, therefore, it was not in any necessity of federalism that our written constitutions originated; it was because among the English people on this side of the water this was and always had been their fashion of government. Professor Dicey has not overlooked the class of facts to which reference is now made, or the inferences to be drawn from them; but

[1] [Reg. v. Riel, 16 Cox C. C. 48.]

it would seem that he has hardly allowed them their due weight. When he remarks of certain written Continental constitutions that they do not "contain a hint as to the mode in which a law is to be treated which violates the Constitution," it might have been added that this is true also of the Constitution of Massachusetts, framed in 1779 and still in force; and as well, we doubt not, of every other State constitution preceding the Federal one, and of nearly every one since. So far as the language of these documents goes (we are not speaking of the Federal instrument), there is probably (allowing for a few exceptions) nothing in them which *requires* a different result from that reached in France and Belgium, where no court "has ever pronounced judgment upon the constitutionality of an Act of Parliament."

Why is it that on one side of the water the provisions of the Constitution are construed as law, to be enforced in the courts, and on the other as precepts of political duty, of "constitutional morality," not enforceable as law? It is not because "State Government throughout the Union is formed upon the Federal model." The existence of State constitutions and of decisions in State courts declaring laws unconstitutional before the framing of the Federal model, is noticed by Professor Dicey himself. The reason is, as we have intimated before, because our people, in Dicey's words, "had inhabited a colony governed under a charter, the effect of which on the validity of the colonial law was certainly liable to be considered by the Privy Council," as well as by other tribunals in England and here, which were more justly entitled to be designated as judicial courts than the Privy Council was at that period. It was because we had always been familiar with the conception of delegated and limited legislative power, and never with any other — with the doctrine which Yorke and Talbot expressed in 1730 when they said, as to certain laws in Maryland, "If any laws had been there made repugnant to the laws of England, they are absolutely null

and void"; which Murray, as Attorney-General, expressed in May, 1775, when he said of a law of Maryland putting a duty on imported convicts, "No colony can make such a law, because . . . it is in direct opposition to the authority of the Parliament of Great Britain. . . . There always is a restriction that they shall not be contrary to the laws of England." Accordingly, when we adopted written constitutions, it seemed a natural thing to interpret them as we did, and to say here also that laws repugnant to the requirements of the new sovereign should be "absolutely null and void."

There is another matter; but one hesitates to approach it, lest he get entangled in that "prolific crop of . . . controversial disquisitions on sovereignty" of which Sir Henry Maine has spoken as a product of our soil. Professor Dicey says: "One may say with sufficient accuracy for our present purpose that the legal sovereignty of the United States resides in the majority of the body constituted by the joint action of three-fourths of the several States at any time belonging to the Union"; and a note refers us here to Article Five of the National Constitution. It is to be remarked that Dicey refers to legal sovereignty, as discriminated from the political sovereignty, and also that he does not here speak absolutely — his "present purpose" being that of pointing out that the national sovereign here is hard to find and hard to wake up; and that is true enough. But it would be difficult to assent in any sense to this indication of our "legal sovereignty."

Observe what "legal sovereignty" means; this valuable discrimination is emphasized by Dicey:

> "It should . . . be carefully noted that the term 'sovereignty,' as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception and means simply the power of law-making unrestricted by any legal limit. If the term 'sovereignty' be thus used, the sovereign power under the English Constitution is clearly Parliament. But the word 'sovereignty' is sometimes employed in a political rather than

a strictly legal sense. That body is 'politically' sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or, perhaps in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested."

The will of the electors really does assert itself by the present constitutional arrangements. "But this is a political, not a legal, fact." It will be noticed, then, that there was no "legal sovereignty" among the English colonies before the Revolution.

Now the fifth article of our Constitution provides for the manner of making amendments to the Constitution, viz.: by proposals from Congress on a two-thirds vote of both houses or from a national convention called by Congress on application of the legislatures of two-thirds of the States; the amendments thus proposed to be, in either case, ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof, as Congress may propose. The Constitution itself was framed by a national convention and was submitted to State conventions; but all of the fifteen amendments heretofore made to it have been proposed by Congress to the separate legislatures of the States (not to State conventions, as they might have been), and have been approved at different, convenient times, as it might happen in different States — languishing along sometimes for months, and even for several years before the requisite three-fourths of the legislatures had acted. Now, what and where under such circumstances is "*the body* constituted by the joint action of three-fourths of the several States?" The Constitution, as regards the adoption of proposed amendments, in no case contemplates any meeting in one of the people or the legislatures of the States. And then can that be the "legal sovereign" which may legally only pass upon what is proposed to it by Congress or a convention, and has no legal initiative?

Shall we then say that there is no "legal sovereign" in the United States? Perhaps so. Our ancestors were afraid of recognizing any such *legal* thing as uncontrollable power anywhere; the political sovereignty of "the people" of course they recognized. The possibility of such a state of things is recognized by Professor Dicey. "In spite," he says, "of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. . . . The question, however," he goes on to say, "whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorized to amend or alter its terms is of merely speculative interest, for under existing federal governments the Constitution will be found to provide the means for its own improvement." But is it true that the power to pass upon amendments proposed by Congress or a convention is the same thing as legal sovereignty, *i. e.*, "the power of law-making unrestricted by any legal limit"? May "three-quarters of the states" legally, *i. e.*, by any permission of the Constitution, legislate as they please? No. All that can justly be said is, that *one* very high act of sovereign power, that of amending the Constitution, is committed, not to three-fourths of the States, but to the checked and balanced alternative combination of agencies which is designated in the fifth article. All that is provided for is "amending." Would anybody say that there is any *legal* power to abolish the Constitution, leaving us nothing in its place? If not, how does Article Five designate a legal sovereign?

This is, to be sure, an old discussion. Calhoun, not to mention others, spoke of "the voice of three-fourths of the States as the highest power known under the system." Sir Henry Maine also has touched the question — not in his well-known discussions on sovereignty in the "Early

History of Institutions" and in the "Ancient Law," but in a paper read before the English "Juridical Society" in 1855. After referring to the difficulty on the subject of sovereignty at that time existing in our country as "likely to grow to prodigious dimensions before this generation has passed away," he goes on to say: "If any part of the American people should be desirous of detaching more of their prerogatives from the several States, and of committing the powers so detached to the Federal authority, must the consent of each separate State be obtained to the innovation, or is there any other *body* distinct from the central Government and from the several States, which can affect the desired change without infringing on positive law?" He proceeds to discuss and to discredit the doctrine of "State rights," and to declare that the fifth article gives "plenary powers of amending the Constitution . . . to three-fourths of the legislatures of the subordinate States. Now, whatever body," it is added, "has an unlimited authority to introduce amendments into the Constitution, is of course empowered to detach as great a measure of sovereignty as it pleases from the separate members of the confederation, and to annex it to the central Government — from which it seems to follow that by this fifth article the sovereignty over each separate State, and over the larger State arising from the Federal Union, is made, in Mr. Austin's words, 'to reside in the *States' Governments as forming one aggregate body.*'" The italics are Maine's. These and all like statements appear to be open to criticism as not taking sufficiently into account the considerations above named. In no sense, as we venture to think, is it true that the entire sovereignty, in the sense of the legal sovereignty, "the power of law-making unrestricted by any legal limit," is committed here to any body or combination of bodies. On the other hand, that appears to be true which was said by Mr. Webster in his argument in the Rhode Island case (Luther *v.* Borden): "Though this Government (that of the Union) possesses sovereign power,

it does not possess all sovereign power; and so the State governments, though sovereign in some respects, are not so in all. Nor could it be shown that the power of both, as delegated, embraces the whole range of what might be called sovereign power."

But we must end this consideration of Professor Dicey's book and the questions which it raises. One would like to comment on his solid and sound utterances on the relation of courts to morality; *e. g.*, this: "There is no legal basis for the theory that judges, as exponents of morality, may overrule acts of Parliament." Is it otherwise here? Judges now and then, especially in heated dissenting opinions, as in the "sinking-fund cases," express themselves as if it were — as if some things which Parliament might do our legislatures could not do, as being contrary to morality and justice, because they hold only a delegation of strictly legislative power. It would be a good thing if some judge, while he has his hand in, would show us how he works this out.

Another extremely interesting thing we have only time to touch. Dicey refers to the fact that what he calls "conventions" — *i. e.*, understandings, usages, not having the force of law — exist in the working of our constitutions as well as the English. That is no doubt true, and it is a highly interesting fact. He cites two, viz.: the conspicuous instance of the Presidential Electors, who, by force of usage and public opinion merely are held bound to vote with their party. If in 1876 a Republican Elector had voted for Tilden, it would have been, in the English sense, unconstitutional, and yet not illegal; it would have been in our sense both constitutional and legal; and yet in a sense common to both countries it would have been contrary to the "conventions of the Constitution." Dicey mentions as another "convention" that a President shall not be re-elected more than once. That is quite overstated. We have re-elected our Governors many times; and when we get a good enough President it is probable that no talk

of a " third term " will be any serious obstacle to re-electing him repeatedly. There is, however, one very interesting " convention," touching the manner of changing our State Constitutions, to which we must allude. It has lately been made the subject of a valuable pamphlet by Mr. C. S. Bradley of Rhode Island, formerly Chief Justice of that State. In controverting the doctrine of a recent advisory opinion (14 R. I. 649), given by the judges of the Supreme Court of that State to the Legislature, Judge Bradley shows that there has grown up in this country what has been called a common-law doctrine as to the method of summoning the political sovereignty of the several States into action. This doctrine, it must be noticed, does not necessarily touch the case of the Federal Government. But in the States it appears to have become the accepted and regular mode of proceeding, that the Legislature should propose to the electors to send delegates to a Constitutional Convention. This is the general practice equally where there are clauses, like that in the Federal Constitution, providing for amendments in other ways, and in cases where there are none; it is irrespective of anything but a prohibitory provision in the Constitution. Thus, it will be seen, we are bringing that wild creature, the political sovereign, into orderly conduct by convention and usage. So that, in the case of this hitherto untamable party, we may begin to hope for results like those which Emerson celebrates in recording the triumphs of civilization over " the aboriginal man ": " They combed his mane," he says, " they pared his nails, cut off his tail, set him on end, sent him to school, and made him pay taxes."

Political students in England are remarking of late years upon the alarming facility with which any Ministry may change the Constitution, and they are turning with curious interest to an inspection of the highly conservative arrangements of our constitutions. More and more attention is likely to be paid to this subject. If it results in the production of more books of the quality of Sir Henry Maine's

essays on "Popular Government" and of these lectures by Professor Dicey, we shall have great reason to rejoice. Thus far, as regards the legal aspect of his subject, Dicey's book is of unique interest. We heartily commend it to the attention of students of our constitutional law. "One reason," he well says, and it is as true for us as others, "why the law of the Constitution is imperfectly understood is, that we too rarely put it side by side with the constitutional provisions of other countries. Here, as elsewhere, comparison is essential to recognition."

BEDINGFIELD'S CASE — DECLARATIONS AS A PART OF THE RES GESTA.[1]

[This article appeared in 1880 and 1881 in three numbers of the American Law Review (14 Am. Law Rev. 817; 15 Am. Law Rev. 1, 71). Its immediate occasion was the controversy between Chief Justice Cockburn and Mr. Taylor arising out of the case of Reg. *v.* Bedingfield, 14 Cox C. C. 341; but Professor Thayer took occasion to go beyond this controversy and examine with characteristic fulness and care the *res gesta* question in all its bearings. In substantially all points the conclusions reached by Professor Thayer at this time stood the test of his many years of later study.

The article has been cited by courts of high authority. See, *e. g.*, Waldele *v.* New York Central R. R., 95 N. Y. 274, and State *v.* Murphy, 16 R. I. 528.]

I.

At page 341, in one of the latest numbers of the current volume of Cox's Criminal Cases (vol. xiv.), the case of Regina *v.* Bedingfield is reported. This case gave rise in England about a year ago to a discussion on the doctrine of admitting declarations in evidence as a part of the *res gesta*, which was peculiarly valuable and instructive. The law upon this topic to-day comes near answering Lord Denman's description of the law of evidence in general in his time, when he called it, not unjustly, "that neglected product of time and accident"; and it is cause for con-

[1] In using this form of the phrase, — *res gesta* rather than *res gestae*, — the writer is aware that he runs the risk of seeming over-nice about a trifle. It is believed, however, that the endeavor to give precision to the phrase will be materially forwarded by fixing the mind upon the singular form of expression instead of the plural; that was the original usage, at least in questions of evidence, and it is not at all obsolete to-day. This matter will be referred to on a later page. [*Infra*, pp. 244, 248. The singular form is used throughout the able opinion of Earl, J., in Waldele *v.* New York Central Railroad, 95 N. Y. 274. So in O'Connell *v.* Cox, 179 Mass. 250, the court uses the form *res gesta*.]

gratulation that the ill-digested doctrine has at last been submitted to a sharp critical inquiry. It is proposed in the present article, *first,* to state briefly the facts of Bedingfield's case; *second,* to give an abstract of the English discussion referred to; *third,* to make some comments upon it, and to present some considerations which may perhaps help towards placing the law upon this subject in a more intelligible shape.

Bedingfield was indicted for the murder of a neighbor, a widow by the name of Rudd, with whom he had intimate relations. He had conceived a resentment against her, and had threatened to cut her throat. She was a laundress, and had, in her business, two women assistants. On the morning of her death, the accused came to her house earlier than he had ever been there before, and they were together in a room for some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a footstool. He went to a shop and bought some spirits, which he carried back to the room where Mrs. Rudd was, both the assistants being at that time in the yard. "In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards to the house. In a few minutes she was dead."

The case was tried at Norwich, on November 13, 1879, before the Lord Chief Justice Cockburn.[1] The counsel for the prosecution proposed, in his opening speech, to state to the jury what it was that the deceased said as she came out of the house; but the Chief Justice prevented it, saying, in substance, that "he had carefully considered the question, and was clear that it could not be admitted, and therefore ought not to be stated, as it might have a fatal effect. He regretted that, according to the law of England, any statement made by the deceased should not be admissible. Then could it be admissible, having been made in the absence

[1] The sudden death of this eminent magistrate, at midnight of November 20–21, 1880, is announced since this article was in type.

of the prisoner, as part of the *res gestae*? It is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if while being in the room, and while the act was being done, she had said something which was heard." The counsel thereupon made no statement to the jury, but said that they should in due time offer it in evidence; and, accordingly, when one of the assistants was on the stand, and testified that the deceased came out of the house bleeding very much at the throat, and seeming very much frightened, and then said something and died in ten minutes, the counsel proposed to ask what the deceased said; but the Lord Chief Justice ruled it out. "Anything," he said, "uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." The statement was then offered as a dying declaration, but ruled out on the ground that it did not appear that the deceased knew that she was dying. After this, a surgeon testified that the wound completely severed the windpipe, the jugular vein, and the thyroid arteries, and was of such a nature that it could not have been made by the woman herself. The defence was that the deceased had cut her own throat and then that of the accused, — the prisoner himself having been found, just after the deceased came out, lying on the floor with his own throat cut, and with the razor under his body and under his hand and with the marks of his fingers on the handle. The accused was convicted.

This statement of the case is mainly taken from the report in Cox. A somewhat fuller report is found in several English newspapers of November 14, 1879, the day after the trial, *e. g.*, in "The London Times." On November 15, "The Times" made it the text of an editorial article, expressing regret at the condition of the law of evidence, as thus laid open. This article called out Mr. J. Pitt Taylor,

the author of the leading English treatise on Evidence,[1] who wrote on the same day a note to "The Times" (printed on November 17), denying the correctness of the Chief Justice's ruling. In the doctrine that the declaration was inadmissible as a dying declaration,[2] he did indeed acquiesce, but he insisted that it should have been received as part of the *res gesta*, — "as original evidence, being distinguished from mere hearsay by its connection with the principal fact under consideration. . . . The surrounding circumstances, whether they consist of declarations or of acts, may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestae;* and I am at a loss to imagine what sensible interpretation can be put upon those words, if they are not to include the cries and complaints of a woman who is apparently running from an assailant with her throat cut." Mr. Taylor then cited in support of his view (with the remark that he could readily cite many authorities the same way) the cases of R. *v.* Foster, 6 C. & P. 325, and Thompson and Wife *v.* Trevanion, Skinner, 402. He added, that the last case had received the approbation of Lord Ellenborough.[3]

[1] A treatise which, in great part, is expressed, and purports to be expressed, in the exact language of Professor Greenleaf's work. If Mr. Taylor, in abandoning his original purpose of merely editing Greenleaf, had indicated the real nature of his book, not merely in the ample acknowledgments found in his preface and elsewhere, but in the title of the book; if, for instance, he had called it "Taylor's Greenleaf," — less dissatisfaction with his course would have been felt on this side of the water.

[2] It is not proposed to consider that branch of the case now. See Reg. *v.* Morgan, 14 Cox C. C. 337. [As to dying declarations see Thayer's Cas. Ev. (2d ed.) 349–370. "The use of such declarations in cases of homicide is very ancient, long antedating our law of evidence, and running back into the very beginnings of trial by jury in criminal cases. Probably it is even far older than that. In 1202, 1 Sel. Pl. Cr. (Seld. Soc.) 11. 27, in an appeal of slaying, we read that 'the king's serjeant and the two knights who made view of the wounded man (who lived four weeks and a half after the wounding) testify that Robert said that Gedard and Humphrey thus wounded him, and that, should he get well, he would deraign this against them, and, should he not, then he wished that his death might be imputed to them.' And so see another case, twenty or thirty years later, in Plac. Ab. 104, col. 2." Thayer's Cas. Ev. (2d ed.) 349.]

[3] In Aveson *v.* Kinnaird, 6 East, 188.

This letter from Mr. Taylor was not the only criticism which this case called forth. Another letter in "The Times" soon followed it, signed "A Barrister Present at the Trial," in which it was declared not only that the woman's declaration "certainly was admissible" as part of the *res gesta*, but also that it was "clearly admissible as a dying declaration"; and on this last head reference was made to East's Pleas of the Crown, 357, R. *v.* Cleary, 2 F. & F. 850, and to "the case at Maidstone similar to that at Norwich," — meaning the case of R. *v.* Morgan, now reported in 14 Cox C. C. 337.

These and other attacks now brought upon the scene no less a personage than the Lord Chief Justice of England himself, who published in December a vivacious pamphlet of twenty-four pages,[1] in which he freed his mind upon the subject in a very readable manner. After snubbing Mr. Taylor — a lawyer, and himself a judge — for "questioning the ruling of a judge, by an appeal to the public," and after sitting heavily upon the "Barrister who was Present at the Trial," as presumably young and inexperienced, the Lord Chief Justice disposes in a few pages of the point about dying declarations, and then devotes the last two-thirds of his pamphlet to the subject of the *res gesta*. He proceeds by dealing, *first*, with the authorities, and, *second*, with the text-books; and then, after some general considerations, he boldly addresses the task of defining the term "*res gestae* as applied to a criminal case," and goes on to apply his definition to the case in hand. Near the end of the pamphlet he makes the important revelation that he had read the depositions before the trial, "and being therefore sensible of the vital importance of the evidence in question to the accused on the coming trial, I took advantage of a break in the circuit to seek the assistance and advice of my

[1] "A Letter to John Pitt Taylor, Esq., in Answer to his Letter in *The Times* of the 17th of November, on the ruling of the Lord Chief Justice in the Case of Reg. *v.* Bedingfield, by the Lord Chief Justice. London: Vacher & Sons, 29 Parliament Street, and 62 Millbank Street, Westminster. 1879."

two colleagues of the Queen's Bench Division, Mr. Justice Field and Mr. Justice Manisty, — the other members of the court being then absent on circuit, — on the point of its admissibility." They both agreed that it was inadmissible, and "adhere to the opinion they then came to." The Chief Justice presently adds: "I am firmly persuaded, and I do not speak unadvisedly," that the Court of Criminal Appeal, if the question had been carried up, would have held the evidence inadmissible.

To return to the body of the pamphlet. The Chief Justice questions the soundness of the two cases cited by Mr. Taylor, and of Lord Ellenborough's dictum in Aveson *v.* Kinnaird, and cites the criticisms of Roscoe in his "Criminal Evidence" upon both the cases.[1] He adds, as the only other authority "in our own courts," of which he is aware, the case of Reg. *v.* Lunny, 6 Cox C. C. 477, an Irish case, which he also questions, — and then he cites as supporting him "the learned editor of the last edition of Russell on Crimes." "The American decisions," it is added, "have no doubt gone still further"; and the cases of Com. *v.* McPike, 3 Cush. 181, Traveller's Ins. Co. *v.* Mosley, 8 Wall. 397, and Harriman and Wife *v.* Stowe, 57 Mo. 93, are cited. These, and other cases referred to in a note to the last edition of Greenleaf, p. 131, he considers to go the length of establishing, as the editor there says, that "'if the declaration is connected with or grows out of the act, *though not contemporaneous with it, but happening after the lapse of some time, it is admissible as part of the res gestae,*' — a doctrine certainly not yet recognized in our law."

The Lord Chief Justice now turns to the text-books: "I take down Professor Greenleaf's learned work on the Law of Evidence, and — what could I possibly do better? — that great repertory of Evidenciary Law, Taylor on the Law of Evidence. . . . I am doomed to be disappointed."

[1] These criticisms, as Mr. Taylor afterwards, with a certain glee, points out, were not Roscoe's, but those of a young editor, made after Roscoe's death, and incorporated in the text, according to a vicious method, without anything to show their separate origin.

The Chief Justice finds in Greenleaf's s. 107 (it should read s. 108) "a fine philosophical flourish, . . . the profundity of thought deepening as he advances. . . . Having pondered with befitting reverence on the profound train of thought involved in these high-sounding and far-reaching phrases, I come back to the question of '*res gestae*,' and read on. . . . Instead of finding any rule for my guidance, I am told that it is a matter for the judge to determine, according to his sound discretion." Greenleaf, he adds, does indeed say that "the principal points of attention are, whether the circumstances were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. The definition is good so far as it goes; but in the use of the word 'contemporaneous,' without more, it obviously leaves the main difficulty unsolved. . . . Dissatisfied, as I have said, with the decisions, and deriving no assistance from the writers on this branch of the law, I must endeavor to solve the difficulty by my own efforts."

In proceeding to do this, the Chief Justice, after remarking by the way, *first*, that the question is not what the law ought to be, but what it is, and, *second*, that "we are dealing with an exception engrafted on a fundamental rule of our criminal procedure," — points out the possibility of abuse in receiving such testimony as affording "a strong argument against the expediency of admitting declarations at all except within very narrow and fixed limits." In the course of these remarks he says this: "There are those who think that if the view taken in the American cases is not law, it should be so, and that whatever flows out of, or is connected, though through intermediate circumstances, and though after an interval of time, with the fact which is the subject-matter of the inquiry, if calculated to throw light on it, should be receivable in evidence. Possibly, when the inability of an accused person to give evidence in his own favor shall have been removed, a restriction on the admissibility of statements made against him in his absence, and

which, unanswered, may operate to his prejudice, — a restriction imposed for the protection of possible innocence, — may be advantageously removed in the interest of justice."

And so, finally, we come to the Chief Justice's own answer to the question, "Looking to the law as it exists, . . . what is the meaning of the term *res gestae,* as applied to a criminal case? To this I should propose to answer thus: Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, — whether on the part of the agent or wrong-doer, in order to its performance, or on that of the patient or party wronged, in order to its prevention, — and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, — as, *e. g.*, in the case of flight or applications for assistance, — form part of the principal transaction, and may be given in evidence as part of the *res gestae,* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer, — such as, *e. g.*, statements made with a view to the apprehension of the offender, — do not form part of the *res gestae,* and should be excluded."

After illustrating the application of this principle by a variety of supposed facts, the Chief Justice gives as authority for it "the established practice in the analogous case of a prosecution for rape," where, although the fact that the woman made a complaint soon after the event is admissible, yet the particulars of the statements may not

be shown. The case of R. *v.* Osborne, 1 C. & M. 622, is cited on this subject as "directly in point." In applying the principle to the Bedingfield case, it is insisted that when the woman came out of the house with her throat cut, all action on Bedingfield's part had ceased: he had cut his throat and fallen to the ground, and the woman must have known it; while she was not fleeing from an assailant, but coming out to get assistance "with reference to her wound." On this last point he charges Mr. Taylor with misapprehending the facts of the case.

Such is an abstract of the pamphlet. It contains, as will have been noticed, a courageous and valuable endeavor to put limits to the doctrine of the *res gesta;* how successful this effort should be deemed we shall consider further on.

Before the month of December was out there came a long reply from Mr. Taylor, a pamphlet of twenty-nine pages,[1] containing in an appendix his original letter to "The Times." Mr. Taylor finds occasion to complain of some "sentiments and expressions" in the letter of the Lord Chief Justice, which he considers to be "neither consistent with your dignity, your generosity, nor your justice," and meets his "raillery respecting . . . 'Taylor on the Law of Evidence,'" by printing at length a letter of praise from the same hand, dated in 1864, in which Mr. Taylor is told: "I cannot sufficiently express my sense of the value of the work in its present complete and perfect form. Nothing more is required. All that could be done or desired in this department of our jurisprudence is accomplished," &c. Mr. Taylor also complains that the Chief Justice should have made himself "*quite* so merry" at Mr. Greenleaf's expense, and, with a certain generosity, desires him to limit his scarcasms to him, since he has adopted Green-

[1] "A Letter to the Right Honourable, the Lord Chief Justice of England, G.C.B., etc., etc., etc. In reply to his Lordship's Letter on the Bedingfield Case. By John Pitt Taylor. Audi Alteram Partem. London: William Maxwell & Son, 29 Fleet Street, E. C. Law Booksellers and Publishers, 1880." The letter is dated Dec. 30, 1879.

leaf's words. "I will admit," he naïvely adds, "that they are undeserving of praise; indeed, they may be described, with tolerable accuracy, as 'full of sound, signifying nothing.'" But he pleads, in extenuation, that the judges had given him no better words, "and that, after all, they were not — as some words I have read — 'full of sound and *fury*,' with a like significance." Our readers will agree that it is a sorry sight to find the Lord Chief Justice of England a party to a controversy which is flavored with such particulars as these; the regret is not lessened on observing that his own manner of conducting the debate was such as justly to sting his adversaries to personal resentment. Leaving this aspect of Mr. Taylor's pamphlet, let us now briefly state his main points.

Mr. Taylor denies the charge of having "misapprehended" the facts in Bedingfield's case; he had stated that the woman was "running" out of the house, and the Chief Justice replied that she was "not running." He quotes "The Daily News" report as saying that she was "running," and "The Times" report as saying that she was met "as she *rushed* out of the house." "The report of the trial stated that Mrs. Rodwell saw her 'coming out of the gate,' and that Mrs. Simpson 'heard a woman's scream, and saw her coming from the house.' The reporter described her as 'immediately after the act coming out of the house with her throat cut, and *staggering* towards the women.' . . . But, after all, what possible difference can it make in the merits of the argument whether the woman was running, or walking, or staggering, or rushing, or even standing still or lying down? The words were unquestionably uttered almost immediately after the scream, *et dum fervet opus*, and their admissibility as evidence cannot depend upon the activity or the posture of the person making them." Again, Mr. Taylor had said that the woman's exclamation was made as she was "coming out of her house"; but the Chief Justice asserts that she was "from twenty-five to thirty yards from her door." To this it is replied by quoting

two witnesses and the summing up of the Chief Justice himself as confirming Mr. Taylor, and it is again added, that the difference is not material, "so long as the woman was giving alarm and seeking for assistance." The last "misapprehension" was that of representing the woman as "apparently running away from an assailant"; the Chief Justice denies that this was true, — "she had left the assailant lying in her front room with his throat cut, which, as appeared from her gestures when brought into the house, she perfectly *well knew*." To this Mr. Taylor replies, *first*, by pointing out that the Chief Justice's position makes it essential not merely that Bedingfield should have been disabled, but that the deceased should know it, — "if an assailant in his pursuit had fallen and broken his leg, and the assailed was not aware of this, but still imagined that he was being followed," it could make no difference; and, *second*, by denying that there is any ground whatever in the evidence for asserting that the woman knew that Bedingfield was disabled, — all that could be inferred from her gestures was "the simple fact that the woman's throat had been cut in the room where the prisoner was found, . . . and that the horror of the attack was still vividly present to her mind"; and, *third*, Mr. Taylor declares that even assuming it to be established that the woman knew her assailant to be unable to do her further harm, "and that she went out for the sole purpose of getting her throat bound up," still, "according to the decided cases and principle, the exclamation ought to have been received as part of the *res gestae*."

This brings Mr. Taylor to a consideration of the cases. The cases of R. *v.* Foster and Thompson and Wife *v.* Trevanion, cited by him in his former letter, are defended; of the former, it is said that it is "cited as an unshaken decision by Starkie, Phillipps, Roscoe, Archbold, Goodeve, Norton, and last, though not least, by Mr. Justice J. Fitzjames Stephen, in his able Digest of the Law of Evidence." R. *v.* Lunny is also upheld as "perfectly sound law." And,

finally, R. *v.* Megson, 9 C. & P. 420, is given as establishing, according to Mr. Taylor's judgment, that in a prosecution for rape the details of the woman's statement, made upon her return home after the assault, may be received for the purpose of disproving consent, although they cannot be received to show who committed the offence. Mr. Taylor cites no other cases. "I might," he says, "here add a cloud of other authorities. . . . But I refrain, for if your Lordship is not convinced by the four cases I have already cited, neither would you be persuaded though I brought to your notice a dozen more." R. *v.* Osborne is disposed of by declaring "the language put into the judge's mouth . . . grotesquely indecent and curiously illogical," and declining to comment upon it. The American decisions to which the Chief Justice had referred are emphatically disapproved; "as exponents of the English law, they seem to me to err as far on one side of the true line of demarcation as your Lordship has erred on the other."

The application made by Mr. Taylor of the case of R. *v.* Megson is noticeable. He considers the question in Bedingfield's case to have been simply whether he or the woman herself had done the deed, and not whether he "or Jones or Styles had committed the murder. Had such been the issue, your Lordship, in conformity with the case of R. *v.* Megson, should have rejected, not the whole statement of the woman, but merely Bedingfield's name. Her exclamation, as admitted, would have then run thus: 'O aunt, see what has been done to me,' instead of 'O aunt, see what Bedingfield has done to me.' Bedingfield's name would have been withheld because, first, it had nothing to do with the question how her throat came to be cut; and, next, it was a matter in which the most truthful person could easily have been mistaken. And a judge, in the exercise of a sound discretion, might well come to the conclusion that, without the test afforded by cross-examination, such a statement of recognition could not safely be admitted." Upon this view, some comments will be submitted hereafter.

After thus considering the authorities and touching upon some minor miscellaneous points, Mr. Taylor denies the Chief Justice's position that "we are dealing with an exception engrafted on a fundamental rule of our criminal procedure," — "we are *not* dealing with an exception at all, but with a fundamental and independent rule"; and he cites Roscoe's Criminal Evidence (ed. 1878), p. 25, and an expression from section 583 of his own work. And then the writer comes to the Chief Justice's definition, of which he says: "I have read the twenty lines of your definition, with an earnest desire to derive enlightenment from them, but I confess that, after the perusal, I have found myself enveloped in a fog, dense as that by which I am now, as I write, surrounded." One part of the definition, viz., that what is said by the suffering party when in flight or applying for assistance is admissible, would seem to admit the declaration in the Bedingfield case; but subsequent explanations limit the meaning of "assistance." Turning back to the first definition, it appears that statements made after all action on the part of the offender has ceased, "with a view to the apprehension of the offender," must be excluded. "If that be so, a cry of 'stop thief' forms no part of the *res gestae*." But yet in another illustration it appears that this is not meant. "In the midst of these counter-illustrations," Mr. Taylor is perplexed; "and all that I have learned is, that Dr. Greenleaf was not far wrong when he observed that it was 'difficult, if not impossible, to bring this class of cases within the limits of a more particular description.'"

Such, in the main, are the positions taken by the parties to this very interesting controversy. The feature of conspicuous interest in it is the Chief Justice's definition, — the effort of a powerful, well-furnished, and practised legal intellect to reduce the law upon this subject to a clear rule. This is a sort of work of which there is but too little from the hands of such men, and it is to be cordially wel-

comed, even when welcomed with criticism. We dissent from Mr. Taylor's view that the term *res gesta,* or any other term which is employed in legal reasoning, "must be left unfettered by useless definition, and be determined in each case, either by the judge or the jury, in the exercise of a sound discretion." A term that cannot be defined should be dropped. It would seem, however, that Mr. Taylor's criticisms upon this particular definition are in some respects just. To our mind there are three objections to it: *first,* that in view of the Chief Justice's own commentary upon the definition its meaning is doubtful; *second,* that if it is correctly applied in Bedingfield's case, it is not supported by the cases; and, *third,* that, as thus applied, it is bad in principle.

In what follows we propose, among other things, to justify these objections. Proceeding somewhat informally, — in a great degree, by the way of taking up the questions suggested in the discussion of which an account has now been given, — we shall endeavor to clear up some incidental matters, to analyze the meaning of the phrase *res gesta* as used in the law of evidence, to examine some of the cases, and in a measure to classify them, and, finally, to arrive at some conception and statement of the doctrine on this head which will be clear and will bear examination.

I. The Chief Justice carefully limits his definition to criminal cases. He also designates the principle in question as "an exception engrafted on a fundamental rule of our *criminal procedure*"; and he intimates that when persons accused of crime are admitted (as they are nearly if not quite everywhere in this country) to give evidence in their own favor, the rule may properly be relaxed. The Chief Justice does not indeed, in terms, state that there is a different rule as to the *res gesta* in civil and in criminal cases, but he appears to intimate it in the ways above named; he limits his definition to "the term *res gestae* as applied to a criminal case." For the view thus intimated he cites no authority, and we are not aware that there is

any authority whatever.[1] It is true there is a familiar principle in criminal law that evidence against an accused person must be given in his presence.[2] We, in this country, value this principle, and have incorporated it in our written constitutions of government. But the rule is nowhere, in either country, held to cut down the admission of declarations which are a part of the *res gesta,* any more than the admission of the declarations of a deceased person against interest. To receive declarations in a criminal case, which are a part of the *res gesta,* whether the accused can testify in his own behalf or not, is no more a hardship than it is to receive anything else; they are as likely to work in his favor as to work against him.[3] The business of supplementing the defects or correcting the harshness of the criminal law by judicial legislation has gone great lengths in former days; in evidence, for example, a distinction between a certain sort of admissions in criminal cases and in civil cases was worked out, and is now established. But no distinction between civil cases and criminal cases as to the admission of declarations as a part of the *res gesta* has as yet been made out, and it is very late in the day to adventure upon such an enterprise.

We conceive, then, that what is law on this subject for a criminal case is law for a civil case, and *vice versa.*

II. In looking over these pamphlets, one is struck with the extreme meagreness of both of them in the citation of cases. The Chief Justice cites but one in support of his view, and that a case at *nisi prius*[4] relating to rape, in

[1] It would seem that the reason for resorting to this distinction is a desire to avoid the pressure of certain loose cases on the civil side. One would not think it, from the tone adopted by the writers of these pamphlets towards "the American cases," — but it is true that there is nothing looser upon the doctrine of the *res gesta* to be found anywhere than is found in the English cases.

[2] MacNally, Evidence, 14, 360.

[3] See, *e. g.*, Hamilton *v.* The State, 36 Ind. 280, where, on an indictment for assault with intent to rob, a declaration made by the prisoner, while beating his victim, that he was doing it "to pay him up" for a previous assault on *him*, was held admissible.

[4] It is most unsatisfactory, in discussing cases, to have to deal with the slender reports at *nisi prius*. The law has suffered beyond measure

which a dictum of Mr. Justice Cresswell seems to lend it some support; but the case does not involve the doctrine of the *res gesta,* in the Chief Justice's conception of that doctrine, at all. The common rule in cases of rape is that the fact of an early complaint made by the woman upon whom the offence is alleged to have been committed may be given in evidence, but the particulars of her statement may not. In order, however, to make this fact — the fact of the complaint — admissible, it is not at all necessary that it should have been contemporaneous with the offence; it is admissible without any reference to that; and so, although it is no part of the *res gesta* of the rape. When the declaration is contemporaneous with the offence, it is a part of the *res gesta,* and then the particulars of the statement are to be received.

On the other side, Mr. Taylor cites only four cases, — all of them at *nisi prius,* — one a well-known, old, and slight memorandum from Skinner; another an Irish case; another a case of rape, which seems to be misconceived by Mr. Taylor; and the fourth a case which, together with the one from Skinner, has been subjected more than once to animadversion.

The part which cases relating to rape play in the general discussions about the *res gesta,* as well as in this particular discussion, and the misapprehensions that exist as to them, make it desirable to give some account of them at this point. In several respects the law of evidence in regard to rape is

from the practice of citing these as authority. Sir Michael Foster long ago said: "Imperfect reports of facts and circumstances, especially in cases where every circumstance weigheth *something* in the scale of justice, are the bane of all science that dependeth upon the precedents and examples of former times." Even in citing a considered opinion, it has been well said that, "to abstract the reasoning of the court from the facts to which that reasoning is meant to apply . . . has a tendency to misrepresent one judge and to mislead another." "It is not right," says another judge, "to repeat opinions hastily formed, and delivered in the hurry of trial; and the practice of referring to them has occasioned all the confusion that the enemies of our law object to." For more of the same import, see Joy on Confessions, pp. 2 and 3. The law of evidence and the criminal law have inherited the chief part of this confusion.

peculiar: the government is permitted to ask the woman — its own witness — whether she made a complaint at or near the time of the offence, and then to call in the person to whom it was made, and have that person testify to the same fact. This appears to be allowing the government to support its witness by evidence that she said the same thing before; but the evidence is really put in by way of supplying a thing which in this particular case is deemed essential to the witness's credit.[1] It used to be laid down that one could always support his witness by evidence showing that he had been consistent with himself; but, as a general doctrine, that ceased to be the law in England a hundred years ago. How, then, shall we account for this doctrine in rape? As an exception, having its roots far back in the law. In Bracton, fol. 147 (vol. ii. Twiss's edition, p. 483), as touching an appeal of rape, we read: "When, therefore, a virgin has been so deflowered and overpowered . . . forthwith and whilst the act is fresh, she ought to repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her, the blood, and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the sergeant of the lord the king and to the coroners and to the viscount,"[2] &c. In Hale's Pleas of the Crown, vol. i. pp. 632 and 633, after stating that in an appeal of rape it is necessary that the woman "make fresh discovery and pursuit of the offence and offender, otherwise it carries a presumption that her suit is but malicious and feigned," it is added, that in an indictment for rape the woman may be a witness, but that her credibility must be left to the jury upon the circumstances of the case; "For instance, if the witness be of good fame, if she presently discovered the

[1] In R. v. Stroner, 1 C. & K. 650, the prosecution was compelled by the court to call the woman to whom the complaint was made, although she was at the time in attendance as a witness for the accused.

[2] [See also Très Ancien Contumier de Normandie, cap. 50, De puellis (*circa* beginning of 13th century); Stat. 4 Edw. I, c. 2; 18 Vin. Abr. 155, Tit. Rape, 10; 1 Seld. Soc. Pub. 3, case 7; 1 Reeves, Hist. Eng. Law, 200; Com. v. Cleary, 172 Mass. 175.]

offence, made pursuit after the offender, showed circumstances and signs of the injury, . . . these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself." And Hale goes on to give some advice as to the trial of this particular offence, founded on his personal experience as a judge, which has been repeated in the books for two hundred years: "It is true," he says, "rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent. I shall never forget a trial before myself of a rape in the county of Sussex," &c. And again, *id.* vol. ii. p. 290, "But of all difficulties in evidence there are two sorts of crimes that give the greatest difficulty, namely, rapes and witchcraft, wherein many times persons are really guilty . . . and, on the other side, persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt." The main part of these statements from Hale is repeated in the later books, *e. g.*, in Blackstone and in Greenleaf. Russell also has them, in 1 Russell on Crimes (5th ed.), 867, and adds the rule of practice, viz., "to ask the prosecutrix whether she made any complaint, and, if so, to whom; and if she mentions a person to whom she made complaint, to call such person to prove that fact," but not the particulars of the complaint. It is a rule founded upon ancient practice and upon the peculiar nature of the offence; it has also been applied to attempts to commit rape and assaults with intent to commit it.

By a natural but not strictly logical extension the evidence was allowed in one or two cases to creep in, although the prosecutrix was dead or unable to testify. In 1840, in R. *v.* Guttridge, 9 C. & P. 471, Baron Parke refused in such a case to admit evidence of the woman's complaint, on the ground that such evidence is only to be received in

confirmation of testimony already given by the woman, unless it be a part of the *res gesta,* as it was not, in that case. But in the same year, in R. *v.* Megson, 9 C. & P. 420, evidence of the complaint in a case where the woman was dead had come in, apparently without objection; and it was only afterwards, when it was sought to press in the particulars of the complaint, that objection was made. The government then urged the admission of the particular statements, as being a part of the *res gesta,* citing Aveson *v.* Kinnaird, Thompson *v.* Trevanion, and R. *v.* Foster; citing also some authorities in favor of receiving the particulars generally in rape. But Rolfe, B., ruled it out, remarking that there is a wide difference between receiving such statements as confirmatory of the woman's credibility where she is a witness, and receiving them in such a case as this, where she is not a witness, and where the complaint is used as independent evidence: "In ordinary cases where she is a witness, evidence of her complaint is admitted to show her credit and the accuracy of her recollection. Here the object was to put it in as independent evidence to show who committed the offence. All that could safely be received was, I think, her complaint that a dreadful outrage had been perpetrated on her." It is evident that this case is but a slight authority in support of the doctrine that evidence of the complaint is admissible at all when the woman does not testify. No objection was made to its admission here, and the only discussion was upon receiving the particulars; the point of the ruling was that whatever may be said for receiving the particulars in the usual case, they cannot be received here. Hardly, if at all, does the case of R. *v.* Nicholas, 2 C. & K. 246, add anything to the authority of R. *v.* Megson on this head; here also the evidence came in without objection. These are the only English cases that we know of which give any support to the extension now referred to, excepting the old case of R. *v.* Brazier, which is disposed of satisfactorily by Baron Parke in Guttridge's case. The doctrine in principle and upon authority,

in England as well as here, seems to be correctly stated in 3 Greenl. Ev. s. 213: "The complaint constitutes no part of the *res gesta* (*i. e.*, it does not, *merely* as being a fresh complaint): it is only a fact corroborative of the testimony of the complainant; and where she is not a witness in the case, it is wholly inadmissible." [1]

The nature of this evidence, then, is merely confirmatory of a particular witness. It is not allowed to the government as a privilege, but is required as practically essential to the government's case, so far as it rests on the woman's testimony. The admission of it at all is peculiar to the case of rape, and one or two related offences upon women. In regard to these crimes there are other peculiarities; *e. g.*, that of allowing the defendant to show as a part of his case the woman's previous immoral relations with him, and her generally unchaste character, and, in some quarters, her unchastity with specific men other than the accused. Steph. Dig. Ev. art. 134. The existence of these various doctrines in the case of rape has often been a puzzle, and there has been the effort, usual in such cases, to explain the exception by general principles that did not apply, and the usual invention of new principles, and, in general, the usual inadvertence to the circumstance that the matter in hand was merely an exception. In this very discussion we have Mr. Taylor, at page sixteen of his pamphlet, making the allegation that the same rule applies to "all crimes of violence." "It is idle," he says, "to try to escape from the authority of this last case, R. *v.* Megson, by drawing a distinction between the crime of rape and the crime of murder, and to urge that statements admissible in the one case would be inadmissible in the other. The laws of England, with all their faults, are not quite so absurd as that. All crimes of violence, whether murder, wounding, robbery, or rape, must be subject to the same rules of evidence." He adds,

[1] See also 1 Russell on Crimes (5th ed.), 868. [And *cf.* People *v.* Sullivan, 104 N. Y. 481, where the complaint was excluded on the ground that it was so long delayed that the "principle justifying its reception" did not apply.]

that no doubt declarations by the woman ravished have been more frequently tendered in cases of rape; but that is only because few juries would be willing to convict of rape, "unless immediately, or so shortly after the occurrence as to constitute a part of the *res gestae,* a complaint had been made by the woman. . . . Still the law, as governing other cases of violence, would be the same." No authority is cited. Similar remarks are found in other quarters, *e. g.,* in Roscoe's Criminal Evidence (8th ed.), 26: "The same rule applies to other cases as to rape; namely, that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible." And so in Stephen's Dig. Ev. art. 8 (giving the rule a wider scope): "In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that he made a complaint soon after the offence to persons to whom he would naturally complain, are deemed to be relevant" (citing only a case of rape). It will be observed that Stephen's article not only extends the doctrine in rape to other cases of violence, but to all criminal cases; and that it does not confine it to the purpose of confirming the testimony of a witness.

Now, upon what authority do these writers proceed?[1] It is believed that they go upon no reported authority whatever (*i. e.,* no English authority), except two *nisi prius* rulings of extremely slight value; viz., R. *v.* Wink, 6 C. & P. 397 (1834), and R. *v.* Ridsdale (York assizes, 1837), — the latter being a case which is only found in a note

[1] In Mr. Stephen's case one may surmise that he was in this instance misled by the method in which his work was composed. In the Indian Evidence Act (where he was *making* law), art. 8 and art. 157, he had made complaints admissible generally, and had also made the fact admissible in some cases, that a witness had previously said the same thing now testified by him. His Digest of Evidence was originally prepared for a similar purpose, viz. to be enacted by Parliament, and not being passed, it was afterwards adapted to the purposes of a statement of the law as it exists. Was Mr. Stephen, perhaps, in preserving article 8 in its present form, led inadvertently into a statement which is, indeed, conformable to his theory of relevancy, but is not the rule of law?

to Starkie on Evidence. It was first printed in 1842, in Starkie's third edition, vol. i. p. 352. Wink's case was an indictment for robbery. The prosecutor was shown to have made a fresh complaint (the robbery was at midnight, and the complaint was at five or six o'clock the next morning), and to have mentioned the name of the robber. So far no objection had been made. "*Carrington*, for the prosecution: 'Does your Lordship think that I ought to ask him what name he mentioned?' PATTESON, J.: 'No, I think you ought not; but when you examine the constable, you may ask him whether, in consequence of the prosecutor's mentioning a name to him, he went in search of any person, and, if he did, who that person was.'" Here, then, no question was raised, and there was no ruling upon the subject. The case of R. *v.* Ridsdale (given in full) is this: "On an indictment for shooting at the prosecutor, PATTESON, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence." Here we have no facts given us, to enable us to judge whether the reporter is accurate in his statement; the declaration, we are told, was "immediately after the injury"; it may then have followed it so quickly as to be fairly a part of the *res gesta*. These two cases, it is believed, comprise all there is in the modern English books in the nature of authority[1] to justify the notion that the doctrine in rape is of general application. We conceive that they are quite inadequate to support that proposition, and that the law is still to be laid down as it was stated above, viz. that the evidence in question is only confirmatory of the witness, and is limited to the case of rape.[2] The precise point recently came up in a well-considered case in Virginia, Haynes *v.* The Commonwealth, 28 Gratt. 942 (1877), on a prose-

[1] We make nothing of the citation of such a case as R. *v.* Wink, in subsequent cases of rape, *e. g.*, in R. *v.* Osborne, merely as authority for the rejection of the particulars of the complaint.

[2] Baccio *v.* The People, 41 N. Y. 265.

cution for grand larceny. The fact of a fresh complaint by the prosecutor had been received below; but this was now held bad. At p. 947 the court (Christian, J.) say: "We have carefully examined all the authorities referred to, . . . and it is manifest that the only exception (established by well-considered cases and reliable text-writers) to the general rule excluding the statements or declarations of parties as hearsay evidence, as a complaint, is the exception in cases of rape. . . . But . . . the evidence is confined to the new complaint, and no detailed statement of the transaction is permitted to go in evidence. . . . Such statement in the form of complaint is admissible, though not a part of the *res gestae*. But we think the exception must be confined to cases of rape. . . . It does not apply to any other case, unless the statement or declaration comes within the *res gestae*. There is one case cited by the Attorney-General, and it is the only one that can be found, which seems to hold that the complaint of a party who has been robbed may be given in evidence, . . . Rex *v.* Wink. There is no case which we can find which affirms the doctrines of this case.[1] . . . But it is opposed by all the recent English and American cases."

Let us now consider how the rape cases are dealt with in the discussion between the Lord Chief Justice and Mr. Taylor. The use of them by the former will be found at page 21 of his pamphlet. After stating and illustrating his own definition of the *res gesta*, — one which turns upon the inquiry whether "all action on the part of the wrong-doer, actual or constructive, had ceased," — the Chief Justice declares that the principle of this rule "has been embodied in the established practice in the analogous case of a prosecution for rape"; the fact of a complaint, as soon as possible after the event, "is deemed essential to the credibility of the story of the prosecutrix," and, when it exists, is therefore always given in evidence, but the

[1] We have referred to one more, — such as it is, — R. *v.* Ridsdale.

particulars of the statement, especially as they affect the alleged assailant, are "rigorously excluded"; and this "because, although if by some . . . fortunate circumstance the woman had succeeded in escaping from the grasp of the ravisher, and in her flight were invoking assistance, her statements or declarations would be admissible, yet when the accused is no longer actually or constructively a party to what takes place, he cannot be affected by what is said in his absence." This seems to import that, in the Chief Justice's conception, the declarations are receivable in the case here put, of a woman just escaped, fleeing and invoking assistance, and that the accused in such a case, if not actually present, is constructively present. He does not seem here to make anything turn upon the question of what the ravisher is doing while the woman is thus, in her flight, invoking assistance, — whether running after her or running away. But he goes on in the next sentence to cite with praise the case of R. *v.* Osborne, 1 C. & M. 622, and a dictum of Mr. Justice Cresswell there, which appears, at first sight, to confuse matters. The dictum is this: "What the prosecutrix said at the time of the committing of the offence would be receivable in evidence, on the ground that the prisoner was present and the violence going on; but if the violence was over and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence." The Chief Justice adds: "The analogy between the cases of R. *v.* Osborne and R. *v.* Bedingfield, as regards the admissibility of such evidence, appears to me to be complete, and the ruling of the learned judge in R. *v.* Osborne to be directly in point. We have here, as it seems to me, a clear recognition of the principle by which the admissibility of declarations in criminal cases should be governed."

Now, is it so clear that the two judges go upon the same principle? Both, indeed, say the prisoner must be present when the declaration is made; but the Lord Chief Justice introduces the fiction of a "constructive presence," while

it would seem from Mr. Justice Cresswell's language, as reported, that he had in mind only an actual presence; at any rate, it is too much to assume that he contemplates anything else. As to the language of Mr. Justice Cresswell in regard to the evidence being admissible, "on the ground that the prisoner was present," &c., it seems a straining of the natural construction of the language to cite this in aid of any theory that there is a peculiar doctrine as to admitting declarations in a criminal case. R. *v.* Osborne was a case where the prosecutrix made a complaint "very soon after" the commission of the offence, "as she was returning home." These are all the indications that we have as to the precise interval of time. It was sought to get in the particulars of the complaint as a part of the *res gesta;* but Mr. Justice Cresswell, while declaring that "the distinction is rather fine," ruled that the statement was not a part of the *res gesta.* "If she were suffering, a surgeon could examine her, and the state of her feelings would be evidence; but what she said about another person would stand on very different ground." Then follows the passage cited by the Chief Justice, and it is added: "R. *v.* Wink is a direct authority in point." Now, in R. *v.* Wink the offence was committed at twelve o'clock at night; the declaration was at five or six o'clock the next morning; while in the case of R. *v.* Osborne there was also nothing to show that the declaration was near enough in time to make it fairly a part of the *res gesta.* That Mr. Justice Cresswell should have cited nothing but Wink's case, where the interval was so long as five or six hours, is a plain indication that he was not contemplating any such nice question of time as that which presented itself in Bedingfield's case. As to the dictum about the woman running away, of which the Chief Justice makes so much, it is to be taken in its connection, and so taken it is but an off-hand remark, well enough adapted to the purpose immediately in hand, but not to be pressed too far or to be nicely reasoned upon. It may fairly be denied that Mr. Justice Cresswell's dictum,

rightly understood, has, in reality, any legitimate application whatever to so close a case as Bedingfield's.

It is apparent from the language of the Chief Justice that he clearly perceives that it is not to be said of all cases relating to rape, that the declaration is to be excluded; that it depends upon whether the declaration is or is not in a fair sense a part of the *res gesta*. In R. *v.* Eyre, 2 F. & F. 579 (1860), it was admitted by Mr. Justice Byles, apparently as being a part of the *res gesta*, with the remark that "whatever she said immediately after the occasion, and what was said to her in answer, is equally evidence." On the other hand, in R. *v.* Osborne it was rejected as not being a part of the *res gesta*. Now this rejection of the declaration in all cases where it is not a part of the *res gesta* — in the sense of the ultimate fact to be proved — is, indeed, the usual practice; but it is not an uncontested practice, nor yet a universal one; and it is submitted that the Lord Chief Justice intimates too much in saying that "the particulars of the statement . . . are rigorously excluded." On the contrary, it was the opinion of Baron Parke, emphatically expressed, that the particulars should be in all cases received. "The sense of the thing certainly is," he said, while yielding to the practice, in R. *v.* Walker, 2 M. & R. 212, "that the jury should in the first instance know the nature of the complaint, . . . and all that she then said. But for reasons which I never could understand, the usage has obtained," &c. Stephen (Digest of Evidence, Note V.) says that he has "heard Willes, J., rule that they were (admissible) on several occasions, vouching Parke, B., as his authority. . . . Baron Bramwell has been in the habit of late years of admitting the complaint itself. The practice is certainly in accordance with common sense." [1] In reading this, it must be remembered that Mr. Stephen is now in a position to keep up the practice. In one of the

[1] [In Connecticut the particulars of the complaint are admitted. State *v.* Kinney, 44 Conn. 153. So in bastardy cases of the declarations of the woman in travail, Benton *v.* Starr, 58 Conn. 285. Compare Harty *v.* Malloy, 67 Conn. 339. *Contra*, State *v.* Spencer, 73 Minn. 101.]

latest reported cases on rape, Reg. *v.* Wood, 14 Cox C. C. 46 (1877), the full particulars were admitted by Baron Bramwell, although the complaint was made an hour and a half after the offence. The case is, however, subject to this observation, that in proving the fact of the complaint the prosecution had already brought out, before the question came up, that the woman gave the defendant's name.[1]

Upon what ground is the admission of such declarations to be defended? Not, certainly, upon the ground that they are a part of the main fact in issue. The answer to this question involves an important discrimination too little considered, the consideration of which must be reserved for another article; viz., the discrimination between declarations which are a part of the main fact in issue, and those which are a part of an evidentiary fact.

II

We have seen that the general rule in cases of rape is, that unless the complaint be made contemporaneously with the outrage, the particulars of it are excluded; that this usage, however, is not universal; that Baron Parke declared he never could understand the reason of it; and that other high authorities, on the bench and off, have advocated the admission of these particulars. The admissibility of them, as a general doctrine, cannot be rested upon the ground of their being a part of the *res gesta* of the rape; it must be urged for the same reason that the fact of the complaint is admissible, for they *are* the very complaint itself; *that* fact or transaction, that *res gesta,* they constitute. It is thought important for the protection of a person accused of rape that the woman's testimony should be corroborated by showing that she made fresh complaint. Surely the importance of it, for the defendant, lies in corroboration at the precise point where the testimony impinges upon him, — where it purports to show that *he* did the deed. There would seem

[1] It is worth noticing that, nevertheless, the accused was acquitted.

great reason to doubt whether anything was gained for the accused by introducing the mere fact of a complaint, and then leaving the jury to their surmises, with a reasonable certainty that they will connect the accused with the complaint, — instead of giving them full opportunity to compare the two stories of the woman, under due caution as to the purpose of now giving in evidence her former story, and the limited way in which alone they should use it. But that which it is now specially desired to point out is the thing before mentioned, viz., that whenever the fact of a complaint is admissible, the things that were said in making the complaint may be regarded as the constituent parts of that fact, — of that *res gesta*. Is, then, this phrase properly to be applied to an evidentiary fact, or is it to be limited to the ultimate facts in issue? We shall be better able to answer this question a little further on. It will be enough at this point to call attention to the form in which Stephen has laid down the doctrine of the *res gesta*,[1] in his Digest of Evidence, Art. 8: "Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it, may be proved if they are necessary to understand it." It will be perceived that this statement is wide enough to cover any act that is an evidentiary fact as well as others. It is also worth observing that the author has here preserved nearly the form in which Baron Parke expressed the principle when he said, in a passage quoted in Stephen's Note V., "Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence." We shall give reasons hereafter for thinking that Stephen's statement, while in one or two respects too narrow, is in the particular now under consideration not too wide.

We have still to notice the manner in which Mr. Taylor deals with the subject of the rape cases. He treats only

[1] The phrase itself is not used in the text of his work.

of the case of R. *v.* Megson, 9 C. & P. 420: we have already referred to this case as one where evidence of the woman's complaint was received without remark, although at the time of the trial she was dead.[1] The complaint had been made "as soon as she returned home"; the assault was committed "very early in the morning," and the woman returned home at about five o'clock, but the precise length of the interval between these two events does not appear. An effort being made by the government to get in the particulars of the complaint, the judge, after argument, rejected the evidence, remarking in substance, that however it might be as to admitting such evidence in the ordinary case, yet here, where the witness is dead, "the object is to give in evidence the particulars of the complaint as independent evidence, with the view of showing who were the persons who committed the offence. All that could safely be received was, I think, her complaint that a dreadful outrage had been perpetrated upon her." This last sentence appears to be merely saying that it was not safe to receive, in this case, anything more than what was already in, viz., the fact of the complaint. But see how Mr. Taylor construes it: "Here then," he says (p. 16), "we have the deliberate opinion of a sound lawyer that for the purpose of disproving consent, as contradistinguished from the object of establishing identity, the woman's statements may be received. They relate to a matter respecting which the speaker is not open to any mistake. They are — if uttered immediately or very shortly after the event the natural outpourings of a spirit humbled by a degrading assault; they are the usual expression of feelings in relation to an occurrence or *res* which has just happened, and which occurrence is the subject of judicial inquiry; and as such they are original evidence, and indisputably admissible." And then he makes the application of this case to the one under discussion which we have previously pointed out, viz., that

[1] *Supra*, p. 225.

if the inquiry had been whether it was Bedingfield or some other man who killed Mrs. Rudd, instead of being whether it was he or the deceased herself, the judge should have admitted all the statement except the name of Bedingfield, making it run, "Oh, aunt, see what *has been done* to me," — the words in italics being substituted by the witnesses, instead of the words "Bedingfield has done." That phrase would be suppressed "because, first, it had nothing to do with the question how her throat came to be cut; and next, it was a matter in which the most truthful person could easily have been mistaken."

Now, has not Mr. Taylor misunderstood the case? Baron Rolfe, it is submitted, did not mean to receive the particulars of the statement here for any purpose, but only the fact of the complaint; nor to express approval of their admission in any case whatever. Mr. Taylor then seems to be in error: 1. In conceiving of this evidence of the woman's complaint as being admissible in any case but that of rape and a few related offences upon women; 2. In supposing it to be admissible even then for "disproving consent," — Baron Rolfe in this very case accurately states it as being "to show her credit and the accuracy of her recollection"; 3. In supposing that if the particulars of the statement are to be given at all, the name can properly be withheld; it seems very odd to say that the naming of the person whom the woman charged with cutting her throat "has nothing to do with the question of how her throat came to be cut"; and as for the danger of mistake, that consideration goes to the effect of the evidence; in such cases (*e. g.*, in the case of dying declarations, where there is often great danger of error), the particulars of the statement, when receivable at all, are to be received in an unmutilated form; and, 4. Mr. Taylor would seem to be in error in supposing that on the facts of such a case as R. *v.* Megson, the fact or the details of the complaint can come in as part of the *res gesta* of the rape, or that Baron Rolfe was considering their admissibility on that ground.

So much for the discussion of the rape cases in Mr. Taylor's pamphlet.

III. Neither the Chief Justice nor Mr. Taylor has undertaken to inquire where this Latin phrase *res gesta* came from, or to trace its history, or to note the various meanings of which it is susceptible. Something of that sort might help us.

The Chief Justice does indeed touch upon this line of inquiry at p. 10 of his pamphlet, where, after conceding, in the course of his criticisms upon the old case of Thompson *v.* Trevanion, that Lord Ellenborough had once said of it that the wife's declarations there "were admitted as part of the *res gestae*," he goes on: "As to which all I can say is that the report in Skinner does not say a word of the sort, and I am mistaken if the term itself is not, at least so far as our law is concerned, of much more modern coinage than the time of Lord Holt"; but he pursues the matter no further. At another place he intimates his opinion as to the value of the phrase, in speaking of it as "this vague, indefinite, and, I cannot help thinking, much abused term of '*res gestae*,' which lawyers persist in using as though there were no English equivalent capable of expressing its meaning, — some of them, I imagine, for the sake of the indefinite latitude which it leaves for the admission of evidence in each particular case; others because it avoids the necessity of laying down any general principle determining such admissibility." So Stephen, in his Note V. to the Digest of Evidence, refers to the phrase we are considering, "The phrase '*res gestae*,' which seems to have come into use on account of its convenient obscurity"; and he adds some instructive passages from the colloquy of the judges in an English case:[1] "How do you translate *res gestae*?" said Bosanquet, J., "*gestae* by whom?" "The plaintiff in error," answered Starkie, who was arguing, "must say by

[1] Why do our reporters wholly omit the judicial interpellation and the dialogue that often take place during argument? The English habit of preserving something of this, adds not a little to the vivacity of the report, and often helps to a correct apprehension of the case.

all the world." "The acts," added Baron Parke, "by whomsoever done, are *res gestae,* if relevant to the matter in issue. But the question is, what are relevant?"[1]

This phrase, in one or another form, — *res gesta, res acta, res gestae,* — was familiar in classical Latin literature, as one may see by any dictionary. It is found, also, in the *Corpus Juris.* The form *res acta* is not often used in our law nowadays, except in the maxim *Res inter alios acta;* but at one time, in this country at any rate, it seems to have been in some degree used interchangeably with the other forms; thus, 3 Dane's Abridgment, 530 (1823): "They are the *res acta,* or transactions at the time, in the usual course of business when a lawsuit is not expected"; and so, p. 306: "*Res acta.* — The last head included not only the *res acta,* but (&c.). Hearsay is often given in evidence as a part of the *res gesta,* . . . as (in case of a bankrupt leaving home) his declarations at the time he left his home are a part of the *res acta.*" As to the maxim *Res inter alios acta,* it is taken from the Roman law, but is not to be found there in its present shape.[2] It is from Cod. vii. 60. 1, where it reads: *Inter alios res gestas aliis non posse facere praeiudicium saepe constitutum est.*[3] Whatever technical meaning the phrase *res acta,* as distinguished from *res gesta,* may have had, in any connection, in the Roman law, it has vanished in our employment of the maxim *res inter alios,* and we may dismiss that form of the expression — *res acta* — from further consideration.[4]

[1] Wright *v.* Doe d. Tatham, 7 A. & E. 313; at p. 355.

[2] Sandars's Institutes (4th ed.), 433.

[3] Compare the maxim from Dig. xliv. 2. 1; *Quum res inter alios iudicatae nullum aliis praeiudicium faciant.*

[4] The word *acta* in classical Latin had, no doubt, sometimes a technical meaning, related to that of *actio* and *agere* in their application to legal proceedings. *Rem agere, rem agi, res acta est,* were phrases that expressed litigation or the end of it; and so the phrase *rem actam agis.* But the term was also used in a sense not technical, and nearly, if not quite, the same as that of the word *gesta.* The maxim *Res inter alios acta,* in its relation to the law of evidence, is the subject of a valuable article by Mr. C. H. Barrows in 14 Am. Law Rev. 350. Stephen has made much of this maxim in his Digest of Evidence, but it would seem that his application of it is quite indefensible.

The phrase *res gesta* is found only a few times in the *Corpus Juris*. One passage has already been quoted from the Code. In the Digest, i. 18. 6. 1, we read: "*Veritas rerum erroribus gestarum non vitiatur*"; and in xxviii. 4. 4.: "*Si quasdam tabulas in publico depositas abstulit, atque delevit, quae iure gesta sunt, praesertim quum ex ceteris tabulis, quas non abstulit, res gesta declaretur, non constituentur irrita.*" The meaning of the term seems to have been quite untechnical; it imported simply a fact, a transaction, an event. The plural sometimes indicated not so much the plural of the English equivalent — facts, transactions — as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by the singular form, — an occurrence, a transaction.[1]

Now, how came this term into our law?[2] The first

[1] Doubtless there were shades of special meaning to this phrase in some connections; it sometimes imported exploits, great deeds, public affairs, and so the ordinary subject-matter of history. A passage from Varro, *De Lingua Latina*, Lib. vi. 77, is preserved in our common dictionaries, which indicates neatly a special meaning of *gerere:* "Tertium gradum agendi esse dicunt, ubi quid faciant; in eo propter similitudinem agendi et faciundi et gerundi quidam error his, qui putant esse unum. Potest enim aliquid *facere* et non *agere*, ut poëta facit fabulam, et non agit; contra actor agit et non facit, et sic a poeta fabula fit, non agitur; ab actore agitur non fit. Contra imperator quod dicitur res *gerere*, in eo neque facit, neque agit, sed gerit, id est sustinet, translatum ab his qui onera gerunt, quod hi sustinent." And so, perhaps, there is a glance at this distinction in Dig. i. 19. 1: "Quae acta gestaque sunt a Procuratore Caesaris, sic ab eo comprobantur, atque si a Caesare gesta sunt."

[2] ["The use of the Latin phrase *res gesta*, in order to say that hearsay is sometimes admissible on account of the closeness of its connection with an admissible fact or transaction, seems to run back for about a hundred years. The plural form (*res gestae*) is later. Both mean the same thing. Probably neither expression is a necessary or really useful one; and the plural phrase has certainly contributed to a mistaken impression that hearsay is always admissible if only it be evidential without requiring trust in the credit of the declarant. It is accordingly often said that the *res gestae* of a fact are its 'surrounding circumstances,' and that a declaration, a verbal act, is as good as any other, when a part of such circumstantial facts. Such statements, however, forget the real conception which is at the bottom of this Latin phrase, and overlook the significance of all the exceptions to the hearsay rule. Whether the law ought to be brought into the shape that is intimated above, and, if so, how, — are questions very proper to be considered. But the endeavor to ascertain just what our

instance of the use of it, which the writer has observed, is in a brief discussion over a point of evidence in Horne Tooke's trial for high treason, 25 Howell's State Trials, 440 (1794). A letter from a certain society had been sent to an association with which Tooke was connected, declining a previous proposal from the latter; Erskine, for the defence, was examining a witness as to the reasons for declining, given by members of the first society in their debates at the time of their vote; Garrow, for the government, interrupted and objected to stating these reasons, — Tooke, he said, was n't a member of the first society, and their letter must be left to speak for itself: "That letter your lordships have received . . . probably upon the ground that as it is an answer to an act which is charged against the prisoner, it is fit to be received as part of the *res gesta* upon the subject." The expression does not occur again in that case. Nor is it once found in the great case of R. *v.* Hardy, 24 Howell's State Trials, 199, concluded only a few days before Tooke's case was taken up, — although there was repeated discussion over the thing itself, which, in later days, was called by this name: *e. g.*, at p. 453, Lord Chief Justice Eyre says: "In the cases of Dammaree and Lord George Gordon the cry of the mob at the time made a part of *the fact,* of *the transaction*"; and in the discussions as to admitting the declarations of co-conspirators, the expression used is always that "they must be a part of the transaction itself," and the like. In neither of the cases here cited by Lord Chief Justice Eyre is the Latin phrase used, nor, as is said before, so far as the writer is advised, has it been found in any case before the year 1794.

law is and how it came about is the matter now in hand. If a change be desirable, it is also desirable that it should be made with a clear understanding of the existing scheme.

"This particular topic is further perplexed by referring to it two classes of cases (relating to agency and rape) that do not belong here; and also by a mistaken treatment of certain other classes of cases (*e. g.*, those relating to bankruptcy) which are more closely connected with the subject. Some of these will be added here." Thayer's Cas. Ev. (2d ed.) 641, n.]

The phrase is not found again until 1801, Hoare *v.* Allen, 3 Esp. 276, where, in an action for the seduction of the plaintiff's wife, it was contended by the defendant that the plaintiff had connived at his wife's elopement by letting her go out with slight attendance when he knew that the defendant intended to "protect her" if she left her husband, and the plaintiff sought to explain this by evidence that he let her go on the belief that she was going to her uncle's, and offered evidence that she told him so at the time of going. Erskine, for the plaintiff, urged the admission of this on the ground that it was evidence, not to prove her real intention, but the plaintiff's belief as to her intention; and Lord Kenyon admitted it, although with doubts: "As some of the judges, on a motion for a new trial, thought this was a part of the *res gesta* and ought to be admitted, he should admit it." This was one of Lord Kenyon's latest rulings. In one of the early cases of his successor we find the same phrase; in Robson *v.* Kemp, 4 Esp. 233 (1802), in rejecting the declaration of a bankrupt made after the alleged act of bankruptcy, offered to show that the intent of the act was fraudulent, Lord Ellenborough said: "Where the declaration of the bankrupt is part of the *res gesta*, . . . it may be evidence."

In 1801 Peake's "Law of Evidence" was published; the phrase does not occur in that, nor is it in Buller, or Gilbert, or any of the other few books, before this century, in which the subject of evidence is dealt with. The first treatise in which it is found, so far as the writer has observed, is Evans's Appendix to Pothier on Obligations, printed in 1806; in vol. ii. p. 284, Evans says: "In questions of fraud or *bona fides*, an adequate judgment can, in general, only be formed by having a perfect view of the whole transaction, which of course includes the conversation which forms a part of it; and, according to the phrase usually applied to this subject, the language which is used on any occasion forms a part of the *res gesta*." This passage is interesting as indicating that the phrase was *in*

common use in 1806. The circumstance that the writer thought it proper to state that the phrase *was* thus "usually applied," may perhaps justify the surmise that it was not a usage of long standing. It may be observed that in Fairlie *v.* Hastings, 10 Ves. 123 (1804), the leading case in regard to the admissions of an agent as affecting his principal, the phrase is not found; such a case would pretty surely have developed the use of this term in later days, as one may see by the notes of the American editor.

At p. 286 Evans makes interesting reference to a case which has since attracted much attention, — one of those now relied upon by Mr. Taylor, — and expresses his disapproval of it: "A case of Avison *v.* Lord Kinnaird (which will most probably not be included in a regular report before this discussion has passed the press)," &c. This case, decided in February, 1805, is found in 6 East, 188, and here the phrase, in the plural form, *res gestae,* is freely used by counsel; Lord Ellenborough also, in addressing counsel, uses it once. It was not long before this case had crossed the water and appeared in our courts, bringing with it the Latin term; in Bartlett *v.* Delprat, 4 Mass. 702 (1808), Story,[1] for the plaintiff, in opposing the admission of certain declarations, classifies the cases where "the declarations of persons are admissible," and includes as one class "declarations making part of the *res gestae,*" citing and stating the case of Aveson *v.* Kinnaird. Prescott, on the other side, presses that the declarations in this case "come strictly within the exception . . . which comes under the description of a part of the *res gestae,* and are within the case of Aveson *v.* Kinnaird; they were made at the time of the act done, and they ought to go to explain it." Story, in reply, insists that "these declarations were not made at the time . . . but long afterwards, and can in no sense be considered as part of the *res gestae.*" The court do not use the phrase. This is the first appearance of it in Massa-

[1] Afterwards Mr. Justice Story.

chusetts. In Swift's "Digest of the Law of Evidence in Civil and Criminal Cases," — the earliest American treatise, — printed in 1810, the phrase occurs, at p. 127, in stating when the admission of an agent is receivable as against his principal: "What is said by the agent relating to such transaction, while acting under such authority, will be received as evidence against the principal, as part of the *res gestae*."

The phrase, then, was fairly afloat in the law of evidence soon after the beginning of this century; but there are signs that it was not altogether regarded with favor. Phillipps's excellent treatise on evidence — so great an advance on anything that had preceded it — was published in 1814; in it (vol. i. p. 202) he said: "Hearsay is often admitted in evidence as part of the *res gesta;* the meaning of which seems to be that where it is necessary . . . to inquire into the nature of a particular act and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence for the purpose of showing its true character." But, having thus introduced the phrase, he struck it out in the fourth edition (1819), and substituted for it the English word "transaction"; this word he retained through three other editions, and until he associated Mr. Amos with himself in getting out the eighth edition, in 1838; in that edition, as a part of most extensive changes, the Latin term in the plural form, *res gestae,* was placed in the text, and it has remained there since. Starkie published his book in 1824, and then and always used the phrase *res gestae.* As to the later leading treatises of Greenleaf, Taylor, and Wharton, it is unnecessary to say that they faithfully reflect the cases in using this term; but a marked exception is found in Stephen, who dispenses entirely with it in his Digest of Evidence.

If it be true, as it seems to be, that the phrase first came into use in evidence near the end of the last century, one would like to know what started the use of it just then.

That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its "convenient obscurity." Questions of evidence, and particularly questions relating to hearsay, were much canvassed in the English courts at the end of the last century and the beginning of this; instead of continuing to be dealt with as being, in a considerable degree, matters of usage, differing in the different circuits, such questions were now more carefully considered at Westminster. This was, no doubt, promoted by the practice of reporting volumes of cases at *nisi prius,* begun by 'Espinasse in 1794,[1] and continued pretty regularly by Peake, Campbell, and others. This practice was adopted with a main view, as 'Espinasse tells us in his preface, to preserve the rulings in points of evidence, — formerly only to be learned "by a close and constant attendance on the Courts of *Nisi Prius.*" The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term *res gesta,*[2] — a phrase which, as we before said, served for the same thing which had been expressed by L. C. J. Eyre, in 1794, by the term "the transaction," "the fact," — which also might mean "a business," as one would speak of the business about which an agent was employed, — which was a foreign term, a little vague in its application, and yet in some applications of it precise, — they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the "limbo" of the theologians did for them, what a "catch-all" does for a busy housekeeper or an untidy one, — some things belonged there, other things might, for purposes of present convenience, be put there. We have seen that the singular form of phrase soon began to give place to the

[1] 'Espinasse published a single volume in 1794: Peake's Cases followed in 1795: and then 'Espinasse began his series (republishing his first volume, with additions) in 1796.

[2] We find it first in the mouths of Garrow and Lord Kenyon, — two famously ignorant men.

plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger "catch-all." To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression.

It is, of course, an essential element of the "convenient obscurity" of the phrase that it has several different meanings. In which of them is it used by the writers of the pamphlets which we have discussed? Before coming to that, let us notice what different conceptions the phrase, in the common plural form of it, may naturally import. The following may be mentioned: (*a*) A conception which limits the term *res gestae* to the ultimate fact in the case, — to a fact in issue; (*b*) One which extends it to any evidentiary fact: — and then, using the term in either of these two ways, 1. That of a single fact, an event, a transaction, of which a declaration may be a part, — *pars rei gestae,* as the phrase sometimes is; 2. That of the details that go to constitute this single whole; 3. That of several distinct facts, events, transactions, going to make up a larger composite whole, *e. g.,* the notion of the particulars of a business or a piece of business intrusted to an agent or of a series of connected transactions covered by a conspiracy; 4. That of the one composite whole so made up; 5. That of evidentiary or illustrative facts, of concomitant circumstances, or "surrounding circumstances," — to use the common tautology which Stephen, having once used, discarded, — as distinguished from the central fact thus surrounded or attended; 6. That of a total whole embodying the central fact with its entire bulk of circumstance; 7. That of a central fact and *some* of its surroundings, *e. g.,* such of them as are relevant or material to the given inquiry. In giving these meanings the writer is not studious to make any exhaustive statement, but is content to name such as come to mind readily, having regard to the use of the phrase in the cases and in the text-books.

The question which we are examining at this moment, it will be perceived, is not what facts or declarations are admissible as parts of the *res gesta* or *res gestae,* but what we mean by the term, and what is the true and natural meaning of it. As going to show the need of some analysis of the import of this phrase, turn to a few instances of its use, whether in the singular or the plural. In the case of Hoare *v.* Allen,[1] it is not quite clear whether Lord Kenyon meant to state a doctrine that the declaration was admissible on the question of the woman's intent, or on the plaintiff's belief of her intent, or as one of a set of facts material to be known in order to present the question fairly to the jury, without considering what its precise bearing might be; but his use of the singular form of phrase points to the conception of something as being a constituent part of some whole, whatever that whole might be. The same idea seems to be in Lord Ellenborough's mind in Robson *v.* Kemp. So in Aveson *v.* Kinnaird, where the plural form is used, the counsel press the admission of certain declarations as "part of the *res gestae,* . . . substantially put in issue by the several traverses. . . . When an act is done to which it is necessary to ascribe a motive, . . . what is said at the time from which the motive may be collected is part of the fact, part of the *res gestae*"; here the notion is of a whole with its constituent parts; and of that whole as a fact actually in issue. Such also seems to be Phillipps's notion in the passage from his first edition before quoted. But observe Starkie's expressions in using the plural form. In his first edition (vol. i. p. 39) he says: "*All the surrounding facts of a transaction,* or, as *they* are usually termed, the *res gestae,* may be submitted to a jury"; later on, however (at p. 49), we read: "Where declarations . . . are admitted . . . as part of the *res gestae* or transaction," &c.; here certainly are two different ideas. Burrill, in his Circumstantial Evidence (p. 368), distinguishes circum-

[1] *Ante,* p. 241.

stances as precedent, subsequent, or concomitant, and says of the last: "These . . . for the most part constitute portions of the *res gesta* or transaction itself"; it is added, as to the last class, that it may fairly include "such as are not strictly contemporaneous, but such as *immediately* precede or follow"; the conception here seems to be that of a whole made up of constituent parts.

Now, how does the Lord Chief Justice use the phrase in his discussion with Mr. Taylor? At p. 20 of his pamphlet he says: "While these particulars . . . *constitute* the *res gestae,* in other words, will be constituent parts of *the offence charged,* . . . (others) form properly no part of the *res gestae* — in other words, of the things constituting, or in point of time coexistent and coextensive with the offence"; here we find no less than three different conceptions in the same sentence, viz.: 1. That of the *res gestae* as meaning a total, made up of constituent parts; 2. As meaning the constituent parts that make up a total; and 3. As including things that do not constitute a total, but are "coexistent and coextensive" with a total constituted by something else; and all these meanings are limited, as related only to the ultimate fact, "the offence charged." Again he says (p. 19): "Whatever act or series of acts constitute . . . *the principal act charged* as an offence . . . and whatever may be *said* by *either of the parties* during the continuance of the transaction with reference to it, . . . form part of the principal transaction, and may be given in evidence as part of the *res gestae* or particulars of it"; here the conception is that the phrase *res gestae* means the particulars, the constituent facts only, and not the whole which they compose; and again, as before, it is restricted to "the principal act charged as an offence." In Mr. Taylor's pamphlet there is little in his own language to show what his precise conception is. Speaking of R. *v.* Megson, he says of the woman's statements: "They are the usual expression of feelings in relation to an occurrence or *res* which has just happened" (*ante,* p. 235). In his

treatise (vol. i., 7th ed., section 588) he says of the rule in question: "The principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction." Here the notion appears to be limited to the ultimate fact in issue, and to include the conceptions (1) of a composite whole, made up of this main fact and those offered in evidence as its constituent parts; and (2) of facts going, not to constitute a whole, but to illustrate another fact, or to "further its object" — whatever this last expression may mean.

It is apparent that some of these ambiguities would have been avoided if the singular form of expression, *res gesta, pars rei gestae,* had been adhered to. It is the notion which this serves to indicate, viz., that of a whole as related to *its constituent parts,* which appears to be the strictly accurate one.[1]

IV. Both of the disputants in this discussion throw overboard "the American cases"; they are pronounced quite too loose in their doctrine of the *res gesta.*[2] One would

[1] How far an extension of this strict conception is established by the cases and is in itself desirable, will be considered hereafter.

[2] There is, indeed, little sign of any considerable examination of them, or of an appreciation of a certain important peculiarity of "the American cases" as being dispersed among thirty-nine different and, in the main, independent sources of authority in the administration of the law. It is sometimes supposed by English writers that the Supreme Court of the United States is an authoritative tribunal in its interpretation of the common law; it would not be strange, *e. g.,* if it were thought in England that the case of Ins. Co. *v.* Mosley, 8 Wall. 397, were *authority* in New York or Massachusetts. However convenient it might be, if this were so, in the particular of giving consistency to our law, yet we, at home, have grown familiar with the fact that we are one country only for certain purposes, and that the administration of the common law is not one of them; as regards that end, we are as many different countries as we are States. The phrases "American law" and "the doctrine of the American cases" are useful and often suitable phrases, but they are heard much oftener than they should be. While they are convenient as indicating an exclusion of any consideration of English or continental doctrine, and also, in a large sense, sometimes as importing the result, in law, of habits or political institutions which are peculiar here, they are very often used by our own writers as well as others in a loose, misleading way, tending to foster vague conceptions, — as if there were some common standard of authority among our States in cases when there is not, and as if

think from the mode of reference to the "American cases" adopted by the parties to this controversy, that American judges had given to the principle of the *res gesta* an extension quite unparalleled in England: one would certainly not suppose that it was the utterance of English judges and recognized English doctrine that are oftenest in the mouths of judges here when authority is sought for whatsoever is loose and objectionable in this vague principle. And yet it was a Lord Chief Justice of England who said, speaking for the court, less than forty years ago, in Rouch *v.* Great Western Railway Co., 1 Q. B. 51, 60 (1841): "The principle of admission is, that the declarations are *pars rei gestae,* and therefore it has been contended that they must be contemporaneous with it: but this has been decided not to be necessary, and on good grounds; for the nature and strength of the connection with the act are the material things to be looked to, and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential." In saying this, Lord Denman supported himself by citing the case of Ridley *v.* Gyde, 9 Bingham, 340 (1832), where the Lord Chief Justice Tindal had said: "The rule is not confined to the precise time of the act in question. . . . The court must, in each case, consider whether the declaration proposed . . . does or does not come within a reasonable time of the disputed act"; he cited, also, the language of Park, J., in Rawson *v.* Haigh, 2 Bing. 99, 104 (1824): "It is impossible to tie down to time the rule as to the declarations; we must judge from all the circumstances of the case; we need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible; but if, as in the present case, there are con-

there were some preponderance, ascertainable and likely to control, as among tribunals recognizing a common authority, instead of a mere divergence of view, more or less complete, among courts of quite independent jurisdiction, some of which are wedded to their own results because they are peculiar, and most of which have the power to perpetuate whatever peculiarity they will.

necting circumstances, it may, even at that time, form part of the whole *res gestae*." This large doctrine, that it is not necessary that the declaration should be contemporaneous with the act, and that the moral connection between the two must be mainly looked at, is also laid down to-day by Taylor in his Evidence (vol. i., 7th ed., section 588); while it is there observed that the view that contemporaneousness is necessary "seems still to be the law in America." The passage referred to reads as follows: "It was at one time thought necessary that they (the declarations) should be contemporaneous with it (the main fact); but this doctrine has of late years been rejected, and it seems now to be decided that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential," citing Rouch *v.* Great Western Railway Co. Taylor also cites Ridley *v.* Gyde, Rawson *v.* Haigh, and Smith *v.* Cramer, 1 Bing. N. C. 585 (1835).

It would have been interesting to know the Lord Chief Justice Cockburn's view of the cases in which this sort of language is used, and also to know how Mr. Taylor reconciles his condemnation of the "American cases" with his acceptance of the doctrine above quoted. The class of cases in which this is laid down (cases in bankruptcy) might, indeed, have been set apart as peculiar, but they are not so dealt with; see, *e. g.*, 1 Tayl. Ev. s. 588, and Steph. Dig. Ev. art. 8, illustr. (*a*). It is these English cases that are relied upon by our courts when they go farthest in their *dicta; e. g.*, in Insurance Company *v.* Mosley, 8 Wall. 397, 407 (one of the cases condemned by the Chief Justice and Mr. Taylor), the court, in laying down that declarations need not be contemporaneous with the act, rely upon Rawson *v.* Haigh, and quote the language of Park, J., above given.[1]

[1] The language is cited as that of "Baron Park" (*sic*). The unfortunate error of name in this citation is often repeated; it attributes the authority of that great lawyer, Baron Parke, to a doctrine which he often denied.

These bankruptcy cases should now have a special consideration; they have had a great deal to do with the rule which we are considering.[1] To understand them it will be convenient to notice the difference between the English law, as held now and formerly, on the subject of proving in a court of law the title of a bankrupt. At present the English rule seems to be the same as that of our last national bankrupt law, — it makes the certificates provided for in the statute conclusive evidence of the assignee's title. But it was formerly necessary, when the assignee undertook to proceed in a common law court, that he should "prove all the steps essential to constitute the party a bankrupt and himself his assignee. (The decree of the commissioners in bankruptcy) is not even *prima facie* evidence. . . . To establish title to the bankrupt's property, the assignee must prove: 1. The commission; 2. The trading; 3. The act of bankruptcy; 4. The petitioning creditor's debt; 5. The assignment." (2 Starkie Ev. 141.) Among the acts of bankruptcy named in the statute were these, viz., beginning to "keep house," departing the realm, and otherwise absenting one's self, — in each case with the intention to delay a creditor. In proving the act of bankruptcy there was frequent controversy over the intent, and it was sought to prove this intent by the bankrupt's own declarations. Now it is to be remarked that, among the grounds on which it was endeavored to bring in the declarations, was an unsound notion of the availability of them as against the creditors, if made at any time before an act of bankruptcy,

[1] ["In some of these very loose *dicta* occur, which have confused the subject when repeated in other cases of a different character. For some explanations as to these cases see 15 Am. Law Rev. 15 *et seq.* It will be observed that in the endeavor to prove acts of bankruptcy consisting of the doing of certain acts with the intention to delay a creditor, such as beginning to 'keep house,' departing the realm and remaining absent, declarations of the bankrupt before or at the time of the act have sometimes been wrongly conceived of as admissions (Parke, B., in Coole *v.* Braham, 3 Ex. 183), and sometimes treated as declarations accompanying an act. In some cases it is important to remember the continuous nature of the act; in others, the continuous nature of the intention, whereby intention at one time becomes evidential of intention at another." Thayer's Cas. Ev. (2d ed.) 645, n.]

or before the commission issued, as if the bankrupt and his creditors were identified in interest. A relic of the former unsettled state of legal conceptions on this subject has survived in that anomalous principle — one of the three enumerated by Baron Parke in Coole *v.* Braham, 3 Ex. 183 (1848) — by which the assignee was permitted to prove the petitioning creditor's debt by the admission of the bankrupt made before bankruptcy;[1] of this Baron Parke remarked: "This relaxation, however, of the strict rules of evidence has never been held to extend to the proof of the trading or acts of bankruptcy by the mere admission of the bankrupt." The last remark might mislead; strictly it is true, but it is not true if taken in the sense that it has never been permitted to prove one element of the act of bankruptcy, namely, *the intention* of the bankrupt, by his own admission made before bankruptcy; or in the sense that the principle that admissions of the bankrupt before the act of bankruptcy were *generally* to be received as against creditors, has never been judicially laid down.[2] On the contrary, in Bateman *v.* Bailey, 5 T. R. 512 (1794), where the admission was opposed on the ground that the bankrupt himself could not be a witness on this point, a widely expressed *per curiam* opinion ran thus: "Although the bankrupt cannot be called as a witness to prove his own act of bankruptcy, yet it never was doubted but that what was said by him at the time, in explanation of his own act, may be received in evidence. An admission by him before his act of bankruptcy of a debt due to another is sufficient to charge his estate. If he had been absent from his home, an admission by him that he had been abroad to avoid his creditors is good evidence. Whatever he says, in short, before his bankruptcy is evidence explanatory of the act done by him. In this instance he absented himself from home under suspicious circumstances, for which his reasons

[1] [So Watts *v.* Thorpe, 1 Camp. 376].

[2] ["It is the daily practice in actions brought by assignees of a bankrupt to prove declarations of the bankrupt before he became so." Lord Kenyon in Kempland *v.* Macauley, Peake, 95 (1791).]

were asked, and without doubt it was competent to inquire of the witness to whom he communicated them what those reasons were." [1] Although in this case the inquiry and the answer were made at the time of the bankrupt's return from his absence,[2] and although the opening sentence of the opinion takes notice of that, yet it will be observed in how unqualified a form the remainder of the opinion is expressed. It was not strange that these imperfectly guarded utterances should mislead. And so we find in Rawson *v.* Haigh, Ridley *v.* Gyde, and Rouch *v.* Great Western Railway Co., that the loose views above quoted run back to Bateman *v.* Bailey as their foundation. So also in 1 Taylor's Evidence (7th ed.), section 588, the doctrine quoted above is elaborately laid down upon the authority of these cases. Greenleaf had said in his section 110: "They (the declarations) must be *concomitant* with the principal act," &c.; and in section 108 he had adopted in a note the language of the Chief Justice in Enos *v.* Tuttle, 3 Conn. 250 (1820), that declarations, to become parts of the *res gesta,* "must have been made at the time of the act done," &c.; but Taylor, in the section above named, diverging from Greenleaf, says of the declaration and the main fact: "It was at one time thought necessary that they should be *contemporaneous* with it; but the doctrine has of late years been rejected," &c.; and in a note, after the remark that "it was at one time thought necessary that they should be *contemporaneous* with it," the author says: "This seems still to be law in America. Thus in Enos *v.* Tuttle," &c., — and then follows Greenleaf's quotation above named. But, unhappily, as has already been intimated, to America also the influence of these cases spread; the opinion of the majority of the Supreme Court of the United States in Insurance Company *v.* Mosley, 8 Wall. 397 (1869), was shaped by it, and so of many another case in this country.

Such has been the ill-begotten progeny of the *dicta* in

[1] Observe that the Latin phrase is not used in this case.
[2] The contrary statement in Ridley *v.* Gyde, seems clearly an error.

Bateman *v.* Bailey. Lord Hardwicke had, indeed, long before been reported as saying of such declarations of a bankrupt, in Ambrose *v.* Clendon, Cases *t.* Hardwicke, 267 (1736), "It is not usual to allow such evidence unless when it is concomitant with facts, as what he says when removing his books or his goods, &c., but not else." Evans, in his learned Appendix to Pothier on Obligations (vol. ii. p. 285), in 1806, had pointed out the looseness of these expressions in Bateman *v.* Bailey, and had insisted that the case was, in fact, to be rested on the doctrine that the declaration was a part of the act which it accompanied. The acute and learned Christian, also, in his treatise on Bankruptcy, had said in vol. i. (published in 1812), pp. 184, 185: "What a bankrupt declares at the time of committing an act of bankruptcy is always received in evidence, when proved by another person. . . . But these declarations have been greatly, I conceive, misunderstood or misrepresented. They must accompany the act; for where words and actions are contemporaneous, they constitute one transaction, they are together one *res gesta,* and the words are evidence of the reason of the act or the intention of the actor. . . . What Lord Kenyon and the court said in the case of Bateman *v.* Bailey, 5 T. R. 512, has, I conceive, led many into error upon this subject. . . . If the court intended to say that what he declared after his return was complete, and when he was doing no act connected with it, it is presumed the decision cannot be supported. Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, &c., what he says is part of the act of bankruptcy; but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no more legal operation than those of any other man." And again, *id.* vol. ii. (published in 1814), p. 672: "The declarations of a bankrupt of his intention for doing an act concomitant with the act are evidence. But the fact (act) must be proved by a witness who has knowledge of

it, and then his declarations at the time, proved by the same or another witness, will make the evidence complete. No error is so common as an attempt to prove a departure from the dwelling-house by a witness, who proves only that the bankrupt told him that he had been from home to avoid his creditors. If the witness proves that the bankrupt was actually at a distance from his dwelling-house when he told him that he was keeping from his home from an apprehension of his creditors, that proves both the fact and the intent." Baron Parke, also, had repeatedly laid down the law in exact conformity with these sound views of Christian. In Newman *v.* Stretch, M. & M. 338 (1829), he had, although with an observable reluctance, admitted the declaration of a bankrupt at the time of his return as to the reason of his absence, — "on the authority of decided cases, especially Bateman *v.* Bailey, 5 T. R. 512, I must receive the evidence of the supposed bankrupt's declarations at the time of his return"; but in Lees *v.* Marton, 1 Moody & Robinson, 210 (1832), where the bankrupt had denied himself to a creditor in the morning and had made a declaration about his absence in the evening of the same day, "Parke, J., rejected the evidence, saying, that unless the statement could be proved to have been made by the bankrupt whilst he was absenting himself, or immediately upon his return, it could not be admitted as part of the *res gesta*." And in Thomas *v.* Connell, 4 M. & W. 267 (1838), where, in proving a fraudulent preference by the bankrupt, his declaration (not connected with any act) about a debt due from him was held admissible to prove his own knowledge of his insolvent condition and his fraud in preferring the defendant, Baron Parke said: "I have always understood the general rule to be, that a verbal statement is not receivable in evidence, unless made at or about the time of an act done, and in order to explain the act; as, for instance, if it is offered to explain a person's absence from home, and is made just before or just after his departure. But, on the other hand, if a fact be proved

aliunde, it is clear that a particular person's knowledge of that fact may be proved by his declaration."

Not only had there been these repeated explicit corrections of the errors, which Mr. Taylor has preserved in his section 588, above quoted, but it was obvious, upon any careful inspection of the cases upon which he relies, that they gave but little support to the doctrine referred to. In Bateman *v.* Bailey, the case itself was that of a bankrupt's declaration as to the cause of his absence, made immediately upon his return; in Rawson *v.* Haigh like declarations were made at his departure as well as during his absence; the act of bankruptcy relied on was that of departing the realm, and it was held by Best, C. J., that "departing the realm is a continuing act, and these letters were written during its continuance"; Ridley *v.* Gyde seems hardly explainable, and does give a certain support to the doctrine. In Smith *v.* Cramer the declarations seem to have been like those in Thomas *v.* Connell, evidentiary of the knowledge of the bankrupt as to his condition; and Rouch *v.* Great Western Railway was a case where the bankrupt's declarations were made immediately on his return, and where the court expressly said that they need not rely on the doctrine above quoted. It seems, therefore, (1) that the supposed authority for this loose doctrine about the *res gesta* is English; (2) that it is laid down in the principal English treatise of the present day upon English authority and in *express contrast* with the more conservative American view; but (3) it ought in candor to be added that the authorities cited for the doctrine, excepting one, support it only by the *dicta* of certain judges, not the most eminent, and that the real doctrine of the bankruptcy cases does not deny that the declaration, in order to be admissible as a part of the *res gesta,* must be "contemporaneous" or "concomitant" with it.

While Greenleaf upon the point in question is thus more strict and more accurate than Taylor, it is yet to be confessed that in some other directions he gave rein to the principle of admitting declarations as a part of the *res*

gesta, and carried things much beyond the line of English authority or of approved authority anywhere; and his doctrine has spread into many of our cases. An examination of his view, a consideration of some of the cases, and a statement and justification of what may seem to be the sound doctrine on the general subject, will be attempted in a third and concluding article.

III

The reader's attention was called in a former article to certain objectionable statements in the English books, and to the fact that a stricter doctrine, upon the points there referred to, is laid down by Greenleaf. But it was stated that this author, in some aspects of the subject, has given out loose doctrine which has found its way into the judgments of our courts.

What is here referred to will be found in Greenleaf's chapter on Hearsay (Evidence, Part II., Chapter 5). He states as his general view (it is not peculiar to him), that declarations which are part of the *res gesta* are admitted, not by way of exception to the hearsay rule, but as not being within the scope of it; and the chapter named is mainly occupied with a consideration of four separate classes of declarations, described in section 123, which are discriminated from hearsay in the way thus indicated, — all of these four classes, as Greenleaf conceives, being reducible to "the principle of the *res gestae*." What is this "principle"? It is nowhere explicitly stated; in order to grasp it we must scrutinize and compare a few of Greenleaf's statements. The principle of the rule against hearsay, as conceived by him, is found in sections 99 and 124: "The term hearsay . . . denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person. . . . The principle of this rule is, that such evidence requires credit to be given

to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony." This being the principle which fixes the objectionable quality of hearsay, we might logically expect it to be laid down that where the declaration is available in evidence on grounds that do not require any trust in the declarant, it does not come under the prohibition of the hearsay rule. Is this the theory that Greenleaf intends to put forth? Twenty-four of the twenty-nine sections that compose his chapter on hearsay are taken up with the four classes of things above referred to; and then they are summed up in section 123, in this way: "Thus we have seen that there are four classes of declarations, which, though usually treated under the head of hearsay, are in truth original evidence; the first class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the second including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; the third consisting of cases of pedigree, and including the declarations of those nearly related to the person whose pedigree is in question; and the fourth embracing all other cases where the declaration offered in evidence may be regarded as part of the *res gestae*. All these classes," it is added, "are involved in the principle of the *res gestae*, and are separately treated merely for the sake of greater distinctness." The common quality — that which brings these classes of cases all under one principle — is not expressly defined; we must collect it from what is said of each class.

The principle of those miscellaneous cases which Greenleaf groups and designates under the specific Latin name, as "all other cases where the declaration may be regarded as part of the *res gestae*," is implied in what is found in sections 108 and 110; statements coming under this head are there said to be "distinguished from hearsay, by their connection with the principal fact under investigation"; as

being "contemporaneous with the main fact under consideration, and . . . so connected with it as to illustrate its character"; and as being "concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the coexisting motives," [1] — as distinguished from being "merely narrative of a past occurrence."

Now how is it that the other three classes are involved in the principle of this one, "the principle of the *res gestae*"? The first of them is one "where the fact that the declaration was made, and not its truth or falsity, is the point in question"; the peculiarity of this is stated in section 101; it lies simply in what is thus said, viz., that the truth or falsity of the declaration is not in question, but only the fact that it was made. The second class is thus described in section 123: "The second, including expressions of bodily and mental feelings, where the existence or nature of such feelings is the subject of the inquiry"; the peculiarity of this class is to be collected from section 102, viz., that these are "the usual expressions of such feelings made at the time in question; . . . if they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence." The characteristic of the third class, "consisting of cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question," is to be gathered from sections 103–106; it is stated in section 103, thus: "It is now settled that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants of (in) the person from whom the descent is made out, and their consequent interest in knowing the connections of the family." [2]

[1] As to this expression, which is from 2 Evans's Pothier, 285, see Eden on Bankruptcy, p. 360.

[2] This language is from the opinion of Lord Chancellor Erskine, in 13 Ves. 147. "The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is made out. . . . If a person says (&c.) . . . it is not necessary (&c.) . . . but it is evidence from the interest of that person in knowing the connections of the family."

Now if it be true that these are all illustrations of the same principle, then it is not one that requires the declaration to be contemporaneous either with the main fact under investigation, or with any evidentiary fact. For in the third class the probative virtue of the declarations is conceived by Greenleaf to lie in "the interest of the declarants" in the person or family with regard to which the controversy exists. As to these declarations in pedigree neither Greenleaf nor anybody else ever contended that they should be made contemporaneously with any act or as illustrative of anything else. Notwithstanding, then, Greenleaf's requirement of contemporaneousness in section 108, when speaking of declarations which he puts under a separate and distinctive title of "*res gestae*," it would seem that in speaking of "*the principle* of the *res gestae*," he contemplates something more expansive. The only common quality in Greenleaf's four classes of declarations is the negative one, *that their value in the case does not necessarily rest upon any trust reposed in the declarant.*

To sum up, then: Greenleaf's conception of the rule against hearsay, and of "the principle of the *res gestae*," to the elucidation of which the chapter on Hearsay is mainly devoted, — may be thus drawn out: — The rule against hearsay prohibits testimony that *requires* the tribunal to put faith in any other person than a witness duly sworn and examined in the case in hand; but it is not directed against testimony that does not *require* such trust in an unexamined person; if the thing sworn to should have a probative virtue, relevant and material in the case in hand, not dependent upon the credit of any unexamined person, then, so far as this rule goes, it is good evidence; it is not material that the thing sworn to — the declaration of a third party — is one which in the nature of it *admits* of being believed on the credit of the declarant, or that there is danger of a jury's taking it on that ground, so long as it has a sufficient probative quality independent of that. Here, then, are two things, (1) hearsay, and (2) something

which is not hearsay; they are not (1) hearsay and (2) *an exception* to hearsay.

In thus dealing with the subject Greenleaf's general conceptions were not original, — they were English; he took them from the eighth edition of Phillipps on Evidence, known as Phillipps and Amos on Evidence, published in 1838, four years before his own treatise; and that again seems in some respects to have followed Starkie in 1824. Before this last date, in Phillipps's earlier editions, the case of declarations which are part of the *res gesta* was dealt with simply as an exception to the hearsay rule, like dying declarations and the other well-known exceptions; (1 Phillipps Ev. 1st ed. c. 7, s. 7). Starkie, while classing the cases coming under the head of the *res gesta* with the others, for the first time dealt with all of them as no exceptions, but as not coming within the rule at all. "The objection," he says (Part I., 1st edition, s. xxvii.), "to the reception of hearsay evidence is founded wholly upon the consideration, that it is *too vague and unsubstantial* to afford any reasonable presumption as to the truth of the recited fact"; and then the cases of the *res gesta* and the others are introduced by naming "several classes of cases . . . where declarations or entries (unlike declarations generally) possess an intrinsic credit beyond the mere unauthorized assertion of a stranger," and which are admitted because "they afford a reasonable presumption as to the truth of the facts to which they relate." Starkie's view of the hearsay rule, then, seems to have been that it rejected all declarations whose evidentiary value lay *only* in the credit of an unexamined person; and that this rejection went upon the view that such evidence was too vague and unsubstantial; but that declarations which had an evidentiary quality drawn from other sources were not within its prohibition; he did not conceive of them as exceptions to the rule, but as not within it; such declarations were not "excepted out of the general rule," but were to be judged of by the usual tests of admissibility as if they were facts of any other sort.

Then came the serious overhauling of Phillipps's book in 1838. In the new edition we have declarations which are said to be part of the *res gesta* more plainly and elaborately discriminated from others as not being within the prohibition of the rule against hearsay; while we have the case of declarations of deceased persons in questions of pedigree, and those against interest, &c., treated differently — *i. e.*, treated as *exceptions* to the rule against hearsay. The writer's conception of hearsay is stated at p. 197, and again at p. 217, much in the phraseology that Greenleaf repeats: "In its legal sense it (hearsay) is confined to that kind of evidence which does not derive its effect *solely* from the credit to be attached to the witness himself, but rests also *in part* on the veracity and competency of some other person."[1] And again: "The principle of the rule according to which evidence is rejected on the ground of its being hearsay is, that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests." Here the view intimated is the same which is found in Greenleaf; viz., that statements by unexamined persons which have an evidentiary value not derived from the credit of him who uttered them are not within the rule against hearsay.

But Greenleaf was wholly peculiar in introducing a large "principle of the *res gestae*," and in referring to it declarations in pedigree, declarations by an occupant of land relating to his possession, and declarations in the course of business. By the English law at the time Greenleaf wrote, as well as now, and by the best-esteemed cases here, it is requisite to the admission of the declarations in these last cases, so far as they are admitted at all, that the declarant should be dead.[2] That brings them to the level of the other well-known *exceptions* to hearsay, and should take them out of Greenleaf's "principle of the *res gestae*."

[1] The present writer has here and elsewhere given his own italics.

[2] To some extent disabilities other than death are enough here. But it is unnecessary to go into detail.

Greenleaf has thus helped to give a vague reach and diffusion to the doctrine relating to declarations which are a part of the *res gesta,* which has puzzled students of this branch of our law not a little; and what is worse, owing to the great authority of Mr. Greenleaf's name, and the many merits of a treatise upon which our lawyers have been trained for nearly forty years, — his views, in some respects very ill-considered, have slipped unquestioned into the opinions of some American courts.[1]

In proceeding now to consider what is the true rule regarding the admission of declarations as a part of the *res gesta,* it is evidently desirable, if indeed it be not necessary, to do what the text-writers have done; viz., to indicate the relation of this rule to the general rule against hearsay. It is impossible here to go into this large subject of hearsay in any detail, to weigh authorities, or to go much into the grounds of the opinions expressed; but a few words must be given to it. It is conceived that no statement and no

[1] *E. g.* Fennerstein's Champagne, 3 Wall. 145, 149. Taylor has preserved the general method adopted by Greenleaf. While he is more accurate in putting declarations in pedigree, in the course of business, and relating to possession, among the exceptions to hearsay, he follows Greenleaf's view, that the other sorts of declarations come in as "original evidence"; *i. e.* (as he expressly uses the term in this connection) as not within the principle of hearsay. At section 606, in his seventh edition, we read almost Greenleaf's words: "The foregoing observations will have shown that there are three classes of declarations which, though usually treated under the head of hearsay, are in truth original evidence; the first class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the second, including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; and the third embracing all other cases where the declaration offered in evidence may be regarded as part of the *res gestae.* All these classes are involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness." After the identification of these different sorts of declarations, one is interested when he observes that Chief Justice Cockburn, at p. 9 of his pamphlet, compliments Mr. Taylor on dealing with them as essentially different. After speaking of the case of Aveson *v.* Kinnaird, he says: "But that decision . . . comes, as you very correctly point out in your work on Evidence (s. 518), referring to this very case, under an entirely different head and rule of evidence; namely, that, 'whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible in evidence.'" Mr. Taylor receives this compliment in silence.

explanation of the existing condition of the law on this head can be satisfactory which does not emphasize, a good deal more than is commonly done in our text-books, the effect of the jury in determining the shape of the law.[1] The English law separates by a heavy line of discrimination that form of circumstantial evidence which consists, or is even but partly composed, of words importing anything material to the case, or of acts whose import is that of a statement, from all other kinds of circumstantial evidence.[2]

[1] [See Thayer's Preliminary Treatise on Evidence *passim*.]

[2] ["The subject of the last section (*res gesta*) is often loosely handled, — as if it were enough to find that declarations were in themselves probative, merely as circumstantial facts, without relying on the declarant's credit, and as if, by calling them 'verbal facts,' they could then be treated just like other facts. But in studying the hearsay rule and observing the shape of the exceptions to it, all becomes confusion if it be not remembered that declarations are often fundamentally different from other facts. Remarks on the present subject are found in treatises and opinions, which, although sound enough in point of abstract reason and good sense, are quite misleading as indicating the present state of the law. Often-quoted passages from Greenleaf and Wharton may be referred to as illustrating what is here said. See also Denver, etc. R. Co. *v.* Spencer, 25 Col. 9, and various Texas cases, *e. g.*, Ry. Co. *v.* Anderson, 82 Tex. 519; De Walt *v.* Houston, etc. R. Co., 22 Tex. Civ. App. 403. And so Fulcher *v.* State, 28 Tex. App. 465, 471: 'Bill of exception number five complains of the admission of the statements of the wounded man made to the witness Campbell about thirty minutes after he was shot, as to the circumstances of the shooting and who shot him. Deceased was shot in the neck, and his articulation was affected by the blood collecting in his throat. About fifteen minutes after he was shot Campbell administered to him some brandy and camphor to clear up his throat, and about fifteen minutes afterwards, when he was able to talk, deceased made the statements complained of. Under the circumstances shown we are of opinion the declarations were admissible as *res gestae*. Willson's Crim. Stats. s. 1046; Stagner *v.* The State, 9 Tex. App. 440; Warren *v.* The State, *ib.* 619; Washington *v.* The State, 19 Tex. App. 521; Pierson *v.* The State, 21 Tex. App. 14; Smith *v.* The State, *ib.* 277; Irby *v.* The State, 25 Tex. App. 203.' And so Freeman *v.* The State, 40 Tex. Cr. Reps. 545. Compare Mitchell *v.* The Territory, 7 Okl. 527; Chic., etc. R. Co. *v.* Cummings, 24 Ind. App. 192; Earle *v.* Earle, 11 Allen, 1; Parkhurst *v.* Krellinger, 69 Vt. 375.

"There is much which illustrates the looseness above referred to, in cases touching a doctrine, often laid down, as to declarations by a person in possession of property. See McCurtain *v.* Grady, 1 Ind. Terr. 107; Elwood *v.* Saterlie, 68 Minn. 173; Rollofson *v.* Nash, 75 Minn. 237; Knight *v.* Knight, 178 Ill. 553, 556; Nodle *v.* Hawthorne, 107 Iowa, 380; Wiggins *v.* Foster, 8 Kans. App. 579. Such cases are sometimes explainable on the doctrine of declarations of a deceased person against interest. Professor Wigmore has thrown light on this topic in his edition of Greenleaf (1 Greenl. Ev. (16th ed.), s. 108). See Ware *v.* Brookhouse, 7 Gray, 454." Thayer's Cas. Ev. (2d ed.) 671, n.]

The fact that a certain statement was made under impressive circumstances, — *e. g.*, a declaration by a person in full possession of his faculties presently expecting death, or a declaration under such circumstances as those attending the woman's utterance in Bedingfield's Case, or the man's in Insurance Co. *v.* Mosley,[1] — may have a strong probative tendency, irrespective of any reliance upon the credit of the declarant; but, as we all know, the law will exclude them unless certain special grounds can be pointed out for receiving them. One thing in the common law was conspicuously true in all trials of fact, viz., that an untrained tribunal, like the jury, was in great danger of misusing this sort of evidence, — of relying upon the statement as true because the declarant said it, and not merely because it was said under the special circumstances. Accordingly, the law was not satisfied with having a statement which had a probative force, drawn from the circumstances under which it was made and independent of credit reposed in the speaker; it did not ask merely whether the statement, in order to have evidentiary value, *required* a reliance on the credit of the declarant, — it considered rather whether it *could* be so misused. To those who look upon the law of evidence as a system elaborated for the mere discovery of truth, and judge it by its logical adaptation to that end, it seems in this part of it peculiarly absurd. To those who take the more intelligent view, that it is not merely a piece of machinery for truth-seeking, but one subsidiary to the distribution of justice, worked through the agency of an untrained tribunal, and shaped to the uses of that tribunal by judges who were often very distrustful of its capacity and fairness, it may present a very different aspect.[2]

[1] 8 Wall. 397.

[2] "It will probably be thought, by persons acquainted with judicial proceedings, that juries do not, in general, properly discriminate between hearsay and original evidence. An opportunity of noticing this frequently occurs in cases relating to the various exceptions to the rule of exclusion, and more particularly where hearsay evidence is introduced collaterally, as where it is a part of a confession of one prisoner affecting another prisoner, or where it is contained in a letter which

It is not, then, to be laid down that, when a hearsay statement has any evidentiary value independent of the declarant's credit, or even when it has a good deal of such independent value, it is therefore to be received; we have no such rule or principle in the law of evidence. We do have, on the other hand, a rule aimed in general at preventing the tribunal from using as the basis of an inference the credit of any person not examined under oath in open court, and which to that end excludes all statements that *may* have support from the credit of such an unexamined person; and then we have exceptions to the rule. Some statements are not included in the rule simply because they *cannot,* in their relation to the case, — *i. e.,* having regard to the purpose for which they are received, — derive strength from the credit of the declarant. The letting in of these declarations is no exception to the rule. But where other declarations are admitted, it is under an exception to the rule, and not as resting upon a principle independent of it. The rule, then, relating to declarations which are a part of the *res gesta,* in any sense in which it belongs to the law of evidence, is properly to be viewed as an exception to the hearsay rule.

V. Let us now come to the cases. What is the import of the term *res gesta* as actually used in the cases, and what is it to be a part of the *res gesta?* What rules or definitions or discriminations are suggested by the cases as touching the admissibility of hearsay as a part of the *res gesta?*

1. In one class of cases the term is used to indicate the very matter in issue, — the very ultimate thing itself to which the controversy relates. To say, in such cases, when it is intelligently said, that a declaration is a part of the *res gesta,* is to say, with the added emphasis of a Latin

is introduced for a different object, or where it consists of a statement of hearsay matters made in the presence of a party to the suit. In such cases, the hearsay evidence generally has much too strong an effect upon the jury, however the judge may caution them not to give weight to the evidence as proving the truth of the facts therein stated." — Phillipps and Amos, Ev. 219.

expression, that the declaration must be received simply because it is the very thing the parties are disputing about. If it be but one element of the thing in issue, it belongs to this class none the less. It was with reference to this sort of thing that Mr. Justice Willes once said: "I have repeatedly heard Lord Wensleydale say the objection to hearsay evidence does not apply to proof of an act done or of a direction to do a thing; you can't prove it in any other way."[1] In proving a slander, or a contract, or knowledge of a certain fact on the part of another as made known to him by the statement of a third person; in proving the ownership of personal property, — where title may pass merely by oral communication; in proving the fact of the delivery of goods at common law or of "actual receipt" under the Statute of Frauds, where, although there be no change in the custody of the goods, there may, as some courts hold, be a change in the possession of them, by the simple act of an oral undertaking to hold in a changed character, — in such case the proof of the words used, whether those of a party to the litigation or of a third party, may be the proof of the very facts in issue. Whatever the parties have properly put in issue by their pleadings may be proved. It is often not easy to say what is involved in the pleadings, or whether a fact is strictly a fact in issue, or an evidentiary fact; but when we have a fact in issue, — whether that fact be a reported declaration, or anything else, — it is not to be made a question in the law of evidence whether one may prove it or not; of course he may. It is a misconception, and it leads to confusion, to discuss such a question under the head of hearsay, or any exception to hearsay.

We are to take notice, then, that this is one sense of the term *res gesta;* viz., the very thing which is controverted; and that, in this use of it, to say that a declaration is

[1] Turner v. Hutchinson, 3 L. T. Rep. N. S. 815. [Cf. Blanchard v. Child, 7 Gray, 155.]

a part of the *res gesta* — of the thing in issue — is an emphatic way of closing any discussion upon the question of its admission. Whatever difference there may be in the law of evidence between declarations and other facts considered as evidentiary matter, there is no particle of difference between them considered as the very thing in controversy.[1]

2. The term *res gesta* is freely used in another class of cases where the specific question is whether a party to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own.[2] When the inquiry is whether the utterance of an agent, or a co-conspirator, is receivable against a party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business; and, of a co-conspirator, that he must have made his declaration while engaged in the common enterprise and regarding that, — in such cases it is common to express this idea by saying that the declaration must be made as a part of the *res gesta;* and if it is not so made, it is deemed to be *res inter alios gesta.* Now it is obvious, on a little reflection, that to settle this question

[1] Partly in explanation of what is here said, and partly as supplementary to it, it should be added that there are many cases where that which is to be proved is in legal effect an ultimate fact, although not so in form. Whenever there exists what is awkwardly called a "conclusive presumption," the proof of the facts which are the basis of the presumption is in legal effect the proof of what is presumed. And again, — what is not always so obvious, — whenever the substantive law has a rule of merely *prima facie* presumption, the same thing is true; if you wish to prove a sale of specific goods, you may prove the oral communication, simply because the common law of sales annexes to the fact of the oral communication this consequence, of a completed transfer of ownership. It is not material, for the purposes of our question, that the consequence is only annexed *prima facie;* it is finally annexed, if nothing appear to the contrary.

[2] [See United States *v.* Gooding, 12 Wheat. 460, 470; Vicksburg Railroad *v.* O'Brien, 119 U. S. 99; Texas, etc. Ry. Co. *v.* Lester, 75 Tex. 56. Compare McNicholas *v.* N. E. Tel. & Tel. Co., 195 Mass. and Conklin *v.* Consol. Ry. Co. (S. J. C. Mass., Oct. 15, 1907).]

adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regulating conspiracy, — a question in substantive law. To hold that a thing is *res inter alios gesta* is to hold that it cannot be used in evidence against a party on a particular ground, viz., the ground of his being responsible for it; but this is only reducing it to the level of an act or declaration proceeding from a stranger, and the question of *evidence* still remains unsettled, whether, being such, it is admissible. To say, on the other hand, that I am responsible for a given declaration by my agent or co-conspirator, is to say that the declaration shall be dealt with as if it were my own; but the question of evidence still remains unsettled whether, being my own, it is admissible in evidence, and for what purpose and with what effect.

Observe, then, that the rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence; and when in stating and applying this rule it is said that the agent's declaration must have been made in and about his principal's business, while actually engaged in it, and as a part of the *res gesta*, — or again, when it is said of a conspirator's declaration, offered against his fellow-conspirator, that it must have been made while he was actually engaged in the common enterprise, about the affairs of it, and as a part of the *res gesta*, — the Latin phrase adds nothing; it is used as a compact expression for *the business*, as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements.

3. Stephen, in his various writings upon the law of evidence, dispenses with the term "circumstantial evidence," and, limiting the word *evidence* to the statements, oral or written, of witnesses, lays it down that there are two classes

of facts which may be proved, viz., facts in issue and facts relevant to the issue. It is practically more convenient to use the term evidentiary[1] facts. We have seen that a party may, of course, prove any declaration which is a fact in issue. Why shall we not also say that one may, of course, prove any declaration that is a fact relevant to the issue, — an evidentiary fact? Because this is precisely where the hearsay rule comes in with its prohibition. The fact of a declaration may have an evidentiary quality, but, by the rule against hearsay, as has been pointed out before, such facts are discriminated from other evidentiary facts; they are not admissible where other facts of no greater probative force would be. In other words, while the hearsay rule does not forbid the proving of any of the ultimate facts in the case, it does forbid the proving of a certain class of evidentiary facts.[2] Observe, then, that the hearsay rule operates in two ways: (*a*) It forbids using the credit of an absent declarant as the basis of an inference, and (*b*) it forbids using in the same way the mere evi-

[1] One of Bentham's words, which, unlike many of those ugly creations, has passed into good legal usage; 6 Bentham's Works, 208.

[2] ["No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made; say, *e. g.*, from the fact of being made under oath, or under impressive conditions, as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements or a class of them which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received as evidence, when once the absence of the perceiving witness is accounted for; and it would in reason have been quite possible to shape our law in the form that hearsay was admissible, as secondary evidence, whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker. This point of view is forever suggesting itself in that part of the subject relating to declarations which are a part of some admissible fact, — of the *res gesta*, as the phrase is. These are often spoken of as parts of a mass of circumstantial facts described as *res gestae*, all evidential, supporting and supported by each other in their tendency to prove some principal fact; instead of being regarded, as they should be, as parts of that fact itself, *pars rei gestae*, lying under the curse of hearsay, but received, by way of exception, on account of this special intimacy of connection with the admissible fact. This part of the subject presents an instructive spectacle of confusion, resulting from the desire, on the one hand, to hold to the just historical theory of our cases; and, on the other, to resort to first principles, without being aware of the size and complexity of the task which is thus unconsciously entered upon." Thayer's Prel. Treat. Evid. 523.]

dentiary fact of the statement as having been made under such and such circumstances. Relief has always been had from the operation of the rule in certain cases when the declarant was dead, but those cases, although covering a good deal of ground, have been rigidly defined: it has never been the English law that the declarations of deceased persons, generally, should be received. It is otherwise in Scotland, and it has been the urgent contention of some persons that the English law should admit the declaration of deceased persons generally.[1] In an important English case growing out of the loss of Lord St. Leonards's will, several of the judges took occasion to express their opinion that it was to be desired that the English law should admit all declarations of deceased persons who were shown to have had special means of knowledge on the subject,[2] but undoubtedly such is not the law as yet, either there or, so far as the writer is advised, in any jurisdiction in this country.[3] Not only is it necessary that the declarant should be dead, but also that certain *specific* evidentiary circumstances should exist, *e. g.*, that the declaration should have been against the pecuniary or proprietary interest of the declarant; the death alone is not enough without the

[1] Appleton, Evidence, c. xii.

[2] In this case it was held in the Court of Appeal that the declarations of a deceased testator were admissible to prove the contents of a lost will, — overruling a previous decision, and plainly resorting, as it would seem, to judicial legislation. The Lord Justice Mellish, while concurring in the result, did not concur on this point. He said: "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was, that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive." — Sugden *v.* St. Leonards, 1 P. D. at p. 250. [For further criticisms of Sugden *v.* St. Leonards see Woodward *v.* Goulstone, 11 App. Cas. 469; Throckmorton *v.* Holt, 180 U. S. 552; Matter of Kennedy, 167 N. Y. 163.]

[3] [See note, p. 303 *infra*.]

evidentiary circumstances, — the evidentiary circumstances are not enough without the death.[1]

But besides this mode of relief against the hearsay rule there has always been another, which is not restricted in its application to the declarations of deceased persons, but applies also to those of the living. While this sort of exception to the hearsay rule has always existed, it has never been well worked out. The characteristic of it is, that the declaration should be made at the same time with the thing which it imports, — the thing which is to be proved, whether an ultimate or an evidentiary fact. An English judge once said that he hardly ever ended a day of trying cases in court without thinking during some part of it, amidst the conflict of testimony, that he would give almost any price for a memorandum in writing made by the parties *at the time* of the transaction. The exception to the hearsay rule which is now mentioned takes notice of one of these strong elements of authenticity, contemporaneousness; it deals, however, not with memoranda signed by the parties, but with statements, oral or written, made by those present when a thing took place, made about it, and importing what is present at the very time, — present, either in itself or in some fresh indications of it, to the faculties of the witness as well as of the declarant.[2]

[1] Why these exceptions should have been made and others not made is to be explained, not by any deep examination into reasons that may distinguish one class of cases from another; but historically, — as a mere matter of fact and of precedent. A single exception was started, and then followed another case, and that was enough; then came in judicial language like that with which Lord Blackburn closed his opinion in a case on hearsay in the House of Lords last year: "But I base my judgment on this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the rule that hearsay evidence is not admissible." — Sturla *v.* Freccia, 5 App. Cas. 623, 647.

[2] Witt *v* Witt, 3 Swab. & Trist. 143. No doubt there are cases which admit other writings, following, *e. g.*, Greenleaf's classification of entries in the course of business as being a part of the *res gesta*, or dealing with agency cases under this head. There are also cases, not thus explainable, like those bankruptcy cases, where letters written during an absence are admissible to show the purpose of the absence. But the writer is disposed to state the doctrine as it is given in the text, leaving such cases to be dealt with on their own circumstances.

The general, roughly stated proposition is, that statements so made are received as a part of the thing, of the *res gesta,* with which they are so closely connected, and as being in themselves good evidentiary facts, — good "circumstantial evidence," to use the ordinary phrase. In other words the common-law difference between declarations and other evidentiary facts now vanishes, — it being always understood that they are not to be taken upon the credit of the declarant.[1] Two classes of these evidentiary and illustrative declarations, which do not in strictness *constitute* a *res gesta,* but are a part of it only in the sense of illustrating or filling it out, must now be discriminated: 1, such as are part of the ultimate fact; and, 2, such as are a part of an evidentiary fact.

(1) Taking, then, first those which attend the ultimate fact:

(*a*) A simple application of the principle, marked by strong good sense, is that which appears to have been made in Thompson and Wife *v.* Trevanion, Skinner, 402 (1693), by Chief Justice Holt, who, at *nisi prius,* in an action of trespass for an assault on the female plaintiff, "allowed that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence." It is true that this fragment of a report (the above is all we have) leaves the case open to criticism; as Chief Justice Cockburn says in his pamphlet (p. 10): "What the facts in the case were we are not informed, or what the statements of the wife had been, or what were the grounds of the Chief Justice's ruling." But the language of the case goes to justify the traditional interpretation of it, that it is an application of the principle that a declaration made contemporaneously with a fact, and about the fact, may be received as evidence of the

It will be remembered, that the present undertaking is not that of a full discussion of the hearsay rule and all its exceptions.

[1] [In Professor Thayer's copy of the article these last words are annotated by him as follows " ? no such discrim."]

truth of what is declared. Such (as Mr. Taylor has pointed out) was Lord Ellenborough's interpretation of it in Aveson *v.* Kinnaird, 6 East. 188 (1806). Counsel had said: "Declarations by the wife upon her elopement . . . accusing him of misconduct could not be given in evidence against him in an action against the adulterer . . . "; and thereupon the report of the case goes on: "*Lord Ellenborough.* — It is not so clear that her declarations made at the time would not be evidence under any circumstances. If she declared at the time, that she fled from immediate terror of personal violence from the husband, I should admit the evidence; though not if it were a collateral declaration of some matter which happened at another time. His lordship also referred to the case of Thompson *et uxor v.* Trevanion, Skin. 402, where . . . Lord C. J. Holt allowed . . . to be given in evidence as a part of the *res gestae.*"

It is evident that, in such cases, difficult questions may arise as to contemporaneousness. There can seldom be a perfect coincidence of time, but the expression, as we have already seen in considering the bankruptcy cases, is not construed with absolute exactness; the rule calls for a declaration which is made either while the matter in question is actually going on, or immediately before or after it. Our Latin phrase is here resorted to, and perhaps helps to a degree of certainty; the nearness in time should be such that the declaration may in a fair sense be said to be *a part* of the *res gesta, i. e.,* a part of the transaction of which it purports to give an account. There are two cases in Massachusetts[1] which may be referred to as illustrating what is legitimate and what is not legitimate in this class of cases. In Commonwealth *v.* McPike, 3 Cush. 181 (1849), on a charge of manslaughter against the defendant for killing his wife, a witness was allowed to testify that the deceased, just before she died, told him that defendant had stabbed her, — although the statement

[1] Both of them are canvassed in the leading case of Insurance Co. *v.* Mosley, 8 Wall. 397.

was made after a very considerable interval of time; this interval is not exactly stated, but it was great enough to allow the deceased, after receiving the wound, to go up stairs and despatch a messenger for the doctor, and then to allow the witness, after meeting this messenger on the stairs, to go after a watchman, return to the house, and go up to the room where the deceased lay.[1] That decision went a great way, and it is conceived that it is indefensible in principle. To include that declaration as a part of the *res gesta* seems to call for a definition of the term which would take in all declarations that were *near* the time. The other case is that of Commonwealth *v.* Hackett, 2 Allen, 136 (1861); on an indictment for murder a witness was allowed to testify that on the street, in the night, he heard the deceased cry out, "I 'm stabbed"; that he at once went to him and reached him in twenty seconds, and that the deceased said: "I 'm stabbed, I 'm gone; Dan Hackett (the defendant) has stabbed me." The evidence was that the defendant had suddenly come upon the deceased, had stabbed him twice, and had run away. This case was elaborately considered; the court gave it "the most anxious and careful consideration, not only on account of (its importance), but because the exception is urged with great earnestness and apparent confidence." The court (Bigelow, C. J.) said that the rule in regard to declarations as a part of the *res gesta* has been often loosely administered, but that "the tendency of recent decisions has been to restrict within narrow limits this species of testimony.[2] . . . We are disposed to apply the rule strictly, and to exclude everything which does not clearly come within its just and proper

[1] The head-note in this case is inaccurate. It shortens the time materially.

[2] Not too much importance should be attached to such remarks. You can find them all ways. "The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine"; per Swayne, J., in 8 Wall. at p. 408. — "Unfortunately the habits of mankind are not such at present as to lead any one to desire any extension of the privilege of having evidence given and taken as part of the *res gestae* of that which it is sought to prove"; per Lord Hatherley, in Sturla *v.* Freccia, 5 App. Cas. 623, 639.

limitations." At the same time (the court went on), "to exclude it here would be practically to say that no declaration or statement, however near the principal fact, or however important as giving it color and significance, could ever be admitted." "The true test of the competency of the evidence is not, as urged by the counsel for the defendants, that the declaration was made after the act was done, and in the absence of the defendant.[1] These are important circumstances, and . . . if they stood alone, would be quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury."

That decision seems to be founded in sound principle and is supported by good authority. It will be observed that the witness heard the first cry; but it is the closeness of the declaration to the fact in point of time, coupled with its own import, that gives it its legally recognized quality as proof; although in form of words the statement is narrative, yet, as the court remark, it is narrative merely in form, and the argument against it on this ground "would be equally strong if the words had been uttered as soon as the knife had been withdrawn from the body."

Let us now look at the leading case of Insurance Company *v.* Mosley, 8 Wall. 397 (1869), a case which has troubled, not only Chief Justice Cockburn and Mr. Taylor, but many intelligent lawyers in this country. It was an action of assumpsit on a policy of insurance issued by the plaintiff in error to the defendant upon the life of her husband. The case came up by writ of error to one of the Circuit Courts of the United States. The question was

[1] This, it will be observed, is a repudiation of the test proposed by Chief Justice Cockburn for criminal cases, viz., the test of the presence or continuing action of the accused.

as to the soundness of two rulings in the court below upon points of evidence. The policy insured against death resulting from personal injury, "caused by some outward and visible means"; it was expressly provided that the policy should not extend to any injury "caused by or arising from natural disease." The declaration alleged that the deceased died from injuries that resulted from falling down a pair of stairs. The defendants (below) pleaded the general issue. The question was whether the cause of the deceased's death was accident or disease. He was "in his usual health" until a certain night when, after having gone to bed, he got up and went down stairs; he returned ill and complained of having had a fall, describing his symptoms; and he continued ill for three or four days, until he died. The testimony which was objected to was: (1) that of Mrs. Mosley, giving the declaration of her husband. She testified that he got up between twelve and one o'clock at night and went down stairs to the privy; she did not know how long he was gone; when he came back he said he had fallen down the back stairs, had hit and hurt the back of his head, and almost killed himself; his voice trembled so as to attract her attention at once; he complained, and appeared to be in pain, and was sick, and she was up with him all night. On the next morning he said he "felt bad," and fainted. (2) The testimony of the son of the deceased, giving certain declarations of his father, was also objected to but received. He testified that he slept in the lower part of the building; that at about twelve o'clock of the night in question he saw his father "lying with his head on the counter and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly. . . . That on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room his head became dizzy; on the following day he said he was a little worse if anything." Nobody testified to seeing the deceased fall. The majority of the court, Swayne, J., giving the opinion, state the questions

to be whether the court erred in admitting the declarations of the deceased (1) as to his bodily injuries and pains, and (2) to prove that he had fallen down stairs. The first class of declarations they readily conclude to be admissible, as being the usual expressions of such feelings, and as relating wholly to what was present. The other question is answered in the same way, on the ground that the declarations were made immediately or very soon after the event, — some of them before the deceased returned to his room, and the others upon reaching it. Both declarations are conceived to be "a part of the *res gestae*." "In the complexity of human affairs," say the court, "what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. . . . Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter were subsisting and in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence and its extent and character." Seven cases are relied upon, including Aveson *v.* Kinnaird, Commonwealth *v.* McPike, Thompson *v.* Trevanion, and R. *v.* Foster.

Mr. Justice Clifford (with whom Nelson, J., concurred), dissented, in an opinion which is devoted to a consideration of the declarations as evidence to prove the falling down stairs. It is insisted that the declarations were not contemporaneous with that fact. The case of Com. *v.* McPike is condemned, as inconsistent with all other Massachusetts cases; Thompson *v.* Trevanion, and R. *v.* Foster, as very slightly reported, as disapproved by Roscoe, in "his valuable treatise on the Law of Evidence," and as inconsistent with all the tests laid down in Taylor.[1]

[1] Observe that they are both approved by Taylor not only in his treatise, but in his pamphlet. And for his comments on "Roscoe," see *ante*, p. 212.

It seems difficult to support this case upon the facts reported, in so far as it admits the declarations as to the fact of falling down stairs. There is nothing whatever to show how long the interval was between the going down of the deceased and his return, and nothing definite to show the interval between his going down and the interview with the son. There is no evidence that either the son or the wife, or anybody, heard the fall; and the wife says expressly that "she did n't know how long he was gone"; the interval may have been five minutes, or fifteen, or thirty. It seems impossible to say that such a declaration is shown to be contemporaneous with the cause of the injury, — so near it that it may fairly be called a part of it; yet the court make the declaration admissible, as being connected with the "bodily injury," and as stating the cause of it "almost contemporaneously with its occurrence."[1] Its relation to the injuries that followed the original cause of trouble, as being an explanation of them, will be considered under a different head.

On the other hand, the declaration of Mrs. Rudd in Bedingfield's Case seems admissible.[2] It was made, as in the case of Com. *v.* Hackett, immediately after the injury. The evidence (collating the fuller details of the "Times" report with those in Cox) was that Bedingfield had gone

[1] The reader will have remarked in this case the court's exposition of the Latin term. This seems to be traceable to Starkie, *ante*, p. 246. Compare Swayne, J., in Beaver *v.* Taylor, 1 Wall. 642; and Fletcher, J., in Lund *v.* Tyngsborough, 9 Cush. 42. The counsel for plaintiff in error in Ins. Co. *v.* Mosley, had said (p. 410): "*Res gestae* are the surrounding facts of a transaction . . . declarations accompanying an act explanatory of that act are *res gestae*. They are the surrounding facts explanatory of an act or showing a motive for acting. But the principal fact must be first established, and until it is established surrounding facts are not admissible; and certainly exhibiting surrounding facts is not establishing a principal fact." But surely this last is a very common way of establishing a principal fact. If the term *res gesta* be limited to the "principal fact," and it be then said that declarations are not receivable unless so intimately connected with that, as to be part of it, things would be simpler.

[2] [As to Bedingfield's Case, see also State *v.* Murphy, 16 R. I. 528; Com. *v.* Van Horn, 188 Pa. 143; State *v.* Robinson, 52 La. Ann. 541; State *v.* Arnold, 47 So. Car. 9; Brown *v.* Louisville Ry. Co., 21 Ky. Law Reporter, 995; State *v.* Hudspeth, 150 Mo. 12; Croomes *v.* State, 40 Tex. Cr. Reps. 672.]

into the house with some spirits, and, "in a minute or two," the attention of a washer-woman in the back yard, or "drying-ground," was attracted by the scream of a woman at the house, and then she saw Mrs. Rudd coming from it. Another woman was at the moment on her way from the drying-ground to the house, and met Mrs. Rudd, "bleeding very much, and seeming very much frightened," who said to her, "Oh, aunt, see what Bedingfield has done to me." Here we have only "a minute or two" to allow for all that happened in the house, whatever it was, after Bedingfield entered with the spirits, until the scream; and then came the instant appearance of the woman, met immediately by another woman on her way from the yard to the house, and at once the declaration. In Com. *v.* Hackett, the witness who had heard the first cry was able to say that he reached the other "in twenty seconds." It would seem that the interval between the scream and the statement here could not have been materially, if at all, more. Chief Justice Cockburn would not object to receiving this declaration in evidence as a part of the *res gesta*, if the defendant had appeared to be continuing to act; *e. g.* (as it would seem), if it had appeared that, having stumbled and fallen and then recovered himself, he had appeared at the door of the house in pursuit just after the words were uttered. His inquiry is, whether the defendant was acting, really or constructively, when the declaration was made. He says: "If a party assailed should succeed in escaping from the immediate attack and presence of his assailant, and should, while apprehending immediate danger, make a declaration in his flight, with a view to obtaining assistance, such declaration would be admissible; but not so if the declaration were made after all pursuit or danger had ceased." How, then, if the party assailed be so severely wounded that he cannot escape, and the assailant has run away? Shall the admissibility of the sudden cries, ejaculations, and hurried statements of the injured person depend upon whether all further danger has in fact ceased? Suppose, as Mr. Taylor

said, that the injured person is escaping, and that his assailant, who was pursuing, suddenly, without his victim's knowledge, falls and breaks his leg, is the admissibility of the instant statements dependent upon this mere question of fact, unknown to the declarant? So it seems. "The declarations of the injured party," the Chief Justice says, "must be in the presence of the accused, or, if in his absence, must be made while his action is continuing, either actually or constructively. . . . A man . . . waylaid by another, who makes a murderous assault on him, . . . succeeding in making his escape, flies, . . . applies . . . for protection, stating what has happened. . . . I should have no hesitation in holding the statement so made to be properly part of the *res gestae*. . . . But if . . . the wrongdoer were to desert and take to flight, statements subsequently made by the injured party to third persons would, I think, stand on an entirely different footing. Next consider the case on the supposition that the act is completed and done; . . . the party who has received a wound is left lying on the spot; the assailant has fled without intention of returning, or of doing anything further towards carrying out his purpose. . . . In each of these cases . . . statements . . . made when the transaction is over form properly no part of the *res gestae*. . . ." It would seem, then, that the Chief Justice would have decided Com. *v.* Hackett the other way; and that Mr. Taylor, at p. 9 of his pamphlet, is too generous when, after putting the case of the broken leg, he says: "In such a case, I will not insult your Lordship by assuming that your decision respecting the admissibility of the statement could have varied in the slightest degree." The Chief Justice, as it seems, would make the question turn precisely upon that, — upon the mere *fact*.[1]

[1] But one cannot feel sure just what the Chief Justice means by "constructively acting," and being "constructively a party to what takes place." Compare what is in the text with what is said at p. 14 of the pamphlet: "A thief takes my purse from my pocket . . . *I see the thief running away*. I call out to a policeman, *telling him that*

A peculiarity of the Chief Justice's view lies in requiring absolutely strict and literal contemporaneousness, — admitting, however, anything that is contemporaneous with certain acts of the accused person, although the main act in question be over. The rigor of this doctrine is clearly inconsistent with what is held in civil cases as the meaning of "contemporaneous"; and, as has been said before, there is not, so far as the writer is aware, any acknowledged difference on this subject between cases civil and criminal.[1] In point of principle, it seems very objectionable at this time of day to draw, for the first time, a line in regard to the admissibility of evidence that involves us in such refinements as those which have been indicated above. There is always advantage in having a precise rule; but there may be a precision which sacrifices too much of substance.[2] When, therefore, we have in practice a rule which saves from the rigid operation of the hearsay rule a quantity of valuable evidence, — such as in modern times no one, if he were making a code, would reject, — it is a step backward to adopt, for the first time, a narrow definition that shuts out a considerable portion of this evidence. Judges are, in general, less afraid of juries now than they used to be; one is reminded, as he deals with this nicety of the Chief

I have been robbed by the man who is disappearing in the distance. . . . The 'inseparable attributes' and 'kindred facts' connected with the taking of the purse may be that the thief . . . knocks me down, or trips me up . . . while he is helping himself to my purse. Thus far I have no difficulty in seeing that the circumstances attending the original transaction form part of the *res gestae*."

[1] Thus, Bishop in his Criminal Procedure, vol. i. s. 1080 (3d ed.), under the heading "The Best Evidence, and the Doctrine of the *Res Gestae*," begins: "The rules on this subject are the same in criminal cases and in civil." In regard to English criminal cases it should be remarked that the judges often exercise a paternal discretion in the conduct of them; this lessens the value of their precedents, as regards rulings that are *favorable* to an accused person. These are often precedents, not so much of law as of mercy or of good sense in administration. Observe, *e. g.*, the strong practical reasons which the Chief Justice gives for this very ruling at p. 23 of his pamphlet.

[2] It is believed that the confusion on this subject has arisen not so much from lack of precision in the word "contemporaneous" as from omitting to fix any precise notion to the phrases *res gesta* and *res gestae*. Consider, for example, what is meant when it is said of the entry of a deceased person, made in the course of business, that it must be contemporaneous. Doe *v.* Turford, 3 B. & Ad. 890.

Justice, of his own sensible remark in Reg. *v.* Birmingham, 1 B. & S. 763 (1861): "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight."[1]

In considering the use of the term "a part of the *res gesta*" in such cases as those now referred to, it is of course evident that it is applied in no exact sense; the phrase, like many others, has a certain play allowed to it; precisely what is meant, is, that the declaration is so close to the act, that it is *as if* it were a part of the fact. This way of using language is no strange thing; the administration of law is a practical matter, carried on by a class of practical men, of whom, in England, it is well said, by a writer who is now one of them: "It is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand."[2] Chief Justice Cockburn's own definition and explanation of this term (pamphlet, p. 19) contains a recognition of the necessity of allowing some play to the expression; after observing that "whatever, whether act or words, forms part and parcel of the fact which is the subject of the judicial inquiry, presents no difficulty," he adds this: "Words uttered during the continuance of the main action, whether by the active or the passive party, though they cannot amount to acts for which the accused can be held responsible, yet may so qualify or explain the act or acts they accompany, that they become essential to the due appreciation of them. There is every reason, therefore, for considering words so spoken during the doing of the act charged as the offence, as part and parcel of the act itself." And yet, of course,

[1] No doubt there is great danger of forgetting the grave difference which the common law makes between declarations and other evidentiary facts. It appears to the writer that Dr. Wharton falls into this error in his valuable treatises on Evidence; see, *e. g.*, 1 Wharton, Evidence, s. 259.

[2] Stephen's Digest of Criminal Law, note xvii.

they are not "part and parcel" of it in any exact sense. In the undertaking to put an unlearned tribunal — and indeed, any tribunal — in possession of facts from which they are to draw inferences to the matters in issue, those facts must be given to them, not in the form that is logically the leanest possible one, but in a form that is fairly and reasonably full in point of detail and circumstance. The principle which we are now concerned with is that which says that words *uttered under such circumstances* are, in general, like any other matters of detail.[1] What is and what is not a fair and reasonable fulness of detail in such cases is always for the court to determine; and doubtless that raises difficult questions, upon which there will always be differences of opinion. But it may fairly be hoped that these differences will diminish if the fundamental theory and conception of the thing can be perceived and agreed upon.

It is always to be remembered that to fix a thing as being really a part of the surroundings of a given fact, or as really belonging to a given situation, is not *therefore* to make it admissible. It is easy to see that, in telling any story, it would be possible to run down the particulars of it into great detail: one might state the condition of the thermometer at the time and spot, the color of each man's hair, the apparent state of his health, the color and cut of his clothes, and so on, — and each of these things would

[1] This sort of thing, and also the classes of declarations objected to by Chief Justice Cockburn, seem to be included in the third article of Stephen's Digest of Evidence, which reads thus: "Facts which, though not in issue, are so connected with a fact in issue as to form a part of the same transaction or subject-matter, are deemed to be relevant to the fact with which they are so connected." One of his illustrations is that of an indictment of A. for the murder of B. by shooting. "The fact that a witness, who was in the room with B. just before he was shot, saw a man with a gun in his hand pass the window, and exclaimed, 'That 's the butcher!' (a name by which A. was known) is deemed to be relevant." Another is the case of R. *v.* Foster, 6 C. & P. 325, a charge of manslaughter committed by A., in carelessly driving over B. "A statement made by B., as to the cause of the accident, as soon as he was picked up ('at the instant,' was Baron Gurney's expression), is deemed to be relevant, though it may not be a dying declaration."

be a part of the *res gesta*. But in very many cases they might properly be rejected. In our double tribunal of court and jury, anything which a party, in good faith, considers to bear upon his case, he may draw to the attention of the court; but the court will apply the principles of good sense as well as law in determining whether the time of the tribunal shall be taken up with it; and so, although much may in fact be kept from the jury which a party is persuaded is admissible, it is to be noticed that he always has his chance at the other branch of the tribunal, — his "day in court" before the public dispenser of sound judgment, as to whether anything which he pleases to offer shall be received. Whatsoever is irrelevant may, of course, be rejected; whatsoever, also, though in strictness relevant, is, as the case stands, clearly inadequate, and so immaterial; whatsoever, though relevant and not quite immaterial, yet, having regard to the bearing of it in other parts of the case or the use that is likely to be made of it, is really colorable.[1] No doubt the exercise of these functions is a delicate matter; but the right to exercise them points to a difference between parts of the *res gesta* which are legally admissible, and other parts. We are to consider, then, that just as there is a relevancy which is logical but not legal, — so that when we talk in a legal discussion of relevancy, we mean legal relevancy, — so in a legal discussion about evidence the expression, "a part of the *res gesta*," means such a part of it as is admissible in evidence, having regard to all the rules.

(*b*) In the Chief Justice's illustrations he limits the declarations to those of the parties to the act: and this is not uncommon. It is no doubt true that in most cases it is the declarations of these parties only that will be material in the case. But that is not always so. In presenting the facts of any transaction it may well happen that the contemporary declarations of a bystander may have a material

[1] Coleman *v.* The People, 55 N. Y. 81, 88; Agassiz *v.* London Tramway Co., 21 Weekly Rep. 199.

value as evidence, and if they have, it is not apparent why they should be rejected; and so in the case cited in Stephen's first illustration under the third article in his Digest of Evidence (*ante*, p. 284, note), the declaration of a third person was received.[1] In such a case as that of Com. *v.* Roberts, 108 Mass. 296, it is submitted that the remark of the bystander, so far as this element is concerned, was properly received below, and that the slight handling of this question by the upper court is unsatisfactory.

(*c*) It is said that the declaration must always accompany some material act or fact. This seems to be true, but is not always clearly understood, or understood in the same sense. We have seen that the very notion of a declaration as a part of the *res gesta,* in the law of evidence, is that it is part of an act or fact. Evans long ago[2] pointed out that it was nothing, *merely* to support a declaration by an accompanying fact, the *res gesta* must be a *res gesta* that has something to do with the case; and then the declaration must have something to do with the *res gesta;*[3] it is not enough that the declaration should be contemporaneous with the *res gesta* if the import of the declaration relate to something else.

By using the plural phrase, *res gestae,* and then conceiving of it as indicating a group of facts surrounding and illustrating some other principal fact, and of the declaration as being one of this subsidiary group, the cases sometimes get, in a peculiar way, at the proposition that the declaration must accompany a fact. Thus in Lund *v.* Tyngs-

[1] *Aliter* in Bradshaw *v.* Com., 10 Bush, 576 Compare Castner *v.* Sliker, 4 Vroom, 95, where the words of a bystander were received; affirmed *ib.* 507, on grounds sufficient in that case, but not, as it would seem, quite satisfactory in a general application. ["BOSANQUET, J. (to counsel), 'How do you translate *res gestae*? *Gestae* by whom? . . . PARKE, B., 'the acts, by whomsoever done, are *res gestae,* if relevant to the matter in issue." Wright *v.* Doe d. Tatham, 7 A. & E. 313, at p. 355 (1837).]

[2] 2 Evans Poth. 287 (1806).

[3] ["It has been well said that *res gesta* must be a *res gesta* that has something to do with the case, and then the declaration must have something to do with the *res gesta.*" Earl, J., in Waldele *v.* New York Central Railroad, 95 N. Y. 274, 286.]

borough, 9 Cush. 36, in holding inadmissible the declarations of a physician as to the nature of the injuries and the condition of a patient, made while in the act of examining him, and at a time when the patient's condition was material, the court go upon the ground that there was no admissible act or fact shown to which the declarations bore the relation of being a part of its "*res gestae*." The court (Fletcher, J.), in a singular passage (p. 42), say: "The *res gestae* are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general the *res gestae* mean those declarations, and those surrounding facts and circumstances which grow out of the main transaction, and have those relations to it which have been above described."[1] Again, on p. 44, it is said: "Every case has its own peculiar distinctive *res gestae;* and to determine, in any particular case, whether or not there is properly any main fact, and what declarations, facts, and circumstances belong to it, as forming the *res gestae,* is often very difficult, requiring very careful consideration and wise discrimination." It was accordingly held that, since the physician's examination by itself was not a material fact, the declarations which accompanied it were not admissible. "There was, therefore, in legal contemplation, no main fact with which the declarations could be connected."

Now, if the declarations here had not been statements of opinion, it is conceived that in principle they might well enough have come in;[2] the manifestation of the physical condition of the patient was a *res gesta,* of which the declarations might be deemed a part, — as being contempo-

[1] The description here referred to was that they "illustrate its character, are contemporary with it, and derive some degree of credit from it."

[2] [Professor Thayer has annotated this passage "qu. as to this."]

raneous and made about that which was present to the senses of the speaker, and present also to the senses of the witness, — and this notwithstanding the declarant was not the suffering party. But in this case the statement was matter of opinion, and it is held that statements of opinion cannot come in in that way.[1]

(*d*) It is said[2] that "declarations . . . are no proof of the facts themselves; and, therefore, if it be necessary to show the existence of such facts, proof *aliunde* must be laid before the jury." This, perhaps, sometimes misleads. Of course, when it is said that you must first have your fact, your *res gesta,* it is implied that you cannot depend on the declaration for the proof of that; but it must not be supposed that the declaration is not legitimately used to prove what the declaration imports, and to supply new and otherwise unproved, or insufficiently proved, elements in the *res gesta.* The remark of the bystander, in the case cited under Stephen's Article 3, who said, "There 's the butcher," was, it is conceived, legitimately to be used as tending to prove that the butcher fired the shot. The exclamation of the deceased in Commonwealth *v.* Hackett, "Dan Hackett stabbed me," was properly to be used to prove that the accused did the deed. And so in Bedingfield's case, the exclamation, "See what Bedingfield has done to me," might properly have been admitted to prove the truth of its import. So in Insurance Co. *v.* Mosley, the fact of a sudden development of physical disturbance having been proved, if the husband had immediately met his son or returned to his wife, the instant declaration that he had fallen down stairs might properly have been used to prove

[1] Wright *v.* Doe d. Tatham, 5 Clark & Finnelly, 313; Lund *v.* Tyngsborough, 9 Cush. 36; Gresham Hotel Co. *v.* Manning, Irish Rep. 1 Com. Law, 125. ["Opinion evidence cannot be introduced by reported declarations. Doe d. Wright *v.* Tatham, *supra;* Lund *v.* Tyngsborough, *supra;* Lane *v.* Bryant, 9 Gray, 245; Bradford *v.* Cunard Co., 147 Mass. 55, 57. Compare Trenton, etc. Co. *v.* Cooper, 31 Vroom, 219; Castner *v.* Silker, 4 Vroom, 507." Thayer's Cas. Ev. (2d ed.) 654, n.]

[2] 1 Taylor, Ev. s. 586.

that fact. In these cases a *res gesta* was first proved independently of the declaration.[1]

(2) Passing now to declarations which attend an evidentiary fact, Chief Justice Cockburn's definition relates only to the ultimate facts in the case, — "the principal act charged." This is often intimated in the common way of speaking of the phrase *res gesta*. Is it intended to say that it does not apply to evidentiary facts? This way of speaking, in many cases, no doubt, arises from the fact that the discrimination between these facts and evidentiary ones is not present to the mind; the more common way of speaking of evidentiary facts is that of calling them "circumstantial evidence," and thus obscuring their character; they are just as much facts to be proved as the ultimate facts in the case. Another circumstance has helped to this mode of speaking of the *res gesta*, as if it were limited to the ultimate facts, — viz., an ambiguity in the meaning of the term "principal fact"; declarations are spoken of as being "*res gestae*," — "surrounding circumstances" attending the principal fact. Thus the word "principal" is used to indicate the relation of a fact to its accompanying declaration. Such is the sense in which the term "principal fact" is used all through the opinion in Lund *v.* Tyngsborough, while the phrase "*res gestae*" is used to denote the concomitant circumstances of any fact, — not discriminating evidentiary facts from any other. The head-note of that case reads: "Where the act of a party (*i. e.*, a person, any person) may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to

[1] Redfield, C. J., in State *v.* Davidson, 30 Vt. 377 (1858), has said that "it is well settled that the declarations of a party injured when no one is present are not evidence to show the manner in which the injury occurred, however nearly contemporaneous." That statement seems entirely unsound. The context shows that the Chief Justice, in saying "when no one is present," means no one who can be a witness; such a case as Bedingfield's would be included in his remark, and the principle thus stated would shut out this declaration, although Bedingfield had been at the time pursuing the deceased, — a contingency in which Cockburn, C. J., would admit it.

constitute one transaction, and so as to derive credit from the act itself, form a part of the *res gestae* and are admissible in evidence." And so Stephen's article 8 (quoted *ante*, p. 234), admits declarations accompanying acts, "*wherever acts may be proved.*" His limitation of declarations to those "made by or to the person doing it" (the act), seems not necessary, for the reasons already indicated.

This discrimination is not much discussed, but it seems clearly good.[1] Suppose that it were necessary for some ulterior purpose to use the fact that a bankrupt had left home with the intention to defraud his creditors, — it would be novel to hear that you could not prove all the elements of that fact in the same way as if it were the ultimate thing in the case. "I never heard," said Coleridge, J., in Thomas *v.* Jenkins, 6 Ad. & El. 525, 529, "that a fact was not to be proved in the same manner when subsidiary, as when it is the very matter in issue. If the fact here was relevant, I think it was to be proved in the ordinary way." In a case, also, in Massachusetts, North Brookfield *v.* Warren, 16 Gray, 171, 174, Bigelow, C. J., speaking for the court, said: "It is not denied that this evidence would have been competent, if it had been introduced to prove a fact directly in issue, . . . but it was contended that it was inadmissible to establish a fact collateral in its nature, from which the main fact in issue was to be deduced by inference. But we know of no such distinction in the rules of evidence. . . . The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue."[2]

[1] 1 Tayl. Ev. s. 587; Hunter *v.* The State, 11 Vroom, 495; R. *v.* Edwards, 12 Cox, 230. The discussion in Lund *v.* Tyngsborough imports that the distinction between an evidentiary fact and another is not conceived of as material. The matter is touched, in passing, by Denio, J., in People *v.* Williams, 3 Parker's Crim. Rep. 84: "To render the declaration competent, the act itself should be pertinent to the issue. . . . The material fact was as to the accused and the deceased being together that night. Even this was not a principal fact, but only a circumstance to show that the prisoner had opportunity."

[2] These cases did not involve the subject of the *res gesta*, but the principle stated is of general application. That which is true of the proof of the fact must be true of the illustration and explanation of it.

But, while this is true, it is yet very important to mark a difference between this second class of declarations and those which are a part of the ultimate fact. In both cases the declarations are receivable to prove whatever they may tend to prove about the fact, the *res gesta,* of which they are a part.[1] But when they are a part of an evidentiary fact, they cannot be received as tending independently to prove the ultimate fact. They attend and illustrate the evidentiary fact; in so far as they go to fill out, to explain, to give full effect to that, they may legitimately operate: but they cannot be admitted to prove a fact of which they are not a part; and by the supposition they are not a part of the ultimate fact.

4. Finally, there is a class of cases that seems to call for some special consideration, viz., where the declaration relates to the physical or mental condition of the speaker. In examining the case of Ins. Co. *v.* Mosley, we saw that one question was as to receiving the complaints of the injured person to show his suffering and the nature of his injuries, and that they were received as a part of the *res gesta.* "Where sickness," said the court, "or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence and its extent and character."[2] Such declarations are very commonly treated under this head. On the other hand, we have seen (*ante,* p. 263, note) that Chief Justice Cockburn considers them as coming "under an entirely different head and rule of evidence," — not naming it, but referring to Taylor's Evidence, s. 518 (s. 580, 7th ed.); and yet, as we saw, Taylor follows Greenleaf in bringing this under the "principle of the *res gestae.*" This view of the Chief Justice is often ex-

[1] [See Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285, 295.]

[2] One sees here a neat illustration of the confusion which is produced by using the plural phrase: the true conception seems to be that the manifestation of sickness is the *res gesta,* and the declarations are a part of that contemporaneous manifestation.

pressed by others,[1] — that this class of declarations does not come in as a part of the *res gesta*. Why? Apparently their admission is put upon the ground of a special exception to the hearsay rule arising out of the supposed "necessity" of the case, — an inexact expression for the *difficulty* of proving facts of the sort referred to. And it would seem that the fact that such declarations are admissible to prove the thing itself, the bodily or mental affection, — and the opinion (1) that they may be received as the *only* evidence of it, and (2) that declarations which are part of the *res gesta* are not receivable to prove that, — are what lead to this doctrine.[2] It is conceived, however, that the juster view is that which deals with the greater part of these declarations as a part of the *res gesta*, — notwithstanding the fact that, like other classes of cases, this also has its own peculiarities.

It is true that the text-books generally say, and the cases in their dicta repeat the expression, that such declarations of a mental affection "are often the only proof of its existence."

(1) But this is often said of declarations, with the admission of which the law of evidence has nothing to do, *e. g.* (to take an illustration in Darby *v.* Rice, 2 N. & McC. 596), a declaration by a third person, in which he went through the multiplication table, would, no doubt, be admissible to show that he knew it;[3] while his mere declaration, "I know the multiplication table," would not be admissible to show that he knew it. So in an action for the seduction of the plaintiff's wife, on the question of damages, a declaration of hers which consisted in swearing at her husband would be admissible, and so under some circumstances a declaration that he beat her a month ago, —

[1] *E. g.*, by Redfield, C. J., in State *v.* Davidson, 30 Verm. 377.

[2] Perhaps, after all, the principal reason is that the text-books are followed but misapprehended; just as Cockburn, C. J., failed to observe that Taylor (and Greenleaf), although treating this class separately for convenience, yet regarded them as illustrations of the "principle of the *res gestae*."

[3] [See Swift *v.* Mass. Mutual Life Ins. Co., 63 N. Y. 186.]

the last being receivable not to show the truth of the beating, but to discover the existing mental condition, as regards her husband, of one who could make such a statement. And where the inquiry is as to sanity and the like, any act or statement may be admissible as a manifestation of the mental state. Such cases really stand outside the hearsay rule.[1]

(2) This is also said of such questions as the first one in Ins. Co. *v.* Mosley. But generally it is said when it is not quite true; probably there are few cases, if any, where, as the question presents itself at the trial, there is not, besides the declaration, evidence of appearances or acts which point the same way. It is material to notice that the text-books and later cases state their doctrine upon this subject as being drawn from Aveson *v.* Kinnaird, 6 East, 188 (1806), to which, no doubt, all our modern cases upon this subject run back.[2] But that case does not justify the view that a mere declaration of mental or bodily condition, with no accompanying fact which might be the sign or the result of that condition, is admissible as evidence of it.[3] There were in that case a variety of other facts manifesting illness. The case was this: the plaintiff, having insured with the defendants the life of his wife, who died soon after, sued now upon the policy; the question was, whether the wife's health at the date of the policy was as warranted therein, and as described in a surgeon's certificate there referred to. The defendants sought to show that she had a settled habit of immoderate drinking, which rendered her life not an insurable one at the date of the policy. The date of the policy was November 22, 1802; that of the sur-

[1] See the discussion in the cases of Shaller *v.* Bumstead, 99 Mass. 112; Wright *v.* Doe d. Tatham, 5 Cl. & Fin. 313; and Waterman *v.* Whitney, 11 N. Y. 157.

[2] As to Aveson *v.* Kinnaird, see Swift *v.* Mass. Mut. Life Ins. Co., 63 N. Y. 186.

[3] [But why should it not be? Whenever the mental or bodily condition is material to the case, it would seem by the reasoning of this article to be of itself an ultimate or evidential fact which may properly be proved by its contemporaneous manifestations in the shape of declarations. And such was Professor Thayer's later view. See note on page 298, *infra*.]

geon's certificate was November 9. She had gone to Manchester to be examined by the surgeon, and he now testified for the plaintiff that he believed her, on that day, in good health; that she was a stranger to him, and that he therefore "observed her very minutely . . . and formed his opinion from an examination of her general appearance, her pulse, complexion, and other circumstances, and principally from the satisfactory answers she gave to his inquiries." The surgeon, in other words, testified to his opinion and gave the grounds of it (Stephen's Digest of Evidence, art. 54). The defendants on their side introduced as a witness a woman who was an intimate friend of the wife, and who was permitted, under objection, to state that having made a casual call on the wife in November, "soon after her return from Manchester," and having found her, at 11 o'clock in the morning, in bed, she then learned from her, — the wife, speaking "in a faint way," — "that she had been to Manchester the Tuesday before, and that her husband had been insuring her life . . . that she was poorly when she went to Manchester and not fit to go; that it would be ten days before the policy could be returned, and she was afraid she could not live till it was made, and then her husband could not get the money." After a verdict for the defendants the case went up on a rule for a new trial, on the ground that this conversation "was improperly admitted, being no more than evidence of hearsay of the wife against the husband." It will be observed that the question here related to the wife's health as of November 22, the date of the policy; that the nature of the defence, viz., a settled habit of hard drinking, made the condition of her health at other periods, not remote from that date, material; that the plaintiff had introduced the testimony of the surgeon as to her health on November 9, the date of the certificate, thirteen days before the date of the policy, and that if that evidence were admissible, whether to show the truth of a representation upon which the policy was made, or to prove her health as

of November 22, — it was allowable to meet it; and that while the exact date of the woman's conversation with Mrs. Aveson is not given, it appears, by her reference to "the Tuesday before," that it was before November 16, and so at a date which was between the date of the surgeon's certificate and that of the policy, and not remote from either, — her condition at both of these dates being material. It is also to be observed that there are two sorts of declaration here, one stating her present condition, and the other stating what it was some days before. At the argument the defendants said that the declarations were made "recently after the insurance effected (which seems not accurate — it was before the date of the policy), when she was lying in bed at an unseasonable hour of the day, apparently very ill and her voice faint. The answers given by Mrs. Aveson to the witness's inquiries are *explanatory of the situation she was found in, and the appearance of illness exhibited by her,* and are naturally connected with the transaction." And it was insisted that, since the surgeon's evidence was founded largely on what she said to him, therefore what she said to others must be good to meet his evidence. The plaintiffs, conceding that what she gave as "her reason for being found in bed . . . might perhaps be admissible as a declaration accompanying an act," insisted that the rest at all events was inadmissible, as being mere hearsay, and "no part of the *res gestae*." They also pressed the clear distinction between the surgeon's evidence as to the wife's statements, and that of the woman, — "The *opinion* of a medical man upon the state of a person's health, which is the object of inquiry, is evidence *per se*, from the necessity of the case; therefore the grounds of his opinion are collaterally let in as evidence also, in which light only the answers of the wife to his inquiries become examinable."

Opinions were given by Lord Ellenborough, and by the Justices Grose and Lawrence; all relied on the fact that the wife's declarations were explanatory of the other facts going to show illness. Lord Ellenborough said: "The

substance of the whole conversation was that the wife had been ill, at least from the 9th of November, when she was examined by the surgeon, and certified to be in good health, down to the day when the conversation took place, *and those appearances were exhibited to the witness;* and in that view I think the evidence was unexceptionable." He had previously said: "The question being what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain (*sic*) her own account of the cause of her being found in bed at an unseasonable hour, *with the appearance of being ill.* She was questioned as to her bodily infirmity; she said it was of some duration, several days. . . . Then, if inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time, this must be evidence." The case is also put by the Chief Justice upon another ground (since generally condemned), — that of allowing to the defendant "a sort of cross-examination, as it were," of the wife, by putting in her contradictory declarations. The other judges both speak of the statements of the wife as explaining the cause of her *being found in bed.* Mr. Justice Lawrence said: "In order to know whether she were in a good state of health on the day of the insurance, it was material to ascertain what the state of health was both before and after that day. If what she said to Susannah Lees were not evidence against her husband, then what she said to the surgeon could not be evidence for him." He had previously said: "As to the general ground of objection to the evidence as hearsay, it is every day's experience in actions of assault that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault.[1] The wife was found

[1] This is sometimes quoted (*e. g.*, in Insurance Co. *v.* Mosley, 8 Wall., at p. 406) as if it meant that the declaration to the surgeon was received to prove the facts of the assault. But the connection seems to indicate what is meant, viz., a statement of the patient's bodily condition.

in bed at an unusual time: she complained of illness, and naturally answered her friend's inquiries by describing how long her health had been bad, and she carried it to a period antecedent to her examination by the surgeon at Manchester."

It is not pertinent to the present inquiry to go into all the questions discussed in these opinions. In so far as the case assumes that, because the surgeon is allowed to give his patient's narrative of a past cause of his disorder as one of the grounds of his opinion, therefore statements of the same character may be given for any other purpose, whether to prove the state of health or as "a sort of cross-examination," — the doctrine of this case is not to be approved. But in other respects it seems sound. The point specially to be observed now is this: the case does not lay down any doctrine that a mere bald declaration of a condition of body or mind, unaccompanied by other facts, is admissible to prove that condition. The single, often-quoted remark of Mr. Justice Lawrence, taken out of its connection, that "it is every day's experience in actions of assault that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault," no more indicates this than Lord Ellenborough's remark does, at the end of his opinion, — "the declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence"; these are short statements, which are to be understood by observing what else is said, and we have seen that both judges rely on the other facts.

Now this case is all the authority upon which the leading text-books proceeded in originally laying down their loosely expressed doctrine.[1] If, however, this case is followed, there should be, in such cases, some *manifested* condition to be explained, and then the declarations are received to

[1] Greenleaf gave two American cases. The only important one is Grey *v.* Young, Harper, 38, which has a dictum resting on the English case.

explain it,[1] just as a bankrupt's declaration was receivable to state the intention of a proved act. If the cases have gone further, as the dicta certainly have, they might well return to the law of the authority upon which they rest.[2]

Before leaving this class of cases, two or three sources of confusion connected with them may be briefly referred to.

(*a*) The opinion has been held that it was a legitimate thing to explain a present fact by stating a past cause of it, or by a narrative illustrating it. In Insurance Co. *v.* Mosley, this seems to have been in fact permitted, but it is to be noticed that the court allowed the statement of the past cause on the view that it was "made almost contemporaneously with its occurrence." And the law is nowadays correctly laid down that a narrative under such circumstances is not legitimate. Chapin *v.* Marlborough, 9 Gray, 244.

(*b*) It has been supposed that there was some difference as regards admissibility, between the reporting of declarations by medical men and by others. There is, as regards the point that an expert when asked for an opinion may state the grounds of his opinion, and so a statement of what is past given to him by the patient; of course a narrative

[1] [This passage and some others (see note on page 293, *supra*) indicate that when the article was written Professor Thayer perhaps favored a narrower view in some respects than was taken by the court in Mutual Life Insurance Co. *v.* Hillmon, 145 U. S. 285, and Com. *v.* Trefethen, 157 Mass. 180. But his views on these points were modified before those cases were decided so as to correspond entirely with the conclusions reached by the court. It so happened that he was dealing with the matter in his classroom on the very day when the Hillmon case was argued at Washington, and the following passage is taken verbatim from notes of his lecture on that day: "Whenever a state of mind is material you can show declarations accompanying the state of mind."]

[2] Edington *v.* Mutual Life Ins. Co., 67 N. Y. 183, 192. In New York, in 1871, the opinion of the majority of the Court of Appeals, proceeding, as it would seem, too literally upon the view that declarations as to a person's own physical sensations, and the like, are only admitted from necessity, declared the doctrine no longer law in the case of the declarations of living parties to the suit, since they are now admitted to testify. The opinion is in several respects ill-considered. Reed *v.* N. Y. Cent. R. R. Co., 45 N. Y. 574. But compare Kennard *v.* Burton, 25 Maine, 39.

repeated for such a purpose is not to be used for any other purpose than that of testing the expert. Apart from that, there is no difference.[1]

(*c*) There is sometimes an impression that a declaration relating to the consequences of an injury must necessarily be given near the time of the injury. But that is obviously not so; if the physical condition of the person

[1] Aveson *v.* Kinnaird, 6 East, 188; Gardner Peerage Case, 170–179. As to the admissibility of a physician's statement of what his patient told him, when he is asked in court for an opinion and for the grounds of it, Bigelow, C. J., in Barber *v.* Merriam, 11 Allen, 322, said: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, *and the causes which have led* to the injury or disease under which he appears to be suffering. This opinion is clearly competent as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. . . . The party . . . who relies on his opinion should be allowed the privilege of showing that his testimony as an expert is the result of due inquiry and investigation into the condition and symptoms of the patient, *both past and present*."

In Massachusetts an ill-founded dictum is afloat in the cases, discriminating between statements in the nature of ejaculations and other more formal ones; the latter may only be reported by physicians. This was started in Bacon *v.* Charlton, 7 Cush. 581, and repeated in Barber *v.* Merriam. It is a pity that this doctrine should not be formally put in controversy; the point has never yet been *decided* by the upper court. That it has but a slight foundation is apparent from comparing the opinion in Bacon *v.* Charlton with the authorities upon which it goes. The court intended to state no new doctrine, and, as it would seem, misconceived the existing rule. The line of Massachusetts cases is, Bacon *v.* Charlton, Chapin *v.* Marlborough, Emerson *v.* Lowell Gas Co., 6 Allen, 146, Barber *v.* Merriam, Ashland *v.* Marlborough, 99 Mass. 47, and Fay *v.* Harlan, 128 Mass. 244. ["For comments on this case [Barber *v.* Merriam] and the results of its imperfect discrimination, see 1 Greenl. Ev. (16th ed.) ss. 162*a*, 162*b*. Several things should be kept distinct which are often more or less confused: 1. The narrative of past facts offered to prove the truth of them. 2. The same, offered as the grounds of expert opinion. 3. Statements of presently existing sensation, or the seat of it. 4. Mere animal utterances and movements indicating these last things. The distinction between (3) as made to a physician and to an ordinary witness may well be thought ill-founded and unsatisfactory. It is, of course, to be remembered that a court may in its discretion exclude (2) as being likely to be misused by the jury, and may limit the witness to the mere fact that he founded his opinion on what he heard, without stating what it was.

"The modern cases on this subject run back to Aveson *v.* Kinnaird, 6 East, 188. See 1 Tayl. Ev. (9th ed.) s. 580; Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285.

"For the very simple method that prevailed formerly, one which, if subject always to the control and discretion of the courts, has much to commend it, see Blandy's Case, 18 How. St. Tr. 1135 *seq.* (1752)." Thayer's Cas. Ev. (2d ed.) 592, n. See also Roosa *v.* Boston Loan Co., 132 Mass. 439, and Commonwealth *v.* Sinclair, 195 Mass. (Apr., 1907).]

a week after an injury be material, declarations made at that time about the present facts are good.[1]

The class of cases in which there is an effort to prove the intention of a person by his own declarations might seem properly to be put with those last considered, since intention is a condition of mind.[2] A reason why they are ordinarily dealt with otherwise may probably be that the question of intention has been most commonly raised in relation to some specific act, as in the bankruptcy cases, and then it is plainly assimilated to ordinary questions of the *res gesta;* when it takes the form of a permanent intention, a disposition or habit of mind, it is not apparent why it should be distinguished from other mental affections, if, indeed, there be any essentially peculiar rule applicable in regard to those. In those bankruptcy cases where the question referred to the intention of a protracted absence from home, we saw that evidence of declarations of intention at any time during the absence was receivable, the *res gesta* being considered to be the continuous act of absence.

Sometimes the question of whether evidence of a person's intention is material is confounded with the question of the mode of proving it, and objections are made to a given effort to prove intention, as if they related to the mode of proving it, when they really relate to the undertaking to prove it at all. An illustration of this may be seen in The People *v.* Williams, 3 Parker's Criminal Reports, 84 (1855). In an indictment for the murder of the defendant's wife by poisoning, it was material to show that the two were together on a certain night. They did not live together; a woman, with whom the wife lived, testified that on the evening in question the wife left her, and that she returned

[1] Kennard *v.* Burton, 25 Maine, 39; Ins. Co. *v.* Mosley, 8 Wall. 397.

[2] "Wherever," said Mellish, L. J., in Sugden *v.* St. Leonards, 1 P. D., at p. 251, "it is material to prove the state of a person's mind, or what was passing in it, and what were the intentions, then you may prove what he said, because that is the only means by which you can find out what his intentions are." Of course it is not literally true that this is "the only means."

at five o'clock the next morning; that "she left my house with clothing for her husband, as she said," — he being the watchman on a boat on the North River. Exceptions were taken, which were treated by the Court of Appeals as exceptions to the admission of this declaration. "The question to be determined," said Denio, J., "is whether the declarations of the deceased as to where she was going on Saturday evening were admissible." It was held that they were not, but an examination of the case shows that this was on the ground, not of the way of proving intention, but of the immateriality of any evidence of it. Leaving the house, said the court, was not material unless it was shown that the deceased met the defendant during her absence; if they met, it is immaterial whether she intended to meet him; if she failed to meet him, he could not be prejudiced by her intention to meet him. In other words, all evidence of intention was inadmissible. But the matter is not fairly dealt with by saying that leaving the house was immaterial unless it were shown that the parties met; to show that the woman left may help to prove that they met; to prove that she was not at home that night, may surely be a step, in conjunction with other circumstances, in proving that she was with the defendant; to show that she left with the intention (assuming the intention legitimately made out) of going to her husband, has some tendency to show, in conjunction with other evidence, which really existed in the case, that she did go to her husband.[1] Assuming that evidence of intention was receivable, this mode of proving it was legitimate, and has the support of many cases.[2]

The writer must here bring these informal and very imperfect suggestions to an end. The general purpose of them

[1] [And so Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285.]

[2] *E. g.*, the line of bankruptcy cases, as to proving the intention of going away. Eighmy v. The People, 79 N. Y. 546, 557, Hunter v. The People, 11 Vroom, 495, 534. But see R. v. Wainwright, 13 Cox, 171, where, on a similar question, Chief Justice Cockburn said: "It was no part of the act of leaving, but only an incidental remark, and only a statement of intention which she may or may not have carried out. She would have gone away under any circumstances."

has been to endeavor to discover a precise conception for the term *res gesta* (since it can hardly be hoped that the use of it will be abandoned), to indicate the general aim of the cases which admit declarations as a part of it, and to make certain comments upon text-books and the cases.

The leading notion in the doctrine, so far as, upon analysis, it has anything to do with the law of evidence, seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove, fill out, or illustrate, — being at the same time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications; this nearness of time is made specific by the terms "contemporaneous" and "a part of the *res gesta*," and it is enough that the declaration be substantially contemporaneous; it need not be literally so. It was either the thing itself which was in issue that was conceived of as the *res gesta*, or, sometimes, some other thing evidentiary of that; in either case the fact or thing which, relatively to the declaration, is the principal fact, — is the *res gesta*. The notion of "*res gestae*" as being the concomitant facts of something else, came in with Starkie's text-book, and has bred confusion.

The writer hopes that he has succeeded in indicating the true relation to this branch of the law of evidence, of the rape cases, the bankruptcy cases, the agency cases, and those where the effort is to prove a declaration as being itself a fact in issue; and as to the great and confused mass of the other cases, that he may succeed in drawing to them an increased attention on the part of those who have it in their power gradually to bring consistency and order into the decisions, or to give shape to the law at once by legislation. It is much to be wished that wise legislation should come in to revise the whole law of hearsay, with a

view to simplify it and to admit many things that cannot now, upon any sound principle, be received.[1]

[1] ["In comparing the cases on hearsay in different States, it should be remembered that they may be affected by peculiarities in the local 'codes' or statutes. These, sometimes, materially broaden the doctrine of the common law, and a discussion, in such jurisdictions, which does not notice this fact, easily operates to confuse the subject with which this book is chiefly concerned, that of evidence at the common law. Without referring to the many 'codes' in this country more or less affecting the subject of evidence, such as those of Georgia ['Declarations accompanying an act or so nearly connected therewith in time as to be free from all suspicion of device or after-thought are admissible in evidence as part of the *res gestae*.' Code, s. 3773], California, Iowa, Ohio, and New York, a recent short and comprehensive statute of Massachusetts may be quoted which deeply affects the doctrine of hearsay, Stat. 1898, c. 535: 'No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.' For the construction of this statute, see Brooks *v.* Holden, 175 Mass. 137 [Stocker *v.* Foster, 178 Mass. 591, 602, and Hayes *v.* Pitts-Kimball Co., 183 Mass. 262].

"For a similar doctrine in the Scotch law see Kirkpatrick, Dig. Scottish Law of Ev., c. iv., and compare Mansfield, C. J., in Berkeley Peerage Case, 4 Camp. 414–415; s. c. Thayer's Cas. Ev., 2d ed., 5.

"In Rowland *v.* Phil., etc. R. Co., 63 Conn. 415 (1893), it appears that Conn. Gen. St. s. 1094 provides that 'in actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased relevant to the matter in issue, may be received as evidence.' For a similar statute in Massachusetts [Rev. Laws, c. 175, s. 67] see Brooks *v.* Holden, *ubi supra*." Thayer's Cas. Ev., 2d ed., 672, n.

Professor Thayer's connection with the Massachusetts statute quoted above (now Rev. Laws, c. 175, s. 66) is not generally known. That act had its origin in the following letter written by him in response to the annual request of the Boston Bar Association through its Committee on the Amendment of the Law for formulated suggestions of needed changes in the law:

"Cambridge, Dec. 22, 1896.

"To the Committee of the Suffolk Bar Association
on the Amendment of the Law.

"GENTLEMEN, — I beg to submit to you the following 'formulated suggestion' for an amendment of the law of evidence, viz.,

"No declaration of a deceased person, made in writing *ante litem motam*, shall be excluded, as evidence, on the ground of hearsay, if it appear to the satisfaction of the judge to have been made upon the personal knowledge of the declarant.

"In support of this suggestion I may submit the remark of Lord Justice Mellish in Sugden *v.* St. Leonards, 1 P. D. 154, 250 (1876): 'If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible.'

"Such is the law of Scotland, — their common law.

"It will be observed that my suggestion falls much inside the scope of Lord Justice Mellish's suggestion, for I limit the proposed change to statements *in writing*.

"Experience would help us to see whether the fuller change would be desirable.

"Truly yours,

"J. B. THAYER."

In the following year the Committee decided to urge the passage of the statute suggested in this letter. It then conferred with the Attorney-General (Hon. Hosea M. Knowlton), who approved of such an act, and recommended it to the legislature in his annual report (Report of the Attorney-General for the year ending January 19, 1898, xviii, xix).

The Attorney-General, however, broadened Professor Thayer's suggestion so as to include oral as well as written declarations. This extension was not favored by the Bar Association, and before the Judiciary Committee it opposed so much of the Attorney-General's recommendation as referred to oral declarations, but the act was reported and passed in the broader form.

It is believed by many that Professor Thayer's plan of limiting this statutory inroad into the hearsay rule to *written* declarations, for the present at least, would have been wiser. It should be further observed that in no event can the purposes of the statute be properly carried out unless the trial judge fully recognizes his duty to reject any declaration, unless he is satisfied that it was in fact made in good faith, and upon the personal knowledge of the declarant. Whether it was so made is a question of fact to be decided by him in the first instance like any other preliminary question of fact determining the admissibility of evidence (Com. *v.* Reagan, 175 Mass. 335); and therefore the party offering the evidence must prove his facts to the satisfaction of both tribunals before the testimony can have any effect. This safeguard against the introduction of manufactured testimony was regarded by Professor Thayer as an essential feature of the act even in the more conservative form in which he favored it; and its importance is obviously greater in a statute which includes oral as well as written declarations. It is to be feared, however, that judges sometimes admit declarations upon the mere proof of facts tending to show that the conditions of the statute were satisfied, thus overlooking the requirement of an independent judicial determination in the first instance of the question whether the declaration was made in good faith and upon personal knowledge (which of course includes the question whether it was ever made at all).]

"LAW AND LOGIC"

[This article appeared in the Harvard Law Review for June, 1900 (14 Harv. Law Rev. 139), in answer to an article in the previous number (14 Harv. Law Rev. 39), in which a learned writer criticised certain views expressed by Professor Thayer in the Preliminary Treatise on Evidence — more especially the proposition that "Admissibility is determined, first, by relevancy, — an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence, which declares whether any given matter which is logically probative is excluded." (Prel. Treat. Evid. 269).]

THE ingenious writer of a leading article under this title, in the last number of the REVIEW (p. 39), seems to find in a book which he does me the honor to criticise, these three things:

1. An opinion, to use his own language, that "the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence"; — as against which opinion he himself declares that "logic furnishes no test of relevancy," adding that, "unless we permit the law to decide that question for us, it is not going to be decided at all."

2. That a decision in Grand Trunk Railway *v.* Richardson, 91 U. S. 469, is "banished from the domain of law," "because the court has excluded evidence which the author considers logically irrelevant."

3. A statement that a certain proposition, decided by the whole Supreme Court, in Richmond R. Co. *v.* Tobacco Co., 169 U. S. 311, is accounted for by the fact that the judge who wrote the opinion had his legal training in Louisiana.

The writer then adds certain views as to the nature of the common law and the operation of judicial precedents in our system.

Into these last matters I will not enter. But as to the others, I should like to say a word or two. I will take them in reverse order.

1. As to the Tobacco Company case, the remark criticised was that "perhaps *this exposition* may be accounted for," etc. The allusion was not to the point adjudged, — relating to a very troublesome question in constitutional law, which was rightly disposed of, as I should think, — but only to the way this result was reached. In different parts of this opinion, a statute of Virginia, which was attacked as an unconstitutional regulation of interstate commerce, is explained as merely establishing "a rule of evidence," and again as requiring the contract "to be embodied in a particular form." These I think to be two different things. Neither of these theories is essential to the discussion. Both of them may well have been peculiar to the writer of the opinion; any of the judges may have rejected either or both of them. In assuming that all the reasoning of the judge who gives the opinion is that of all the judges who are silent in their assent to the judgment which it explains, the learned critic overlooks, for the moment, facts that are familiar to the legal profession.

2. As regards the Richardson case, it was cited in the book referred to — by a reference *to a particular page in the Report* — as illustrating the point that what are called questions in the law of evidence are very often, in reality, questions belonging to some other part of the law; a man, it was said, who mistakes the proposition of substantive law on which his case turns, and offers evidence accordingly, is often told that his evidence is not admissible, when the real thing meant is that he is wrong in his notion of the true proposition of the issue; for example, as to the true legal standard of diligence. This was one of several illustrations. The plaintiff in error, in Richardson's case, in repelling the charge of negligence, had offered evidence of "the usual practice of railroad companies in that section of the country." The court, in sustaining the rejection

of this evidence, after stating that it is "impossible for us to see any reason" for admitting it, pointed out, on the page cited, what the issue was, and added: "Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides," etc. This I understand to be a statement that the plaintiff in error appears to be wrong in his conception of the true standard of diligence, and that the evidence was inadmissible upon the real issue. The citation of this passage seems to be a fair one, as illustrating the point to which it is applied. With the soundness of the decision, in rejecting the evidence, I was not, and am not now, concerned.

When, therefore, the critic asks, "On what ground is this case banished from the law?" the question is wide of the mark. It is not "banished from the law." It is used as furnishing, in a particular argument of the judge, an illustration for a remark in the text, — a remark which has to do with the exclusion of certain matters from the law of evidence, but not at all with excluding them from "the law."

3. This brings me to the main point, viz., what the critic says as to the theory of the law of evidence which is put forward in the book referred to. That theory is that our law of evidence is a *rational* system, as contrasted with certain older modes of proof; that in admitting evidence in our law, it is always assumed to be logically probative, *i. e.*, probative in its own nature, — according to the rules that govern the process of reasoning; that the considerations determining this logical quality are not fixed by the law, and that, so far as legal determinations do proceed merely on such considerations, they do not belong to the domain of law; that the law of evidence, however, *excludes* much which is logically good, that is to say, good according to the tests of reason and general experience; and that the rules of exclusion make up the main part of the law of evidence. The reasons for these views, and the details and

qualifications of them, are not for this place: they are indicated in the book referred to.

Now this book uses the word "relevancy" merely as importing a logical relation, that is to say, a relation determined by the reasoning faculty. The word "admissibility" is the term which it applies to the determinations of the law of evidence. The critic seems not to observe this; and his remarks, for this reason, are in some respects inapplicable to the text that he is dealing with; as when he says that "logic furnishes no test of relevancy."

I confess that I do not know what he means when he imputes to me the doctrine that "the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence." So far as I perceive the meaning of this passage, it seems to be a senseless opinion. The law of evidence begins — at least its main function begins — when it excludes matter logically probative, for one or another of the many practical reasons that have shaped its principles and its rules. That irrelevant matter is to be excluded is matter of course; that is to say, such matter is outside the very notion of "evidence," in a rational system of evidence like ours.

The critic appears to me to be entirely right in saying that the judgment of a court "has the same value in this branch of the law that it has in any other branch." Doubtless, it settles the particular case. It stands also, if it does stand, as a precedent to help settle other like cases. But bad reasoning in the law of evidence, like bad reasoning in all other parts of the law, is simply bad reasoning; and it is never good law. It may, to be sure, change the law; and the result reached by it may stand as a new proposition in the law of evidence, as in any other part of the law. But the bad reasoning itself never passes into a precedent having legal authority. It is always open to question. The law has no orders for the reasoning faculty, any more than for the perceiving faculty, — for the eyes and ears.

Of course I agree entirely with the critic that our courts are not engaged in reaching "mathematical conclusions," or in merely logical, abstract, or academic discussions. For the evidence of this agreement I respectfully refer him to the book in question, — *passim*. It is with entire satisfaction that I look on at the destruction by the critic of that man of straw put forward in his paper who seems to have entertained a different opinion.

A CHAPTER OF LEGAL HISTORY IN MASSACHUSETTS

[In 1895, on the twenty-fifth anniversary of Dean Langdell's coming to the Harvard Law School as a professor, an anniversary number of the Harvard Law Review was published.[1] This bore the following dedication:

TO

C. C. LANGDELL,

IN HONOR OF

HIS GENIUS AS A LAWYER,
HIS ORIGINALITY AS A TEACHER OF LAW,
HIS SAGACITY AS A LAW-SCHOOL ADMINISTRATOR,

AND

HIS DEVOTED AND SUCCESSFUL SERVICES AS DEAN AND PROFESSOR DURING THE LAST TWENTY-FIVE YEARS,

The Following Essays

ARE INSCRIBED, WITH CORDIAL REGARD, BY HIS PRESENT AND FORMER COLLEAGUES IN THE FACULTY OF THE HARVARD LAW SCHOOL.

J. B. THAYER. J. SMITH. J. C. GRAY. O. W. HOLMES.
J. B. AMES. E. WAMBAUGH. S. WILLISTON.
J. H. BEALE, JR.

and each of Dean Langdell's colleagues contributed an essay on some legal topic. This "Chapter of Legal History" was Professor Thayer's contribution.]

THE matter of which I shall write has to do with the competency of witnesses. The main features of the common-law doctrine on this subject, the general course of its

[1] 9 Harv. Law Rev. 1.

development, and the fact of its substantial disappearance in England and elsewhere, are fairly well known. To these matters, therefore, and the history of them, I need merely allude, — to the ancient common-law jury, at once witnesses and triers; to their necessary qualifications, determined by those of witnesses in the canon law;[1] to the slow coming in and the strange development of the practice of receiving witnesses to testify to these juries;[2] to the simple beginnings of the rules relating to the disqualification of these new witnesses, not at all identical with the disabilities of the civil or canon law, and so not the same as those of jurymen, but originating quite naturally in the requirement of an oath, in natural incapacity, in proved untrustworthiness, and in great and obvious danger of perjury; to the working out of these rules in the course of the seventeenth and eighteenth centuries into technical details which greatly perplexed the administration of justice; to the advent of Bentham, and his keen and truculent attacks upon the system;[3] and finally to the melting away in England of almost the whole fabric, under the attacks of Bentham and his followers, during the period between 1833 and 1853 inclusive. Of all these things I will merely remind the reader, and will pass on.

In Massachusetts, as regards the competency of witnesses, we have had for nearly twenty-five years as clean a sheet, probably, as the world affords. The law stands thus:[4] "No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness

[1] Glanville, II. c. 12; Bracton, p. 185; Ayliffe, Parergon Jur. Can. Angl. (1st ed.), 536; Oughton, Ord. Jud. (1738) 156; 3 Bl. Com. 361–364.

[2] Thayer's Preliminary Treatise on Evidence, chaps. II, III, IV.

[3] The first publication of his writings on this subject was in Paris in 1823. *Traité des Preuves Judiciales. Ouvrage extrait de M. Jérémie Bentham, Jurisconsulte Anglais, par Et. Dumont, etc.* 2 vols. This appeared in an English translation in 1825; and in 1827, John Stuart Mill's edition of Bentham's entire treatise on "The Rationale of Judicial Evidence" was published, in five volumes. It takes a good deal of courage to read it.

[4] Stat. 1870, c. 393, s. 1; approved June 22. Pub. St. Mass. c. 169, s. 18. [Now Rev. Laws, c. 175, s. 20.]

in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: First. Neither husband nor wife shall be allowed to testify as to private conversations with each other. Second. Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other. Third. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him." I take this from the Public Statutes of Massachusetts, the compilation now in use. It varies from the original statute of 1870 only by the insertion, in the first line, of the words, "whether a party or otherwise." These provisions do not apply to "the attesting witnesses to a will or codicil," — a class of persons, it will be observed, who are required in order to constitute the document, and not merely to give evidence in court.

Although this statute uses the words, "except in the following cases," the cases named are really not exceptions. The first provision as to husband and wife is only a limitation of the range of their testimony; the second secures a privilege; and the third, relating to accused persons, like the second merely secures a privilege.

It may be well to add that the Massachusetts statute also provides that conviction of a crime (any crime) and disbelief in a God may be given in evidence to affect a witness's credit; that a party calling his adversary as a witness shall have "the same liberty in the examination of such witness as is allowed upon cross-examination"; and that "the usual mode of administering oaths now practised here, with the ceremony of holding up the hand (no book being used) shall be observed; . . . (yet) when a person declares that a peculiar mode of swearing is, in his opinion, more solemn and obligatory than by holding

up the hand, the oath may be administered in such mode." [1] A Quaker may "solemnly and sincerely affirm, under the pains and penalties of perjury," and so may any one who declares (and satisfies the court) that "he has conscientious scruples against taking any oath"; and so *must* he who is "not a believer in any religion." He who believes in a religion other than the Christian, "may be sworn according to the peculiar ceremonies of his religion, if there are any such." [2]

In Massachusetts then, all the common-law grounds of witness-exclusion have disappeared: lack of religious belief, pecuniary interest, being a party to the suit or a party's husband or wife, and conviction of an infamous crime; — all, except the lack of natural capacity.

1. As to religious belief and the oath. In this respect, as in others, the change was slow. The two colonies, at Plymouth and Massachusetts Bay, were much distressed by two peculiar classes of people, Quakers and Indians. They regarded the first of these for a long time as the worst sort of intruders, as bringers of a sort of spiritual small-pox; and struggled to be wholly rid of them. To relieve them from the pressure of any hardship, by dispensing, for example, with the necessity of an oath, would have been the last thing likely to be thought of; the effort was to drive them out. In England the Quakers had some relief as early as 1695. It had been found there, after a long contest, that the Quaker was a sort of person who could not be killed off, or put down, or driven out; he had to be lived with.

[1] This clause covers the case of some Roman Catholics. See the explanation of the court to Bishop Fenwick, when he inquired why it was proposed to adopt in his case a method different from the usual one: viz., "It is well understood, as matter of general notoriety, that those who profess the Catholic faith are usually sworn on the Holy Evangelists, and generally regard that as the most solemn form of oath, and for this reason alone that mode is directed in this court, in case of administering the oath to Catholic witnesses. This is done by the witness placing his hand upon the book whilst the oath is administered, and kissing it afterwards." The Reporter adds: "The oath was then administered to Bishop Fenwick in this form." Com. *v.* Buzzell, 16 Pick. 153, 156 (1834).

[2] Pub. St. Mass. c. 169, ss. 13–31 inclusive. [Now Rev. Laws, c. 175, ss. 15–33 inclusive.]

Here it took longer to find that out. Such well-intending people as these would indeed, here and there, melt in among their neighbors, like other people; and it seems to have required some effort on the part of the authorities to adhere to the orthodox view about them. While, therefore, in the Plymouth Colony, in 1657 and 1658, laws were passed prohibiting and punishing the bringing in or entertaining of Quakers, laws of the same period appear to have recognized some of them as freemen. And although in 1661 several penalties, including whippings, were again imposed on newcomers, yet in 1681 it was enacted, on petition of "several of the ancient inhabitants of the town of Sandwich, called Quakers," that they should have "liberty to vote in the disposal of such lands, and . . . to vote for the choice of raters, and shall be capable of making of rates, if legally chosen thereunto by the town and persons aforesaid, so long as they carry civilly and not abuse their liberty." [1]

Quakers, like all others, were early required in the Plymouth Colony to take the oath of allegiance, "the oath of fidelity" as it was called, and on refusal were, at first, ordered to leave, and afterwards regularly fined, on being summoned "at each election," five pounds on each refusal.[2] It was not until 1719, long after the union of the colonies, that Quakers were allowed to substitute for the oath a solemn declaration of allegiance.[3] On March 5, 1743–4, by a law limited to three years Quakers were, for the first time, allowed, "upon any lawful occasion," instead of taking an oath, to "solemnly and sincerely affirm and declare under the pains and penalties of perjury"; but they could not do this in criminal cases, as witnesses or on any juries, nor could they, in general, hold any office where an oath was then required.[4] This law was afterwards renewed for

[1] Plym. Col. Rec. vi. 71. In following the course of events, it may be well to notice that George Fox, the founder of the Quakers, was born in 1624, and began to preach about 1648.

[2] Plym. Col. Laws, 76, 130.

[3] Province Laws, ii. 155.

[4] Province Laws, iii. 126. It is interesting to see by other parts of this statute that provisions had become necessary for cases when a majority or all of "the assessors or collectors of any town" shall be Quakers.

ten years, and, in 1759, it was permanently enacted and made applicable also to criminal cases.[1] Finally, by Stat. 1810, c. 127 (February, 1811), Quakers were allowed to affirm on all occasions.

How was it with him who was not a Quaker, but had like scruples? After the familiar way of legislators, no general principle was applied till later. Probably there were few cases of trouble. One such occurred as late as 1815,[2] when Judge Story committed for contempt a witness, not a Quaker, who refused from conscientious scruples to take the oath. It was the St. 1824, c. 91 (P. S. c. 169, s. 16),[3] which first allowed to others the liberty earlier gained by the Quakers, whenever "required to take any oath on any lawful occasion." The constancy of that God-fearing people had its final victory at last, in working out freedom of conscience for all.

The case of that other class of persons mentioned above, the native Indians, was also a troublesome one. They could not be expelled; they also must be lived with. The religious condition of these people, "the veriest ruins of mankind upon the face of the earth," as one of the clergy called them, was a puzzle to the colonists.[4] Saving the scanty converts, they seem to have been regarded either as wholly destitute of religion or as worshippers of false gods, and even of that peculiarly dangerous false god, the devil.[5] How could an

[1] Province Laws, iv. 180. A passage from the diary of Chief Justice Lynde as to a case before him in Nantucket in July, 1737, shows that Quakers then served on grand juries; and in some cases, apparently, without taking the oath: "13th Wednesday, in the morning about ten, in Mr. White's meeting-house, began the trial of Abia. Comfort, an Indian woman, against whom a bill of indictment was drawn up and presented . . . to the Gr. Jury, whereof Joseph . . . was appointed foreman, with eleven more Englishmen, but *five* and most Quakers; yet on the Court's having their hats off, and manifesting the decency of their's too, they, some of themselves, and others easily submitted to their being taken off, and had the Gr. Jury's oath or declaration administered to them, some holding up their hands."

[2] U. S. v. Coolidge, 2 Gallison, 364. A similar case in England is mentioned as occurring in 1854. Powell, Evidence (3d ed.), 29.

[3] [Now Rev. Laws, c. 175, s. 18.]

[4] Palfrey, Hist. New Eng. i. 43–50.

[5] "And it is ordered that no Indian shall at any time *Powaw* or perform outward worship to their False Gods or to the Devil, in any part of our jurisdiction, whether they shall be such as shall dwell here

oath be administered to such persons? Could the Pilgrim or the Puritan allow before his magistrates the invocation of Baäl or of Satan? or the swearing in of one who knew no God at all? Evidently not. And yet there was constant occasion for Indian testimony. For example, Zachariah Allin, of the Plymouth Colony, was convicted, in 1679, "by the testimony of sundry Indians," of having supplied them "with some quantities of strong liquors."[1] Although this was a trial by jury, yet it is expressly said to have been according to "Chapter 14th of our Book of Laws, section the 7th." Turning to this[2] we find that "It is ordered that the accusation, information, or testimony of any Indian or other probable circumstance, shall be accounted sufficient conviction of any English person or persons suspected to sell, trade, or procure any wine, cider, or liquors above said, to any Indian or Indians, unless such English shall, upon their oath, clear themselves from any such act of direct or indirect selling; . . . and the same counted to be taken for conviction of any that trade any arms or ammunitions to the Indians." This procedure was enacted in the Massachusetts Colony in 1666, in the Plymouth Colony in 1667, and later in the Province, in 1693–4.[3] While, as in Allin's case, it might be combined with a jury trial, this was really "trial by oath," a very ancient thing.[4] A touch of it may be seen, in Massachusetts, under a statute relating to usury, Stat. 1783, c. 55, as explained by Shaw, C. J., in Little *v.* Rogers, 1 Met. 108, 110 (1840).

or shall come hither; and if any shall transgress this law, the *Powawer* shall pay five pounds, the procurer five pounds, and every other countenancing by his presence or otherwise (being of age of discretion), twenty shillings; and every town shall have power to restrain all Indians that shall come into their towns from profaning the Lord's day." This was a Massachusetts statute of 1633, preserved in the "Laws of 1660." (Whitmore's ed., Boston, 1889) Part II. 163. A similar provision is found in the Plymouth Col. Laws, 298, "Laws of 1671."

[1] Plym. Col. Records, vii. 242, 247.

[2] Plym. Col. Laws, 290; Plym. Col. Rec. xi. 234, 235.

[3] Plym. Col. Rec. xi. 219, 256; Plym. Col. Laws, 152; 4 Mass. Rec. Part II, 297; Whitmore's edition of Mass. Laws of 1660 and Supplements, Part II, 236; 1 Prov. Laws, 151.

[4] Thayer's Preliminary Treatise on Evidence, 24–34.

What was thus called in the books Indian "testimony," was probably not under oath. In the sort of case just referred to, the Indian merely made a criminal accusation. How was it in civil cases? An answer is found in a Plymouth law of 1674,[1] where, after reciting that many controversies arise between English and Indians, and that Indians "would be greatly disadvantaged if no testimony should, in such case, be accepted but upon oath," "it is ordered that any court of this jurisdiction before whom such trial may come, shall not be strictly tied up to such testimonies on oath as the common law requires, but may therein act and determine in a way of Chancery, valuing testimonies not sworn on both sides according to their judgment and conscience." In March, 1679–80, in Dexter & wife *v.* Lawrance (7 Plym. Col. Records, 222, 223), in an action of trespass on land of the female plaintiff, purchased by her of an Indian, the jury's verdict ran thus: "If Indian testimony be good in law, we find for the plaintiff five shillings damage and the cost of the suit; but if not good in law, we find for the defendant." It is added: "The charges of the suit is three pound, which was ordered by the court to the plaintiff." It seems a fair interpretation that this means judgment for the plaintiff, and so a holding that "Indian testimony" was good in law. It will be observed that the suit was between white persons, and that the statute related only to controversies between whites and Indians.[2]

In Smith *v.* Freelove (7 Plym. Col. Rec. 255, 256), in 1682, in an action of trespass relating to Hog Island in Plymouth, while John Alden, "aged eighty-two years, . . .

[1] Plym. Col. Records, xi. 236; Plym. Col. Laws, 171.

[2] In Rhode Island, in 1673, the General Assembly, after directing the trial of an Indian charged with murdering another Indian, by a jury of "six Englishmen and six Indians," ordered "that, in all cases of this nature wherein one Indian hath a complaint against another Indian, the testimony of an Indian may be taken, and in the judgment of the jury to accept or refuse the evidence as it were the testimony of an Englishman." 2 R. I. Col. Rec. 509. [See Judd's History of Hadley, 263, for trial by jury of four Indians for murdering a white man in 1696.]

being one of the first comers into New England to settle at or about Plymouth, which now is about sixty-two year since," in giving his testimony is regularly sworn, — four "ancient Indians . . . do affirm and testify" merely, the magistrate certifying that these "testimonies was subscribed to and declared to be the real truth."

There are instances, and probably many of them, in the court records of the Province, in the eighteenth century, where Indian testimony was introduced. In some the memorandum is added, "Sworn in court," and "Attested in court." In some it is merely described as "testimony." And again, as in the deposition of "Hepsabe Seeknout, widow of Joshua Seeknout, late Sachem of Chappaquiddick," dated Oct. 1, 1717, it is said to be "taken in court and spoken as in the presence of God." We may observe this same form of injunction formerly given in England to witnesses brought forward by one on trial for treason or felony, none of whom could be sworn until 1695, in high treason, and 1702 in felony.[1] "Look you here, friend," said Chief Justice North, in 1681, at the trial of College for high treason, when the accused called one of his witnesses, "you are not to be sworn; but when you speak in a court of justice you must speak as in the presence of God, and only speak what is true."[2]

It may be added, that in criminal trials and inquests where Indians were concerned, there was a common practice of adding Indians to the jury, much as witnesses to deeds were added to juries in the old days of the English law, but for a different reason.[3] In June, 1675, in the Plymouth Colony, three Indians were tried for the murder of another Indian and convicted. The names of the twelve jurors are given,[4] and it is added: "It was adjudged very expedient by the court that together with the English jury above named, some of the most indifferentest, gravest, and

[1] Stat. 7 Wm. III. c. 3, and Stat. 1 Ann, c. 9; 2 Hale, Pl. Cr. 283.
[2] 8 How. St. Tr. 626.
[3] Thayer's Preliminary Treatise on Evidence, 97.
[4] 5 Plym. Col. Rec. 168.

sage Indians should be admitted to be with the said jury, and to help to consult and advise with, of, and concerning the premises. (Then follow their names.) These fully concurred with the above written jury." The verdict was guilty; it began: "We of the jury, one and all, both English and Indian, do jointly and with one consent agree upon a verdict," &c.[1]

While converted Indians might of course be sworn, it is, I believe, matter of conjecture how far, if at all, unconverted Indians were formerly admitted to the oath in Massachusetts. They were either "worshippers of false gods" or atheists. The latter could not testify here until 1859. The former, after the case of Omichund *v.* Barker,[2] in 1744–5, might have testified under the forms recognized in their religion, when they had any; and it may be that a search in our Judicial Records under the Province will reveal instances of that practice. I know of no clear case.[3]

In Omichund *v.* Barker, it was declared to be the common law of England that heathens (in that case, native Hindoos)

[1] A like case, in 1682, is found in Plym. Col. Rec. vi. 98, the case of an Indian indicted for rape on a white girl. The names of the twelve jurymen are given; "unto which English jury four Indian men present were added, viz.;" etc. In Chief Justice Lynde's Diary, under date of June 14, 1732, he speaks of holding court at Nantucket with a "grand jury of eighteen, a 3d Indians." Bills of indictment against several Indians were under investigation. Again, on July 13, 1737, it appears that the grand jury of twelve, mostly Quakers, above mentioned (p. 315, n. 1), had also four Indians added to their number, and they found *billa vera* against an Indian woman charged with murder for concealing the death of a bastard child.

[2] 1 Atk. 21; s. c. 2 Eq. Cas. Ab. 397; Willes, 538.

[3] The opportunity for such a search will soon exist when the thorough and admirably devised work of collecting, arranging, and indexing our early judicial records, now going forward under the direction of John Noble, Esq., Clerk of the Supreme Judicial Court for the County of Suffolk, shall have been completed. To his courtesy I am indebted for a number of the references here used. I must not omit to mention that courts were established among the Indians, in some cases, at their request, and Indians were appointed to try small causes among their people. Mass. Records, ii. 188 (1647). Chief Justice Lynde in his Diary (p. 28) speaks of visiting an Indian magistrate at Nantucket, in 1732, — Corduda, "a good and strict old man." It is not necessarily to be concluded that any oath was administered to the unconverted. But I observe that where Indians were a part of coroners' juries, upon the death of an Indian, the verdict in some cases expressly says that it is under oath, and no qualification is made as to the Indians. Such a case occurred at Barnstable in 1720, and at Yarmouth about the same time. It may be conjectured that, as time went on, Indians would generally

might testify when sworn according to the forms and ceremonies required by their own religion; on the principle that no more was essential for an oath, than that witnesses should "believe in a God, and that he will punish them if they swear falsely."[1] The doctrine was there laid down that it was not necessary to believe in a future existence, but only in a God who will punish in the present state; that greater credit might be given to a witness who believed in divine punishments hereafter;[2] and that "such infidels, if any such there be, who either do not believe in a God,[3] or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances." This case, therefore, disposed of all difficulties, growing out of the form of the oath, or the ceremonies accompanying it, in the case of all sorts of persons whose religious belief made them amenable to any kind of an oath.

It is to be remembered, of course, that before the case of Omichund *v.* Barker, and even long before it, the practice of the courts may have conformed to the doctrine there

be admitted to the oath when they did not object, on a presumption of their being converted or, at any rate, of their recognizing its obligation.

[The following interesting extract from the records was given to Professor Thayer by Mr. Noble soon after this article was published:

"2906

Complaint against Zachalenaco otherwise called Zechariah an Indian man of Kecomochog, an Indian town, for murdering an Indian man called Wawhanonaw.

Witnesses.

BENJA. SABIN, Senr. } English
JNO. CHANDLER Junior }
HENRY PAPAMAWANET
CHEAWANCHENET alias
DIG CELLER
NAWASPETO, a woman
MONEHAQUATO, the murdered man's squaw
AWESIOAME, a girl of 11 years old daughter to the murdered man
JYAMUSQUE, a woman
JOSEPH ROBINS

The Indian witnesses (all saving ye little girl) were sworn to be sent to ye Grand Jury

Apr. 24, 1694. SAM. SEWALL."]

[1] *Per* Willes, C. J., Willes Rep. at p. 549.

[2] And so Hunscom *v.* Hunscom, 15 Mass. 184 (1818). Compare the note to that case, as to the English law.

[3] So Thurston *v.* Whitney, 2 Cush. 104.

laid down. That case itself only confirmed the action of Lord Hardwicke in ordering the taking of a deposition in 1739. And another instance of the same sort in the Privy Council is reported by Sir John Strange, as of Dec. 9, 1738.[1] "On a complaint of Jacob Fachina against General Sabine as Governor of Gibraltar, Alderman Ben Monso, a Moor, was produced as a witness and sworn upon the Koran. I made no objection to it."[2]

After the Revolution,[3] a statute was passed that "In the administration of oaths in this Commonwealth, the ceremony of lifting up the hand, as heretofore used, shall be practised, with such exceptions as to Mahometans and other persons who believe that an oath is not binding unless taken in their accustomed manner, as the several courts shall find necessary in the execution of the laws." The practice under this statute appears to have been liberal, and to have followed that of the English court in Colt *v.* Dutton, 2 Sid. 6 (1657), in allowing a variation from the common form, not merely where this was thought not binding, but where it was thought less solemn. And so the court was able to answer the Roman Catholic Bishop as it did in 1834.[4] This practice was sanctioned by Rev. Stat. c. 94, s. 8 (Nov. 1835), allowing it "when the court . . . shall be satisfied" of a witness's belief as to the greater solemnity of another form, — changed by Stat. 1873, c. 212, s. 1, to "when a person . . . shall declare."[5]

Regarding the Indians as atheists, they would regularly have been wholly excluded from giving testimony; for atheists, as I have said, were not admitted to testify in this

[1] 2 Strange, 1104.

[2] Compare a case of swearing a Jew on the Old Testament, in 1667–68, Robely v. Langston, 2 Keble, 314.

[3] Stat. 1797, c. 35, s. 10.

[4] Com. v. Buzzell, 16 Pick. at p. 156; supra, p. 313, n. 1. Compare Vail v. Nickerson, 6 Mass. 262 (1810) and Bonnier, *Preuves* (4th ed.), I. ss. 420, 424.

[5] And so now in Pub. Stat. c. 169, s. 14. [Now Rev. Laws, c. 175, s. 16.] Rev. Stat. c. 94, s. 11, had also introduced the express provision previously mentioned, that believers in any other than the Christian religion might be sworn according to any peculiar ceremonies of their religion.

State until the enactment of the General Statutes (Dec. 28, 1859), where it was provided (c. 131, s. 12; now Pub. St. c. 169, s. 17),[1] that "every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury."[2] But the politic and sensible arrangements about Indians which were actually adopted have been already stated. For such an exception there was not only the usage as to the witnesses of persons accused of high treason or felony, mentioned above (p. 318), but there was the nearer analogy of children too young to take an oath, in rape cases.[3] This practice as to young children was, indeed, declared bad, by a divided court, in Powell's Case, Leach (4th ed.), 110 (1775), and by a unanimous court in Brasier's Case, *ib.* 199 (1779). But it has recently been revived in England, by statute, in a similar class of cases.

2. Passing from the oath and the religious disabilities to those arising from a pecuniary interest in the litigation and from legal infamy, — these[4] were for the first time attacked and dealt with together in 1851, in the first Massachusetts Practice Act, a statute bringing about extensive reforms in civil procedure at common law. A commission, appointed in 1849 by the Governor, in pursuance of a joint legislative resolve of the same year, moved by B. R. Curtis, then a member of the Massachusetts House of Representatives, and consisting of himself, R. A. Chapman, afterwards Chief Justice of the State, and N. A. Lord, another distinguished lawyer, in a report of permanent value, addressed to the legislature of 1851, recommended, among many other things, the abolition of the disqualification of witnesses for crime or interest.[5] The commissioners were

[1] [Now Rev. Laws, c. 175, s. 19.]

[2] In England, this was partly accomplished in 1854 by Stat. 17 and 18 Vict. c. 125, s. 20; it was completed in 1869, by Stat. 32 and 33 Vict. c. 6, s. 4. See the later comprehensive statute of 1888, Stat. 51 and 52 Vict. c. 46.

[3] 1 Hale, Pl. Cr. 634; 2 *ib.* 279.

[4] Abolished in England by Lord Denman's Act in 1843, Stat. 6 and 7 Vict. c. 85.

[5] Hall's Mass. Practice Act of 1851, 150–156.

unwilling to admit parties to testify, but they proposed allowing the examination of parties, before the trial, upon written interrogatories. In making their propositions as to crime and interest, they said, referring to the English legislation of 1843, "We have been a good deal influenced by the course of legislation in England." At that time a measure for allowing parties to the litigation to testify had been pending in Parliament for two years, but was not yet adopted. It passed, however, in England, almost immediately afterwards, in the very year, 1851,[1] which saw the enactment of the commissioners' recommendations in Massachusetts. This Practice Act of 1851 (c. 233) was repealed the next year, in order to change some matters of detail, but was mainly re-enacted as Stat. 1852, c. 312; and in all respects material to the present discussion the two statutes were the same.[2]

3. The case of parties to the suit in civil proceedings was not disposed of until 1856. The Stat. 1856, c. 188, made them competent and compellable in all cases, with qualifications which were abolished from time to time. The case of the husband and wife of the party to a civil suit was dealt with in the Stat. of 1857, c. 305, and in later ones;[3] but the present simple rule which makes the husband or wife of a party competent and compellable in all civil proceedings, and competent but not compellable in all criminal proceedings, was not adopted till the Stat. 1870, c. 393.

4. The admission of the accused person in all criminal proceedings, with the qualifications stated before (*supra*, p. 312), was allowed by Stat. 1866, c. 260. This remarkable inroad upon the common law had been first made in Maine

[1] Stat. 14 and 15 Vict. c. 99. And see Stat. 32 and 33 Vict. c. 68 (1869).

[2] As regards interrogatories to parties before the trial, this convenient introduction of equitable discovery into common-law practice had long been known in some other States of this country. In England it was not introduced until 1854 by the Stat. 17 and 18 Vict. c. 125, s. 50 *et seq.*

[3] In England, in 1853, by Stat. 16 and 17 Vict. c. 83.

by a statute of 1864, c. 280; and it has long been the law in most of our States. It was introduced in the Federal jurisdiction by a statute of March 16, 1878.[1]

The enactment in Maine of this sensible and very important change, not yet accomplished in England, is understood to have been principally due to the efforts of Chief Justice Appleton, an early disciple of Bentham, and author of a little treatise on Evidence, published in 1860. This book was largely a reprint of an early set of articles published thirty years earlier in the American Jurist,[2] eagerly advocating the English reformer's views. It was mainly Bentham's influence working through younger men, such as Denman, Brougham, and Taylor, the writer on Evidence, that overthrew so rapidly in England the system of witness exclusion. It was the English example that moved us. And as we see, it was the same powerful influence of Bentham that has finally carried the reform on this side of the water to a point not yet reached in his own country.[3]

[1] 20 U. S. Stat. at Large, 30.
[2] Beginning in Vol. IV. p. 286.
[3] "I do not know," says Sir Henry Maine, "a single law reform effected since Bentham's day which cannot be traced to his influence." Early History of Institutions (London, 1880), 397.

TRIAL BY JURY OF THINGS SUPERNATURAL

[This paper was first read before the dining club referred to on page 153 above, and was afterwards published in the Atlantic Monthly for April, 1890 (vol. 65, p. 465).]

THE law can deal with the supernatural — with such questions as the existence of God or the devil — in any way that it chooses. Two ways have been adopted. One is that of assuming their truth and reality, and then legislating upon that basis, in such a way as leaves open no question of fact about them; directing certain conduct, forbidding certain other conduct. The volume of our oldest Anglo-Saxon laws begins with an assumption of the existence of God. It is providing a penalty for stealing, and opens thus: "The property of God and of the Church twelvefold." This is the first sentence in the long annals of our recorded English legislation, now reaching back for nearly thirteen hundred years. The existence of God has always been assumed in English law; and so the English Commonwealth punished capitally a denial that God exists, and any denial of his leading attributes such as his omnipresence, of the Trinity, of certain things about Christ, of the resurrection of the dead, etc. It is laid down by high authority in England to-day, although this is controverted, that it is punishable as blasphemy at common law to deny the truth of Christianity or the existence of God. In the opinion of Mr. Justice Stephen, it is, in point of strict law, criminal blasphemy in England to sell, or even lend, a copy of Strauss's "Life of Jesus," or Renan's work of the same name, or certain works of Comte. Whatever may be the exact truth about that, yet in England always, and for the most part here, the plan has been pursued of asserting

and sustaining by law the truth of certain opinions about the supernatural. Even now the phrase is familiar that "Christianity is part of the common law." This is, indeed, a highly figurative expression, very likely to be misunderstood, the import of which may be best surmised by remembering that the old judges also said that the "almanac is part of the common law." It is true in a sense, but by no means in a literal sense. Now, under any such laws as these which I have just referred to, or under our own laws against blasphemy, which rather deal with a certain objectionable method of handling given opinions than with the sober and decent denial of them, there is no chance left for any legal discussion as to the reality or truth, in point of fact, of these things; that is, of the existence of God, the nature of Christ, and the like.

But there is another way. Formerly, legislators did sometimes leave open a question of fact as to the existence and the operation of supernatural influence. When they tried people for witchcraft, it was a question, not indeed whether there were a devil and evil spirits able to communicate with men and to operate among them, for the truth of this was assumed, but whether, on a given occasion, these creatures had actually been operating in league with the accused persons and in a certain way. That is a sort of question which our system of law has not and never had any suitable machinery for determining; and so in recent times we do not take this course. But suppose we did, how should we deal with the question? Precisely as they formerly dealt with it, precisely as we now deal with any other question of fact, — by calling witnesses, by expert testimony, and by a jury, or, it may be, a judge; and this was the same machinery that our ancestors used in the witchcraft cases. When Ruskin was brought into court, some years ago, for libelling Whistler, the artist, by some highly flavored remarks about his pictures and his capacity, the artistic merit of these works was submitted to the decision of a jury: the pictures were hung up before them, and artists like

Burne-Jones and Rossetti were called in as expert witnesses to aid the jury by their opinions. And so it was, a few years ago, when the sculptor Belt brought a like inquiry before a London jury, who sat upon the question of his capacity to do work of any artistic worth, examined his busts, with a collection of which the court-room was furnished, and had to hear, digest, and pass judgment upon the expert opinions of the leading artists of England. The Londoners laughed at all this, and were reminded, they said, of the fable, — how the beasts of the field quarreled as to which should be greatest among them, and called in a passing crow to settle the question. They spoke also in jest of a judge who once proposed to end the everlasting controversy over fate and free will by making up what the lawyers call a "special case," and arguing it out *in banc.* It was, to be sure, a sorry sight. The tribunal was not fit for the task, but it was the best that the law could furnish. And now, if the question of the existence of supernatural intelligences and their influence should ever be submitted to our courts for decision, it would be before just such a tribunal, either a jury or a judge, and upon just such proofs that it would have to be determined. Legally speaking, the fundamental facts about religious truth as manifested upon any given occasion might be settled one way to-day and another way to-morrow, according as different juries should find.

It is not impossible that we may yet see something of this sort done about Spiritualism; that is to say, may see the question passed upon whether it is or is not true. But so far, in modern times, such things do not come up in this way. When Spiritualists get into court nowadays, it is on the charge of defrauding people and using undue influence, as in the case of Home in England, twenty years ago, who was compelled to return several hundred thousand dollars' worth of property to a woman of seventy-five, a Mrs. Lyon, who had given it to him on the faith of certain alleged messages from her deceased mother; it was a mere question

of undue influence, of the abuse of a relation of confidence.[1] And so of the case of a Mrs. Fletcher, who, a few years ago, was found guilty, in London, of obtaining property by false pretenses and conspiracy. She has written a book about it, and insists that her spiritual communications were genuine, and so the pretenses were not false; and that the court wrongly rejected an offer on her part to prove them true, and so condemned her wrongly. But it appeared to the tribunal like a pretty vulgar case of fraud.[2] The court left to the jury fairly the question of her own belief in the manifestations, which was the main thing. In like manner, the Rosses in Boston, not long ago, were arrested for defrauding; and in England, a few years since, a Spiritualist was convicted, under an old statute, as being a "rogue and vagabond" for using these means to defraud.

But the indictment of Mrs. Fletcher on the occasion above named also included a charge of pretending "to exercise divers kinds of witchcraft, sorcery, enchantment, and conjuration." That was under an existing statute in England, — a law that "every one who pretends to exercise . . . any kind of witchcraft, sorcery, enchantment, or conjuration . . . commits a misdemeanor," and must, upon conviction, be imprisoned for a year, etc. This calls for no result, such as defrauding; it is merely a pretending to exercise. That law was enacted in 1736, at the same time that the former law of 1603, which had been passed to please King James when he came to the throne, was repealed. The former law had made it a capital crime, with-

[1] [Lyon *v.* Home, L. R. 6 Eq. 655.]

[2] [Compare Dean *v.* Ross, 178 Mass. 397, 402, where the court said: "The defendant's last two contentions are that no one can say that spirits do not speak through mediums, and that if the deception was so obvious that the plaintiff ultimately found it out she cannot rely on having been deceived by it but ought to have found it out before. As to the first contention it is enough to say, without going further, that the defendant did not rest her case on the truth of her representations that the plaintiff's dead husband spoke to the plaintiff through her, the defendant, but on the flat denial of the whole story told by the plaintiff; and of the second contention it is enough to say that the defendant made the representations to the plaintiff immediately after the death of her first husband, and her eyes seem to have been opened at or about the time she was married to her second husband."]

out benefit of clergy, to "use, practice, or exercise any witchcraft, enchantment, charm, or sorcery, whereby any one shall be killed, . . . pained or lamed in his body"; and also "to consult, covenant with, entertain, employ, fee, or reward any evil or wicked spirit, to or for any intent or purpose." This law hardly supports Selden's well-known remark about it: "The law against witches does not prove there be any, but it punishes the malice of those people who use such means to take away men's lives; if one should profess that by turning his hat thrice and crying buz he could take away a man's life, though in truth he could do no such thing, yet this were a just law made by the state that whosoever should turn his hat thrice and cry buz, with the intention to take away a man's life, should be put to death." The law does not, to be sure, prove that there be any witches, but certainly it assumes the reality and possibility of witchcraft and of commerce with evil spirits. In the trial, then, of cases arising under this law, it became a mere question of fact whether in reality a particular person did practise witchcraft and deal with spirits, or not. But the law of 1736, which is the existing law, deals only with pretending to exercise, etc. An English judge of our own day has raised the question whether it would be a good defense, under the present law, to prove that the accused not only pretended to practise witchcraft, but actually did it. I suppose that it would not. But if it would, then we might see the question of the truth of witchcraft submitted to a jury to-day, as Mrs. Fletcher tried to leave the question of the reality of her communication with spirits.

There was a period of nearly two hundred years during which such allegations had to be passed upon by courts of justice in England, in administering the ordinary laws of the land; and especially during the period of one hundred and thirty years after the act of King James. In Scotland, also, they did it, and, as we all know, here.

I am going to examine a little carefully two famous trials of this sort in the seventeenth century, one in Eng-

land and one in Scotland, with a view, especially, to mark the way in which legal machinery worked, in performing so singular a task as that of passing on the truth and reality of witchcraft. I pass by the New England cases, because they are but poor illustrations of anything that can be called legal. There was, I believe, no lawyer engaged in the trial of the Salem witches, either on the bench or at the bar.

I. The first of the cases I refer to was the famous one of the so-called "Suffolk Witches," tried before Sir Matthew Hale at Bury St. Edmonds, in 1664, for bewitching seven children.[1] This case has a special interest because it was one of the authorities relied upon by the court that condemned so many unhappy persons at Salem, twenty-eight years afterwards. "They consulted," says Cotton Mather (Upham's "History of Witchcraft," ii. 361), "the precedents of former times, and the precepts of learned writers about witchcraft, as Keble on the Common Law, . . . also Sir Matthew Hale's Trial of Witches, printed, Anno, 1682." The testimony included statements by the relatives of the children as to their remarkable behavior, which they themselves had seen; of certain experiments upon three of the children who were in court; and of the expert testimony of a person styled in the report "Dr. Brown of Norwich, a person of great knowledge." This was no other than Sir Thomas Browne, then sixty years old, and a physician of much distinction. This expert was by no means uncommitted on the subject of witchcraft. "For my part," he had said twenty years before, in the Religio Medici, a book already famous and in its seventh edition, "I have ever believed and do now know that there are witches. They that doubt of this do not only deny them, but spirits; and are, obliquely and upon consequence, a sort, not of infidels, but atheists." And in another treatise, published only two years later than the Religio Medici, in dealing with Satan

[1] This case is found in the State Trials and elsewhere. Stephen gives a short account of it in his History of the Criminal Law, i. 378, to which I am indebted for some references.

as "the great promoter of false opinions," he said, in that manner of his which carries pleasure to the marrow of a reader's bones: "Lastly, to lead us further into darkness and quite to lose us in this maze of error, he would make men believe there is no such creature as himself, . . . wherein, besides that he annihilates the blessed angels and spirits in the rank of his creation, he begets a security of himself, and a careless eye unto the last remunerations. . . . And to this effect he maketh men believe that apparitions and such as confirm his existence are either deceptions of sight or melancholy depravements of fancy. . . . Thus he endeavors to propagate *the unbelief of witches,* whose concession infers his coexistency; by this means also he advanceth the opinion of total death, and staggereth the immortality of the soul," etc.

We are not told in the report how it came about that "Dr. Brown" was in the court-room, whether casually or because he was summoned as a witness; but being there, and having heard the evidence and seen the three children in court, he was asked by Sir Matthew Hale to give his opinion; and, as we read in the report, "he was clearly of opinion that the persons were bewitched," and said "that in Denmark there had been lately a great discovery of witches who used the very same way of afflicting persons, by conveying pins into them, and crooked, as these pins were, with needles and nails. And his opinion was, that the devil in such cases did work upon the bodies of men and women upon a natural foundation, (that is), to stir up and excite such humours superabounding in their bodies to a great excess, whereby he did in an extraordinary manner afflict them with such distempers as their bodies were most subject to, as particularly appeared in these children; for he conceived that these swooning fits were natural, and nothing else but what they call the mother, but only heightened to a great excess by the subtilty of the devil, co-operating with the malice of those which we term witches, at whose instance he doth these villanies."

This is the testimony of an "expert witness," and it could not but have had a great effect. For although it was as true then as it is now that the opinions of an expert are not binding upon the jury, are only so much advice and instruction for them, educating them for their task of forming an independent opinion of their own (as in the case of Whistler *v.* Ruskin), yet such opinions, in matters where the jury know so little and the expert knows so much, are often likely to be acted upon as if they were authoritative. It is highly probable that this opinion was so taken. A few carefully put questions to Sir Thomas Browne might have essentially reduced the proportions of his statement. How, for instance, did he know what had taken place in Denmark? Personally, he probably knew nothing about it, for the accounts of his life do not indicate that he had ever travelled there. And so, in a degree, as regards all the witnesses; for it must be remembered that, at that time, on a trial for a capital offense, as this of witchcraft was, the accused person was allowed no counsel to assist him in trying his case. What did these old women, frightened out of their wits, know about cross-examination? At that time, it may be added, *their* witnesses could not be sworn. Strange as it may seem, it was not for a generation yet that these privileges were allowed in England at any capital trial; and it was far later than that before they were allowed in all of them. It is probable that many thousands of accused persons were unjustly hanged in England, while this state of things existed, whose lives would have been saved by a moderately skilful cross-examination of the government witnesses.

In other respects, what was the nature of the legal machinery which was to be applied to the solution of the strange and difficult questions that were brought up in these proceedings for witchcraft? They were to be settled by the verdict of a jury, — instructed by evidence, to be sure, and advised by the court, but having at that time (unlike the present) the legal right to find a verdict on

their own information and knowledge only, although they had not publicly stated this in court so that it might be sifted, and although it was contradicted by all the evidence in the case. While the jury had this great and unmanageable power, their verdict was practically uncontrollable: he whom they acquitted was finally acquitted, and he whom they found guilty was guilty once for all, saving only the judges' power of delaying execution and the king's pardoning power. Points of law might be taken, but there was then no way of reviewing or setting aside the verdict in a criminal case for an error in finding the fact. The judges were then in the latter days of an experiment at fining and punishing jurors for acquitting improperly, but that soon got its death-blow, and the modern practice of granting new trials was just beginning.

Who and what were the jury? A body of plain, every-day men, having some little qualification of property, and challengeable for a few of the plainer disqualifications for fair dealing, as, for example, that they were in the employment of either party, — a good representation, no doubt, of the average fairly well-to-do citizen, filled full of all the ordinary prejudices, presuppositions, ignorance, superstition, of the times. The jury, as Sir Henry Maine has said, is but "a relic of the ancient popular justice, . . . the old *adjudicating democracy*, limited, modified, and improved in accordance with the principles suggested by the experience of centuries." We can get a side-light on the jury of that period, and their feeling about this class of cases at just about this time, from Roger North's life of his brother Francis, the Lord-Keeper Guilford. Francis North became chief justice of the Common Pleas in 1675, while Sir Matthew Hale was yet sitting as chief justice of the King's Bench. He was a good lawyer and a man of the world. "Sharp and shrewd," says one of his biographers (Lord Campbell, Lives of the Chancellors, iv. 333), "but of no imagination, of no depth, of no grasp of intellect, — any more than generosity of sentiment." But he did have

a certain hard sense that kept him free from the delusions that affected that much greater but over-religious man, Sir Matthew Hale. Roger North, in the affectionate and most readable life of his brother to which I have referred, and which Talfourd has called "one of the most delightful books in the world," says that his brother was extremely "scrutinous," as he calls it, in criminal cases when they were at all obscure, especially when they were capital cases; "but never more puzzled," he goes on, "than when a popular cry was at the heels of a business; for then he had his jury to deal with, and if he did not tread upon eggs they would conclude sinistrously, and be apt to find against his opinion. And for this reason he dreaded the trying of a witch. It is seldom that a poor old wretch is brought to trial upon that account but there is, at the heels of her, a popular rage that does little less than demand her to be put to death; and if a judge is so clear and open as to declare against that impious, vulgar opinion that the devil himself has power to torment and kill innocent children, or that he is pleased to divert himself with the good people's cheese, butter, pigs, and geese, and the like errors of the ignorant and foolish rabble, the countrymen (the triers) cry, this judge hath no religion, for he doth not believe witches; and so, to show they have some, hang the poor wretches. All which tendency to mistake requires a very prudent and moderate carriage in a judge, whereby to convince rather by *detecting of the fraud* than by denying authoritatively such power to be given to old women."

Francis North had been made the more thoughtful upon this subject on account of the conviction of two old women before one of his colleagues upon trivial evidence, reinforced by their confessions. "This judge," says Roger North, "left the point upon the evidence fairly (as they call it) to the jury, but he made no nice distinctions, as how possible it was for old women in a sort of melancholy madness, by often thinking in pain and want of spirits, to contract an opinion of themselves that was false; and that

this confession ought not to be taken against themselves, without a plain evidence that it was rational and sensible, no more than that of a lunatic or distracted person."

Roger North had himself been present when his brother had to try an old man for bewitching a girl of thirteen. The girl had shown the usual symptoms of strange fits when the man came near her, and of spitting out pins. But these pins, unlike the common case, were straight, and his lordship, we are told, "wondered at the straight pins, which could not be so well couched in the mouth as crooked ones; for such only used to be spit out by the people bewitched. He examined the witnesses very tenderly and carefully, and so as none could collect what his opinion was; for he was fearful of the jurymen's precipitancy, if he gave them any offence." The old man defended himself well (without counsel, of course), and called his witnesses, who could not (as I have said) be sworn. "After this was done," goes on the biographer, "the judge was not satisfied to direct the jury before the imposture was fully declared, but studied and beat the bush awhile, asking sometimes one person, and then another, questions as he thought proper. At length he turned to the justice of the peace that committed the man and took the first examinations, and, 'Sir,' said he, 'pray will you ingenuously declare your thoughts, if you have any, touching these straight pins which the girl spit? for you saw her in her fit.' Then, 'My lord,' said he, 'I did not know that I might concern myself in the evidence, having taken the examination and committed the man. But since your lordship demands it, I must needs say I think the girl, doubling herself in her fit, as being convulsed, bent her head down close to her stomacher, and with her mouth took pins out of the edge of that, and then, righting herself a little, spit them into some bystander's hands.' This," adds the biographer, "cast an universal satisfaction upon the minds of the whole audience, and the man was acquitted."

Now Hale, in dealing with his jury, gave them no such

quiet exhibition of his anxiety and his doubts; he took a very different method, and one which is exactly indicated by Roger North's slurring expression as to his brother's colleague, Raymond, — "whose passive behavior," as he said, "should let those poor women die," — namely, "he left the point . . . fairly (as they call it) to the jury." Hale had done just this, and in a manner which indicated his own unwillingness to interfere with the natural movements of the jurors' minds, whose tendencies on such a question, of course, he must well have known. "He would not," he said, in charging the jury, "repeat the evidence to them, lest he should vary it one side or the other. They had two things to ask: Were the children bewitched? Were the prisoners guilty of it? That there were such creatures as witches he made no doubt at all; the Scriptures and the laws of all nations, including England, showed that. And he desired them strictly to observe this evidence, and the great God of heaven to direct their hearts in this weighty thing. For to condemn the innocent and to let the guilty go free were both an abomination to the Lord." Thereupon the jury went out, and in half an hour found the women guilty on thirteen charges. This was on Thursday afternoon, March 13, 1664–5.

Now what was this evidence which Chief Baron Hale was content to leave to the jury with so little remark, and with no criticism whatever? Our source of information for this is an account printed certainly as early as 1682, and perhaps, as there is some reason for thinking, in Hale's own lifetime, — an account prepared with care by one who was present at the trial. It bears plain marks of an effort to vindicate the justice of the proceeding.

There were, as I said, seven children supposed to be bewitched: of these, one had died before the trial; of the others, not one actually testified in court; three were reported as sick, and the other three who came to court were conveniently bewitched at this time and made dumb. But these three did go through many manifestations before the

court, which must have strongly impressed any jury of plain men whose minds were preoccupied with a belief in witchcraft. One of the children was a girl of eleven, who lay on a table in the court-room, on her back, as one in a deep sleep, unable to move any part of her body, except (a common symptom in witch cases) that her stomach, "by the drawing of her breath, would arise to a great height." Then she recovered herself and sat up, but could neither see nor speak, though able to understand what was said to her; and then "she laid her head on the bar of the court with a cushion under it." The judge directed one of the alleged witches to come near and touch the girl, "whereupon," we read, "the child, without so much as seeing her, for her eyes were closed all the while, suddenly leaped up and catched Amy Duny (the old woman) by the head and afterwards by the face, and with her nails scratched her till the blood came, and would by no means leave her till she was taken from her; and afterwards the child would still be pressing towards her and making signs of anger conceived against her." Another girl of eighteen "fell into her fits" on being brought into court, and was carried out; in half an hour she recovered, and came back and was sworn, but as she undertook to testify "she fell into her fits, shrieking out in a miserable manner, crying, burn her, burn her, which were all the words she could speak." Repeated experiments were made in court of the touching of the children, while appearing to be insensible, by the old women, and of their starting up into activity. Now, says the reporter, "there was an ingenious person who objected that there was here a great fallacy in this experiment," for the children might be shamming. Whereupon the judge (who was always fair) had an experiment tried that well-nigh upset the whole business. Three persons of consideration, including Serjeant Keeling, were desired by the court to attend one of the children, in the further part of the hall, while she was in one of her fits, and then send for one of the old women. This was done. The girl's apron was put

over her eyes, and a person who was not one of the witches touched the girl's hand, which produced the same effect as the touch of the old women themselves. "Whereupon," goes on the report, "the gentlemen returned, openly protesting that they did believe the whole transaction of this business was a mere imposture. This put the court and all persons into a stand." But at length Mr. Pacy, the father of the eleven-year-old girl, made a naïve suggestion that seems to have been thought a valuable one, namely, he "did declare that possibly the maid might be deceived by a *suspicion* that the witch touched her when she did not"; and the reporter, with an amusing credulity, says this was afterwards found to be true, so that "by the opinions of some this experiment (which others would have a fallacy) was rather a confirmation that the parties were really bewitched than otherwise."

One readily guesses that these dramatic incidents must have told strongly on the feelings of any plain and ordinarily kind-hearted jury. Some of the children were probably in a state of real hysteria; and the scene was heightened by all the fear and sorrow which their distressed mothers and relatives felt in telling these things, and in telling how one child had been already killed by these torments, and others were now languishing at home, at the point of death, from the same cause.

The other testimony, which a lawyer of the present day reads with amazement, was calculated to have much effect on the jury. It was, in substance, this: As to two of the children, their mother gave an account of a quarrel which she herself had had with one of the old women some years before. The woman had had the reputation of being a witch for several years. As soon as this quarrel came, the witness's little nursing boy was very sick for several weeks. She consulted a doctor who was reckoned good at helping bewitched children, and was advised by him to hang up the child's blanket by the fire all day, and when she took it down at night to burn anything that she found in it. She

did hang it up, and at night found in the blanket a great toad, which she caused to be held in the fire with the tongs; then followed (as the reader will anticipate) "a great and horrible noise," "a flashing in the fire like gun-powder," "a noise like the discharge of a pistol, and thereupon the toad was no more seen nor heard." The child recovered, but the old woman (the witch) was found, on the next day, to be herself terribly burned, and she charged this on the witness, and threatened her.[1] About two years later, the witness's daughter, ten years old, was taken in much the same way, and in her fits charged this old woman with afflicting her, and soon died; and, moreover, the witness herself became lame, and ever since, for more than three years, had gone on crutches.

As to two more of the children, eleven and nine years old, their father testified to a quarrel with one of the old women; and that the younger daughter immediately fell into fits, had the pricking of pins in her stomach, and shrieked out like a whelp, and continued in this condition nearly a fortnight, charging the old woman with afflicting her. He caused the woman to be put in the stocks, whereupon the other daughter fell sick in the same way. Their aunt testified that they were then sent to be under her care; that she had at first no faith in the stories, and thought that the children were deceiving; but they went on to throw up crooked pins and sometimes nails, although she took care that no pins were used in their clothes; and a large

[1] As regards this experiment with the toad, it is singular how the human fancy holds on to such conceptions. A near relative of mine, who lived in Andover eighty years ago, has told me that she went to school there, as a very young child, to an old woman who was generally believed to be a witch. On a neighboring farm, one day, the churning did n't work right, and the failure of the butter to come was attributed to the machinations of this old woman. The butter-makers resorted to the usual way of exorcising the evil influence by heating the spit and thrusting it red-hot into the cream. It turned out that the old woman at once appeared with a burned hand; and this was widely received as conclusive evidence that she was a witch. This was in the nineteenth century. Of this old woman, as of Moll Pitcher of Lynn, who was known to my friend, I was told that she did not discourage this opinion, for it was worth something to her in the gainful occupation of fortune-telling.

quantity of these pins, and also nails from the same quarter, were produced to the jury. The doctor who attended one of the children testified to his inability to account for the cause of their disorder. Similar stories were told of the other children. And finally, by way of confirming the idea that all this sort of thing was traceable to the old women, a man testified to his wagon having once struck and injured the house of one of the women, whereupon the cart was afterwards upset, and also stuck unaccountably in a gate, and the like. Another man, having touched her house with his axle, had four horses die soon afterwards, and also cattle and pigs; and himself grew lame in his legs and was troubled with lice. A woman, having been threatened by one of the old women, afterwards lost all her geese and had a new chimney fall, and also lost a firkin of fish which her brother had sent her from the "northern seas"; as to the firkin, the unfortunate mariners who were to have delivered it to her told her "they could not keep it in the boat from falling into the sea, and they thought it was gone to the devil, for they never saw the like before." An examination of the persons of the alleged witches was also had by some women appointed by the court, and they reported certain appearances which were in those days considered marks of a witch.

This, with the expert testimony of Sir Thomas Browne, was, so far as we can tell, all of the evidence. Think of Sir Matthew Hale leaving all that rubbish to the jury! What is even worse, think of his doing it with nothing to mark any just appreciation of its character! That Hale himself really believed the evidence and approved the jury's action is shown by the fact that he sentenced the women at once, on the next morning. He might have delayed, and have respited them; that was very common with the English judges when there was any doubt. But here the conviction came in the afternoon; and Hale, after having the three children and their parents at his lodgings the next morning, where he found, as the reporter tells us, that

within half an hour after the conviction the children had all recovered, that they had slept well, that they now spoke perfectly and were in good health, proceeded forthwith to the final step. He must also have learned that morning of the alleged circumstance that the mother, who had been for more than three years on crutches, and had testified on them in court, was, upon the jury's verdict, "restored to the use of her limbs," and went for the first time without her crutches. Hale had two of the children come into court and confirm all that had been testified by their friends; "the prisoners," says the reporter, "not much contradicting them." And then, "the judge and all the court (being) fully satisfied with the verdict, gave judgment against the witches that they should be hanged." They were urged to confess, but would not; and in three days they were executed.

II. I pass at once to the Scotch case. This case is remarkable for preserving the principal arguments of the prosecuting counsel, both to the court and jury; so that we may see just what the line of reasoning was by which a tribunal might be persuaded of these things. It brings strongly to light the way in which the security afforded by legal forms and solemnities for the accurate investigation of facts may wholly break down when the men who are to do the judging have their minds saturated with certain sorts of opinion. We should be very foolish if we supposed that we are wholly rid of this sort of difficulty at the present day. It is familiar to us in some of its plainer forms. The most conspicuous illustration of it in our own time is the outcome of the electoral commission for determining who had been chosen President in 1876. On a set of questions which divided the commission, as they divided the country, sharply on political lines, we tried to make the commission judges. Most of its members, no doubt, approached the questions with a patriotic purpose to be perfectly impartial, perfectly judicial. They listened to arguments on both sides, and deliberated and gave their

opinions; and they were divided, eight to seven, — precisely on party lines; and this not merely on one or two of the questions, but on every question of importance. In the journal of the commission one may read thirty-four divisions of eight to seven, almost every one that is recorded. Some persons blamed them. But whom would you blame? I believe it is common for those who lost to blame all of those on the opposite side, as having been partisans. But of course it must not be overlooked that the minority showed precisely the same solidarity. The fact is that the human creature, do what he will, *cannot* rid his mind of preconceptions; and I suppose that we ought to thank God that it is so, that we cannot make ourselves into mere thinking machines. At any rate, so the fact is; these judicial treasures we have in earthen vessels.

The Scotch case came on thirty years or more after the trial of the Suffolk Witches, near Glasgow. It arose in 1696, a few years after our Salem trials. It derives a certain interest from the fact that the bewitched person, a girl of eleven, Christian Shaw, afterwards, with her mother, began at Paisley that manufacture of thread which has since made the place famous the world over. Her father was the Laird of Bargarran, in Renfrewshire, a little way out of Paisley. Christian had caught a servant, Katherine Campbell, stealing some milk on a Monday in August, and received a vigorous cursing for it; thrice the servant wished that the devil might "harle her soul through hell." On the next Friday, Agnes Naesmith, an old widow and a reputed witch, was in the laird's courtyard; the girl, Christian Shaw, gave her a saucy answer to some question, and the old woman appears to have shown resentment. On the next evening, Saturday, strange manifestations began with Christian Shaw, which continued for months. She flew over her bed, lay insensible for days, stood bent like a bow upon her feet and neck at once, "fell a-crying" that Katherine Campbell and Agnes Naesmith were hurting her, etc. She was taken to Glasgow to see a distinguished

physician, Dr. Brisbane. Here her health grew better. She had an intermission of nearly a fortnight. She went home again, and her symptoms came back worse than ever; her head was pulled down towards her breast, and her tongue violently thrown out and squeezed between her teeth, especially when she undertook to pray. They took her back to Dr. Brisbane at Glasgow; and now, even on the journey thither, she developed a new thing, — the spitting out of hairs, curled and knotted, of coal cinders as big as chestnuts and almost too hot to handle, straw, pins, small bones, pieces of wood, feathers, gravel-stones, candle-grease, and egg-shells. She was visited by great numbers of people in Glasgow, and by many of distinction. She sat up in bed, unable to see or hear, and called for a Bible and a candle, and preached to the invisible Katherine Campbell for two hours. And now she began to accuse others, and to see the devil himself. The clergy took it up; she became the object of constant observation and labor with the credulous Presbytery of Paisley. She saw a good many witches, and was much beset by them and by the devil, particularly when any religious exercise was on. "Usually," we are told in the naïve story of all this, printed within a year or so, in 1698, "when ministers began to pray she made great disturbance by idle, loud talking, whistling, singing, and roaring; and when she recovered she laid this off on the hellish crew about her." Now people would hear sounds as of strokes, and she complained that various people were striking and tormenting her, and urging her to kill her young sister. She went on to name more people, and was tormented when they touched her, among them an old Highlander who had come along and asked a night's lodging; his touch tormented her, and he was arrested. The next day, a clergyman tried the experiment of covering her with his cloak, and bringing her in and letting the Highlander touch her. He did so, and she was at once tormented. Then she begged the Highlander to let her tell their secrets, upon which, says the simple narrative, "the old fellow

looking at her with an angry countenance," her mouth was stopped and her teeth set. Early in February, 1696–7, came a meeting of a commission of distinguished persons appointed by the Privy Council of Scotland to examine and report upon this whole case. Christian Shaw accused various persons, and was touched by them in public and duly tormented. Then came confessions. One person charged by Christian was a beggar, described as "an ignorant, irreligious fellow who had always been of evil fame"; another was his daughter of seventeen, who, after being, as the narrative says, "seriously importuned and dealt with by two gentlemen," confessed and implicated her father and the old Highlander. A boy under twelve was arrested, and although at first he vigorously denied any guilt, he confessed and implicated his brother, aged fourteen, — now in jail at Glasgow, and about to be transported for something else. This boy also, at first, wholly denied the business, "yet," says the narrative, "at length, through the endeavors of Mr. Patrick Simpson, a neighbor minister, ingeniously confessed his guilt."

On February 11 there was a public fast, and Christian was present in church all day, — listening to three sermons; certainly a good day's work. That evening she had a sharp attack; "and when the fit was over," we read that she had to hear another discourse. "Mr. Simpson, going about family worship, did expound Psalm cx., and speaking of the limited power of the adversaries of our Lord Jesus Christ, from the latter part of verse 1, she was on a sudden seized with another grevious (*sic*) fit, in which she put out of her mouth some blood, which raised grounds of fear and jealousy in the minds of spectators that something in her mouth, hurting her, had been the occasion of it; yet they could not get her mouth opened, though they used means to open the same, her teeth being close set. And in the interval of the fit, she being asked if she found anything in her mouth that had been the occasion of her putting out of blood, she replied she found nothing, nor knew the

cause thereof; but opening her mouth, those present found one of her double teeth newly drawn out, but knew not what became of the tooth; for though search was made for the same, it could not be found. After which," we are told, " the minister proceeded (with his discourse), but was again interrupted by her renewed fits, yet closed the exercise with prayer, after which, without more trouble, she was taken to her bed."

She went on in this way accusing more people, a midwife and others, up to a certain Sunday morning near the end of March, when it all stopped. It appears to have been about this time that the final report was made by the commissioners to the Privy Council of the doings of the witches. In eight days a new commission was appointed, " not merely to examine, but now actually to try the accused persons, and sentence the guilty to be burned or otherwise executed to death, as the commissioners should incline." The commission met, heard a sermon by Mr. Hutchinson on the stimulating text, " Thou shalt not suffer a witch to live," and in a day or two adjourned for a month. Three confessions had been heretofore obtained, and it was desired that the clergy should try in this interval to get more of them. This seems to have been regarded as very important; and they succeeded in getting two more on the morning that the commission met. It is strange that neither of these two " confessants " appears to have been put on trial. Twenty-four persons had been accused. Seven of them were tried before a jury, and all convicted. After conviction one confessed, and committed suicide in prison the same night. The other six, including Katherine Campbell and Agnes Naesmith, and at least two of the earlier " confessants," were burned at Paisley on June 10, 1697.

Now, although I have been drawn into this long narrative, my chief concern is with the arguments and the trial. We have no full report; it appears, however, that they had the testimony of Dr. Brisbane, the Glasgow physician and expert, of Christian Shaw herself, now restored and in her

right mind, of the five surviving "confessants," and of many others. The accused had an advocate, and in this they were more fortunate than a witch tried in England would have been at that time.

Observe, then, that this Scotch case is very different from that of the Suffolk Witches, in that the person bewitched testified here, and that *five of the alleged witches* also testified. In this way there was brought into the case a body of what was called "spectral evidence," which Sir Matthew Hale did not have to deal with. All of the "confessants" testified that they had personally seen the devil in one or another shape, and had been carried through the air in "flights"; they had met with the devil and companies of witches, being all invisible, and had appeared to Christian Shaw while unseen to everybody else, and put pins and hair, cinders, and the like into her mouth, and had, while invisible, by upsetting boats and otherwise, assisted in several murders.

The testimony of the expert, Dr. Brisbane, was of course important. It was much cooler than that of Sir Thomas Browne in the case of the Suffolk Witches. He adhered, at the trial, to a deposition which he had previously given, in which he had said that he found Christian Shaw, on her first coming, "brisk," "florid in color," "cheerful," and "every way apparently healthful," and that he saw nothing in what took place during her first visit to him — the convulsive motions and groans and talk against Campbell and Naesmith — which was not "reducible to the freaks of hypochondriac melancholy"; and at that time he treated her accordingly, with advantage. But what he could not explain was what happened afterwards. He was often with her, he said, and "observed her narrowly, so that he was confident she had no visible correspondent to supply hair, straw, coal cinders, hay, and the like, all of which on several occasions he saw her put out of her mouth without being wet; nay, rather as if artificially dried, and hotter than the natural warmth of her body. . . . Were it not for the

hay, straw, etc., he should not despair to reduce the other symptoms to their proper classes in the catalogue of human diseases." At the trial, referring to these previous statements, the doctor declared that in his opinion these things "did not proceed from natural causes arising from the patient's body." Now as regards this testimony by Dr. Brisbane, one observes no statement at all that he had at any time had the girl searched. There is also no statement, like Sir Thomas Browne's, that he himself believed in witchcraft or thought these strange occurrences traceable to that; and none that he absolved the girl from cheating. It is, as we have it, only a guarded declaration that these things are not imputable, in his opinion, to any bodily disease. If this was all he meant to say, — and it seems to have been so, — we can hardly excuse Dr. Brisbane from the charge of a cunning or cowardly unwillingness to intimate his whole mind; one can easily guess how a more frank expression as regards imposture on the part of the Laird of Bargarran's daughter, and as touching the folly and credulity of the Presbytery of Paisley, and generally of the learned and fashionable world of Glasgow and of all Scotland, might have affected the prosperity of a famous and successful physician; but it was the part of a scholar and of a man, at such a time, to say what he thought. If he had done it, it looks very much as if he might have saved the lives of seven poor wretches who afterwards died for this, and might have checked the horrid superstition that had many a victim yet. In reality, this canny statement of the expert (if it be really his exact statement, and not a poor report of it),[1] "that in his opinion the things mentioned in his attestation did not proceed from natural causes *arising from the patient's body*," was pressed upon the jury as saying that it came from no natural causes at all. These things, said the government's advocate to the jury, were

[1] We cannot be quite sure; but one suspects Dr. Brisbane grievously. This deposition and subsequent evidence are given at pages 129, 130, and 140 of "The Witches of Renfrewshire," Paisley, Alexander Gardner, 1877.

"deponed by Dr. Brisbane, in his opinion, *not to proceed from a natural cause.*" He did not say that; he said something very different indeed from that, and yet something that might easily be taken for it.

But not yet, as regards this Scotch case, am I speaking of what seems to me its most interesting feature, the illustration it furnishes of the use of legal machinery in ascertaining questions of fact touching the supernatural. This is found in the two arguments for the government to which I have referred, — one to the court, the other to the jury. There is something very ghastly in the application which they furnish of the formal precision of legal and logical methods, and of the analogies of natural science to a consideration of all this wretched compound of imposture and superstitious misconception which was laid before the jury. There came first a long argument to the court, on the question of receiving the "spectral evidence"; that is, the testimony of the five "confessants" and of Christian Shaw to the supernatural sights and sounds and communications which they had had, — all of which was ultimately received and submitted to the jury. The line of argument was this: You have here, the counsel said to the court, a case, where the witchcraft is sufficiently proved, and also the fact that these accused persons are the witches; and the question is of admitting *in such a case,* necessarily involving, as it does, the existence and present exercise of supernatural influences, the testimony of six persons testifying to their own seeing and hearing of certain things, — things which are in their nature objects of sense. The crime of witchcraft is an occult and secret one; witches work in secret and invisibly to most persons. "It is a part of the witches' purchase from the devil that they cannot be seen at some occasions; so that the abominations committed then would remain unpunished if such witnesses were not admitted." When these witnesses testify to going and coming from meetings, *especially on foot;* falling down and worshipping the devil, then under a corporeal shape (and he had such

a shape when he tempted our Saviour); the murdering of children by a cord and napkin; the tormenting of others by pins, etc., they speak of plain objects of sense and are to be believed. It is said to be dangerous to allow this, since Satan may have represented others by false shapes. But here other facts point the same way, and, besides, experience and the opinion of the wisest divines, lawyers, philosophers, physicians, statesmen, judges, and historians, at home and abroad, are that the apparitions of witches are commonly real, and we must go by what is generally true. Moreover, it is easier for the devil to transport people in hurricanes, as in the case of Job, protecting their faces so that they are not choked with the rush of air, than it is to form the curious miniature of fictitious transactions on their brain. It is both a greater crime and pleasure *to act* in truth, and the devils and witches do so in fact (unless the place be far distant or the party indisposed), and this is supported by the writers and witches of all nations and ages. The extraordinary nature of these things is not to diminish the certainty of these proofs, for in law, as in nature, reality and not simulation is to be presumed. Our Saviour's miracles were the subject of the testimony of witnesses, his transfiguration, walking on the waters, standing in the midst of the disciples while the doors were shut, and "arguing assurance by their senses that a spirit had not flesh and bones." And if it still be said that it is not conceivable how the girl or witnesses could see what the bystanders could not see, besides its being impossible that real bodies should enter at closed doors and windows and should not intercept the sight of what is behind them, the answer is: (1) that we are not to deny proved facts because philosophers have not certainly reached yet the invisible manner of their existence, like the facts of nature that the loadstone draws iron and the compass turns always to the pole, and the facts of Scripture that an angel (and the devil was an angel once, and retains as yet his old power) smote the Sodomites so that they could not see the door

while they did see the house, and that Balaam's ass saw the angel when his master could not see him; and (2) that where the fact, as here, is proved, it is enough for us to suggest a possible way in which it may come about; such a way is this, namely: Satan is a personage whose knowledge and experience make him perfect in optics and limning, and he is also very strong and agile, "whereby" (and here I cannot do justice to the passage without exact quotation) "he may easily bewitch the eyes of others to whom he intends that his instruments should not be seen, in this manner as was formerly hinted, namely, he constricts the pores of the witches' vehicle, which intercepts a part of the rays reflecting from her body; he condenses the interjacent air with grosser meteors blown into it, or otherwise does violently agitate it, which drowns another part of the rays; and lastly he obstructs the optic nerves with humors stirred towards them: all which joined together may easily intercept the whole rays reflecting from their bodies, so as to make no impression upon the common sense; and yet, at the same time, by the refraction of the rays gliding along at the fitted sides of the volatile couch, wherein Satan transports them, and thereby meeting and coming to the eye, as if there were nothing interjacent, the wall or chair behind the same bodies may be seen; as a piece of money lying out of sight in a cup becomes visible how soon the medium is altered by pouring in some water on it. Several of your number do know that the girl declared that *she saw and heard the door and windows open* at the witches' entry, when, no doubt, the devil had precondensed a soft postage on the eyes and ears of others to whom that was unperceived. So Apolonius escaped Domitian's flight, and Giges became invisible by his magical ring. John of Sarisberrie tells us of a witch that could make anything not to be seen; and Mejerus relates another that had the like power. Some Italian witches of greater than ordinary wit confessed to Grilandus the devil opening doors and windows for them, though the more ignorant (witches) by a fasci-

nation think themselves actors of this; whence (our lawyer concludes) it ought not to be doubted by any reasonable man what in all times and places is so incontestable fact."

There was much more in this singular argument, but surely enough has been quoted to mark the nature of the idle and wandering speculations into which a legal discussion may degenerate when it enters upon such questions as these. What the considerations were that prevailed with the court we do not know. But in fact, as I said, all this evidence was received; some of it under a *cum nota,* that is, a qualification that it must have corroboration, and the rest as that of persons not old enough to be sworn, and so to be taken with caution.

The jury at the trial sat continuously for twenty-six hours. Such was the custom of that time even in England, — to go through a case without adjourning. One sees many examples of it in the State Trials. Twenty hours were taken up with the putting in of the evidence and incidental arguments; and then came six hours for the final addresses and the final deliberation.

The government advocate's argument to the jury was brief. (1) He drew their attention to the extraordinary nature of these occurrences, which on the one hand are true, as being proved by unexceptionable witnesses, and on the other are very strange, of a sort not explainable by the ordinary course of nature. He recited all that I have mentioned, and more: such as Christian Shaw's talking once with her invisible tormentors, and asking them about their red sleeves, and then seizing these invisible people and pulling away two pieces of red cloth, unlike any in the house; and again her glove being lifted from the floor by an invisible hand. It is, then (so he argued), plainly to be concluded that *there is witchcraft* here. (2) He enlarged upon a variety of circumstances tending to show that *these accused persons were the witches:* such as that all of them had "insensible marks" on their bodies, that is, places which were not sensitive; most of them had long

been reputed to be witches; none of them ever shed tears; the touch of all of them set the girl into torments; all were named by her, in her fits or out of them. These things, he said, which the wisdom and experience of all nations recognize as the marks of a witch, and which are so many discoveries by Providence of a crime that would otherwise remain in the dark, all concur in these persons, and such a concurrence was never known to happen when they were incorrect. (3) There are the positive depositions of the "confessants" to the actual sight of the devil and the witches at their work. As to these depositions and Christian Shaw's testimony, the "spectral evidence," he drew attention to circumstances that confirmed the witnesses; for example, their concurrence, and the fact that they accused their own relatives. Of one of them the advocate says, "She went on foot to the meeting (of witches) with her father, except only that the devil transported them over the water Clyde, which was easy to the prince of the air, who does far greater things by his hurricanes."

Such were these arguments, the feature which gives its peculiar interest to this Scotch case. It will be observed that, in a sense, they relied upon the same sort of thing that would be relied upon to-day, namely, the testimony under oath of persons speaking to what they say they have seen and heard, and the testimony of experts negativing (for so this testimony was interpreted) any known natural cause as competent to explain the facts thus proved. It is true that documents were laid before the jury that would not be received to-day, — for instance, a long narrative of events prepared by the Presbytery of Paisley; but the purport of it was the same in kind as that of the testimony. The one radical difference between the trial as it was conducted then and as it would have been conducted later, while it was still possible to try for witchcraft (that is, down to 1736), lay in the different preconceptions, the different mental furniture and mental attitude, of the judge and jury at the trials. The "spirit of the age" appears in the things

of which a tribunal will take judicial notice, as the lawyers say.

A great and admirable English judge, Chief Justice Holt, who came in at the English Revolution and sat till 1710, tried eleven cases of witchcraft, but there was never one conviction. As has been truly said, he went far to put an end to witchcraft trials by simply directing the prosecution, in 1702, of one Richard Hathaway, who had declared himself bewitched, and had assaulted a woman as being the witch. At that trial Holt showed, as North had showed, what a shrewd and sensible judge might do and might always have done, even with all the danger from juries at that time: he himself questioned the witnesses narrowly and in a way to reveal imposture. For example, a witness had said that he saw Hathaway with his eyes open and yet unable to see.

Holt. "And yet you say he was blind; how could that be?"

Witness. . . . "I wagged the hair of his eyelids and put a candle to his eyes, and he took no notice of it."

Holt. "How could you know that he did not see?"

Another witness, a woman, testified that she thought Hathaway bewitched.

Holt. . . . "Did you ever see anybody bewitched?"

Witness. "Yes, I have been so myself."

Holt. "How do you know you were bewitched?"

The woman answered, among other things, that she "flew over the heads of them all."

Holt. "Woman, can you produce any of those women that saw you fly?"

Witness. "It was when I was a child. They are dead."

Hathaway pretended to have fasted a long time. One of the witnesses called by him was a doctor. When the counsel had done with him, Holt put him two questions.

"Doctor, do you think it *possible*, in nature, for a man to fast a fortnight?"

Witness. "I think not, my lord."

Holt. "Can all the devils in hell help a man to fast so long?"
Witness. "No, my lord, I think not: and that made me to suspect him." [1]

And then in charging the jury Holt put the question to them, not whether Hathaway was bewitched, but whether "he was under a delirium of his mind, and did fancy himself to be bewitched." Here we have a man whose mental outfit was of the modern style. This temper was not favorable to prosecutions for witchcraft. If it had been exhibited by Sir Matthew Hale or the Scotch judges, there would probably have been no convictions and certainly no executions.

[1] [14 How. St. Trials, 639.]

BRACTON'S NOTE BOOK[1]

[This was written as a book review for the "Nation," in which it appeared on March 22, 1888. No one would have lamented more than Professor Thayer the recent untimely death of Professor Maitland, of whose work he had the highest appreciation.]

THIS is a book of extraordinary interest and value; and the importance of its contents is well supported by the thorough and admirable manner in which it is edited. It presents us with authentic copies from the judicial records, hitherto unpublished, of cases in the King's courts of the time of Henry III., covering nearly the first twenty-four years of his reign, say, 1217–40. Not merely that; it is a selection of the more important cases, and made by a contemporary writer; and there is very strong reason indeed to believe that it was made by Bracton himself.

Bracton was one of the principal judges of the time, and the author of a great legal treatise of which, comparing it with Blackstone, Mr. Maitland well remarks: "Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole." It has been the fashion, at one time and another, to slight Bracton on account of his use of matter derived from what has been called the legal *plenum* of that period, the Roman law. Fitzherbert, in his "Abridgment" (*Garde*, 71), has preserved a remark of the Judges in the generation just preceding his own, to the effect that Bracton was never regarded

[1] "Bracton's Note Book": A collection of cases decided in the King's Courts during the reign of Henry III., annotated by a lawyer of that time, seemingly by Henry of Bratton. Edited by F. W. Maitland of Lincoln's Inn, Barrister at Law, Reader of the English Law in the University of Cambridge. London: C. J. Clay & Sons, Cambridge University Press Warehouse. 1887. Three volumes, octavo, pp. 337, 720, 723.

as an authority in English law — "et tout le court dit que Bracton ne fuit unques tenus pur auctor en nostre ley." This was repeated by a chief justice in the next century (Plowden, 358); and in the last century we hear it more than once, not only in England, but on the Continent. But, whoever says it, we know it now for a shallow and ignorant remark; we know that the sober Reeves was much nearer right when, in composing his "History of the English Law," he praised Bracton so highly and adopted him "as the basis of all legal learning." Now there is good and probably sufficient reason to believe that we have here a note book of cases, prepared under his own supervision, which Bracton used in the preparation of his great work; and we may now have the novel and really startling satisfaction of testing and weighing Bracton's statements of the law by comparing them with the cases upon the authority of which he made them. It is many a year since any contribution has been made to the study of the history and foundations of the English law which is at all comparable to this.

The manuscript of the "Note Book" was discovered in the British Museum in 1884 — or rather the true character of the manuscript was first suspected then — by Professor Vinogradoff of Moscow. We owe the publication of it now to the devotion and generosity of Mr. Maitland. He speaks in the most modest way of his excellent editorial labors:

"Before I am blamed for having done less than might have been done in the way of collating rolls, giving various readings, making indexes and notes, it will, I hope, be remembered that this has been a private enterprise. I have often had to count the cost; also to reflect that another day in the Record Offices or the British Museum would mean another hundred miles in the train. . . . As there was no learned society whose business it was to encourage the study of English legal history (for the Selden Society was not yet born nor even thought of), it seemed likely that the 'Note Book' would remain unprinted for many years unless some one would make such an edition of it as could be made at his own cost and without giving to it all his time. Perhaps I was not the man for the work; but I have liked it well."

The cases themselves, of which there are 1982, are in the Latin of the original rolls, and fill two stout octavo volumes. Then there is another thinner first volume, containing a short preface, an account of the discovery of the manuscript by Professor Vinogradoff, a full and excellent introduction by Mr. Maitland, and, finally, a careful apparatus of tables and indexes. For many people the index of persons and of places will have much interest, exhibiting as it does familiar names of the present day upon the judicial rolls of six or seven centuries ago.

The discovery of the real nature and value of this manuscript so recently, and by a Russian, is a striking reminder of the relative backwardness of English scholars in a knowledge of the history of their own law. Vinogradoff, Professor of History at Moscow, while investigating the sources of mediæval history in England in 1884, in the course of examining Bracton and his authorities, was referred to this manuscript. A careful reading of it and comparison with Bracton's text led him to the belief that "it was drawn up for Bracton and annotated by him or under his direction." He published a letter in the "Athenæum" for July 19, 1884, giving strong reasons for this opinion; and the matter was then taken up by English scholars. England owes Mr. Maitland much for having come forward at once and assumed the great labor and expense of this publication. And it will do well if it heeds his humorous warning, in calling for a new edition of Bracton's treatise — so lately edited, in a very discreditable manner, at the public expense: "Bracton's treatise ought to be carefully and lovingly edited. If this be not done by an Englishman, it will be done by a foreigner — as it is written: Vocabo super eos gentem robustam et longinquam et ignotam cuius linguam ignorabunt"; and for this passage he duly cites his authority, Bracton, folio 34. "Carefully and lovingly edited" — the phrase is a peculiar one; but it intimates well the character of the writer's own patient, scholarly, thorough, admirable work in editing the "Note Book."

Passing over the first sixty pages of his Introduction, which relate to Bracton's treatise, and to matters illustrating his personal history, and which are full of instruction, we come to what takes up the larger part of the remaining eighty pages — an excellent account of the "Note Book" and of its relation to the great treatise. The manuscript was bought by the British Museum from the library of a Mr. John Holmes of East Rexford. A few pages are missing at and near the beginning, and an unknown amount is wanting at the end. Some memoranda upon it in a hand of the fifteenth century indicate that it was in about its present shape then. It has marginal notes in a hand of the thirteenth century which appear to have been made by the person for whom the cases were copied. In comparing the "Note Book" with the original rolls, Mr. Maitland discovered that many of the rolls here copied are not now extant; but where they do exist he found a circumstance which we must let him tell in his own words:

"When, having copied some pages of the 'Note Book,' I took my transcript to the Record Office, in the hope of finding the original records, I expected that the work of hunting for my cases would be tedious. To my surprise and delight, on taking up the first roll, I discovered that the work had been done for me. Every case that I wanted had against it a mark of an obvious, unmistakable kind. In the margin of the roll, down the whole length of the case, some one had drawn a firm, heavy line, in color a dark rusty brown; to look at, it was much such a line as might have been drawn by the old-fashioned red-lead pencil. I soon learned to know that this 'scoring,' as I call it, was the work of the man who had the 'Note Book' made for him. Whenever there was a scored roll, the cases in the 'Note Book' agreed perfectly with the cases on that roll, saving the immaterial omissions, of which hereafter, and saving mere clerical blunders. . . . In some instances the copyist has apparently obeyed what he took to be his instructions, with a slavish obedience; he has left out the important end of a case, because the mark on the roll did not go far enough, or has copied just the first lines of the next case, because the mark went a little too far."

Mr. Maitland's argument (pp. 72–117) for thinking the "Note Book" to be Bracton's is singularly temperate; at the same time, it is strong, and such as will bring many a reader to join with him in the "revocable judgment" which, after the formula of the rolls, he enters up at the end of the discussion: "Et ideo consideratum est quod Henricus recuperavit seisinam suam, saluo iure cuiuslibet." We will state the outline of the argument, but much of its force depends on circumstances for which we have not room.

Bracton's treatise cites nearly five hundred cases, of which two hundred are found in the "Note Book." All are from three classes of Rolls: (1) Of the bench at Westminster; (2) Of pleas which followed the King; (3) Eyre Rolls. Both the treatise and the "Note Book" begin and end their collections from the rolls of the first class at the same point. Both begin taking cases from the rolls of the second class at the same point, and, as regards these, all the cases in both are from the same six consecutive rolls. Of the Eyre Rolls the treatise cites twenty, and the "Note Book" only eight; but all, in both, are rolls of the same two famous judges, Pateshull and Raleigh; and inasmuch as the cases from the Eyre Rolls come last in the "Note Book," and the end of this is lost, a reason is given for the absence from it now of other cases of this class.

Again, there is a close and curious resemblance between the side-notes and other annotations of the "Note Book" and the text of the treatise. The nature of the annotations, as being made by the one for whom the work was done, their references and omissions to refer to legislation, and their citations of other cases, indicate pretty plainly their date as about that of the compilation of the "Note Book" itself, viz., about 1240–56; and with this the handwriting agrees. Curious phrases, the same context of words, the same peculiar opinions, and the same errors appear in both. As regards certain not perfectly verifiable cases briefly cited in these annotations, *e. g.*, thus: *fere casus*

Cole, casus Corbyn, casus Radulphi de Arundelle, etc. — Mr. Maitland examines them all. Some of them occur in a like form in an important manuscript of the treatise; others appear to be cases tried before Bracton himself, or such as related to neighbors or friends of his, or are in some probable way connected with Bracton.

The last of Mr. Maitland's arguments points out that the "Note Book" and the treatise are both "guilty of the same astonishing blunder." The statute of Merton, chapter ix., as is well known, preserves, as of the date of January 23, 1235–6, the fact that the Bishops declared that they could not and would not answer certain questions relating to bastardy which were at that period put to them, and that they asked the Lords to consent to a change in the law, so that children born before the marriage of their parents should be legitimated by the after marriage. And then came the famous answer: "Et omnes comites et barones una voce responderunt quod nolunt leges Anglie mutare que usitate sunt et approbate." A hundred years later (11 Ass., 20) Chief Justice Scrope said, in explanation of this "statute," that previously, if it was alleged that a man was a bastard, it was usual to send to the Bishop to certify in this form, viz., whether he was born before marriage or after, and upon the answer the common-law courts gave judgment according to the law of the land. The operation of this was to keep the question of law in the hands of the common law judges instead of leaving it with the clergy. There had been in October, 1234, an ordinance requiring this to be done; and the statute of Merton shows that the Bishops refused to obey it. Now, it is a singular fact that Bracton transposes the order of these two provisions; he makes the ordinance of 1234 follow the statute of Merton, as of October, 1236, and as having been called out by the refusal recorded in the "statute." This error in Bracton was pointed out by Selden. Now, the "Note Book" does the same thing, with a variation; it makes the ordinance follow the statute of Merton, only it carries both back to

the year 1234. As regards these enactments there are also other remarkable resemblances between the treatise and the "Note Book," in points where both differ from the statutes; and these are brought out very clearly by Mr. Maitland by the use of parallel citations.

Such, in a very imperfect summary, are the arguments. While "the value of this book," as the editor justly says, "does not depend wholly or even chiefly" on the success of the argument that it is Bracton's own "Note Book," he reasonably considers the case to be made out, and sums up thus:

"The treatise is absolutely unique; the 'Note Book,' so far as we know, is unique; these two unique books seem to have been put together within a very few years of each other, while yet the statute of Merton was *noua gracia;* Bracton's choice of authorities is peculiar, distinctive; the compiler of the 'Note Book' made a very similar choice; he had, for instance, just six consecutive rolls of pleas *coram rege;* Bracton had just the same six; two-fifths of Bracton's five hundred cases are in this book; every tenth case in this book is cited by Bracton; some of Bracton's most out-of-the-way arguments are found in the margin of this book, in particular that about the binding of land by warranty, that about the ejectment of a disseisor; the same phrases appear in the same contexts, *Juste propter jus sed iniuste propter iniuriam, Nihil certius morte, nihil incertius hora mortis;* Corbyn's case, Ralph Arundell's case are 'noted up' in the 'Note Book'; they are 'noted up' also in the Digby MS. of the treatise; with hardly an exception all the cases thus 'noted up' seem plainly to belong to Bracton's country, to affect persons whom Bracton must have known, Raleighs, Traceys, Gorges, Blanchminsters, Winscots, Arundells, Punchardons; lastly, we find a strangely intimate agreement in error. The history of the ordinance about special bastardy and the *Nolumus* of Merton is confused and perverted in the same way in the two books."

As regards one of the Latin phrases quoted in this passage — when Bracton says, "licet nihil certius sit morte, nihil tamen incertius est hora mortis," and the annotator says, "nihil certius morte, nihil incertius hora mortis," the

suspicion arises that both may be using some familiar quotation or commonplace; and Mr. Maitland does not overlook this.

> "Mors incertarum rerum certissima cunctis,
> Incertum quando, certum aliquando mori";

so run certain seemingly monkish lines of unknown origin, in a little "Flores Poetarum" published at Cologne in 1712. And Chaucer, as a friend reminds us, said, in the "Clerk's Tale," in the next century after Bracton's:

> "And al so certein as we knowe echoon
> That we shal deye as uncerteyn we alle
> Been of that day when death shal on us falle."

Perhaps the "nihil certius morte" will hardly be found in any classical author. And yet Bracton does quote Horace. In his "Est enim modus et mensura et fines certi, ultra quæ citra quæ nequit consistere rectum" (fol. 229 b), one detects the passage from Sat. i., 106, 107:

> "Est modus in rebus, sunt certi denique fines,
> Quos ultra citraque nequit consistere rectum."

Fleta (Lib. iv, c.; 23, s. 4), which seems to belong to the date of 1285, or thereabout, repeats this (as we might expect) in Bracton's form, but with the slight variation of "ultra quæ et citra." And then, oddly enough, in the "Placitorum Abbreviatio" (226, col. 2), we may read it actually incorporated in the records of the King's Courts in precisely Bracton's form (saving only an evident slight misprint), at the end of a long judgment of 1291 in an Irish appeal on a writ of right. Among a variety of defects it was adjudged that the form in which the parties had put themselves upon the grand assize was wrong. Form, the judgment says, is necessary here, and consent of the parties will not cure the fault (etc., etc.), "cum sit modus et mensura et fines certi ultra quæ citra quæ nequid (*sic*)

consistere rectum. Ideo consideratum est quod processus predictus irritetur," etc. Now, evidently the writer of that judgment might have taken this passage from his Bracton, or even, what is less likely, from his Fleta. Or, perhaps, Bracton's use of it had made it a commonplace. Or was it, possibly, already a commonplace when Bracton used it?

So far we have spoken of the relation of the "Note Book" to Bracton. But the interest of it, as connected with other books and authors, does not end with what has yet been stated. "There can be but little doubt," says Mr. Maitland, "that, some two hundred and fifty years after its making, it came to the hands of another very famous lawyer, of Chief Justice Sir Anthony Fitzherbert, who published his 'Grand Abridgment' in 1514. . . . If Bracton introduces, Fitzherbert closes one great period of English law, the age of the Year Books." Mr. Maitland gives his reasons for this opinion, and they are very strong. We will merely indicate them. Fitzherbert has 214 cases from the reign of Henry the Third, of which 207 are from the first twenty-four years of the reign and are all in this book, and seven only are from the later thirty-two years. The cases are taken from the same rolls and follow the same unusual order adopted in the "Note Book." And it tends a little to support this conclusion that here and there in the "Note Book" words (like *Corona*, etc.) are scribbled in it in a hand of the fifteenth or sixteenth century, which may well have been the catchwords for a Digest:

"For a second time, therefore, our 'Note Book' entered into the history of English law. Mediately, through Fitzherbert, it became one of Coke's main authorities (the treatises of Glanvill and Bracton are the others), for what was law before the days of Edward the First, his only authority for the case law of those days. . . . That Coke had studied at first hand the rolls of the thirteenth century, there are very few signs indeed; he was dependent on Fitzherbert, and Fitzherbert was dependent on this 'Note Book.'"

It strikes a reader's attention that the number of cases in Bracton and in Fitzherbert which are also found among the 2000 of the "Note Book," is very nearly the same. But a look at the tables given by Mr. Maitland indicates that they are not the same cases. Was there an attempt on Fitzherbert's part to select such only as were *not* in Bracton's treatise? It looks a little like that; and one wonders what that may mean. The reader also finds himself curious as to the intermediate history of the "Note Book" — from Fitzherbert to Mr. John Holmes of East Rexford. Could not something be done to clear this up, by working backward?

And, now, what is it that one finds in the "Note Book"? This is not the forum for any extended answer to that question, nor have we room for it now. But it may be said in a word that it is a mine of treasure for the student of our ancient law. To one who has any acquaintance with the learned researches of the Germans into the old Frankish and Germanic law, it will have much interest — both giving and receiving light. And, again, as a link between the older law and the Year Books, it will help to a better understanding of much in these dark volumes which the lawyers of their own time did not understand. The puzzling subject of the secta and the various substitutes for it, and the earlier usages as to trial by jury, are illustrated in many of the cases. As regards the law of real property, "numberless points are here set in a clear light." There is much relating to the jurisdiction of the spiritual courts. Wager of law and trial by battle are in full operation at this time. Selden remarks (*Duello*, c. 8): "Rare are the examples of battels waged upon criminals in the annals of the English laws, and (if I forget not) the least plural number doubled comprehends as many as are therein reported with ensuing performance"; and thereupon he cites three cases from the Year Books. At least three more may be found in the "Note Book." A highly interesting class of cases are the appeals from the county and hundred courts; they disclose the antiquated procedure and usages that long held their

own there, when newer ideas had made great headway in the King's Courts. We had marked a number of these cases for quotation, but they must be omitted. "In the eyes of a few connoisseurs," says Mr. Maitland, "the gems of this collection may be two cases which seem to show that feoffments to uses are as old as the days of Henry the Third." But perhaps in this, as a learned friend suggests, the author seems to intimate a greater significance in those cases than they really have.

It should be added that Mr. Maitland has collated all his cases with the originals at the Record Office so far as the rolls are now extant; and that he has also done his readers the same good turn as in his excellent publication, three years ago, of the "Gloucester Pleas of the Crown," in extending the abbreviated Latin of the text. We have now, in Palgrave's "Rotuli Curiæ Regis," a copy of all extant rolls of the King's Courts from the beginning, in 1194, to the year 1200, being those of the sixth, ninth, and tenth years of Richard I. and the first year of John. Then come the invaluable selections of this "Note Book," running from 1217 to 1240; and also Mr. Maitland's other volume before referred to, the "Pleas of the Crown for the County of Gloucester," in 1221. And the much abbreviated contents of the "Placitorum Abbreviatio," in a way, carry us on from 1194 to 1327. These comprise about everything that we now have in print of that magnificent collection of judicial rolls now roofed within the Record Office in London. But we have a promise of more, thanks to the Selden Society, which is to issue to its subscribers very soon a collection of Pleas of the Crown, to be edited and translated by Mr. Maitland, which will help to bridge the gap between Palgrave's volumes and the "Note Book." In the good work upon which it is thus entering, we trust that the new society will be heartily encouraged by large additions to its funds and its membership. It is most fortunate in having at its service so learned, accomplished, and devoted a scholar as Mr. Maitland.

It goes hard with us to make any complaint whatever, but we have found ourselves wishing now and then that the index of subjects were a little fuller — at any rate in cross references — and that an index for the Introduction had not been omitted.

THE TEACHING OF ENGLISH LAW AT UNIVERSITIES[1]

[At the annual meeting of the American Bar Association in 1894 Professor Thayer was elected chairman of the Section on Legal Education. It thus became his duty to deliver the chairman's address at the next meeting of the Association at Detroit, and this paper was prepared for that purpose. It was read on August 27, 1895, and appears in the Reports of the American Bar Association, Vol. 18, p. 409. It has also been published in the Harvard Law Review (9 Harv. Law Rev. 169).]

In so great a country as ours, so wide and so diversified, it is peculiarly well, now and then, to gather together from far and near, and meet on a common footing as Americans. And so we have come now to this beautiful city, a novel and strange place to many of us, to breathe for a day or two this exhilarating atmosphere of a common nationality, the broad and general air that blows not merely here or there in our country, but everywhere; to think the thoughts and interchange the sentiments that concern us as American lawyers. For myself, I have been chiefly moved, in coming here from the far-away sea-coast of Maine, by the desire to say a few words towards urging a very thorough and learned study of our English law, and the maintenance of schools of law which conform in all respects to the highest University standards of work.

We, in America, have carried legal education much farther than it has gone in England. There the systematic

[1] The reader is requested to observe that this paper does not deal with mere methods of teaching, or with any differences which may be supposed to be appropriate in undergraduate instruction as contrasted with that of postgraduate and professional courses. It is directed to the University teaching of English law, by whatever methods carried on, in whatever departments, and for whatever purpose. The author had chiefly in mind the "law schools" properly so called; that is to say, schools aiming directly at professional education.

teaching of law in schools is but faintly developed. Here it is elaborate, widely favored, rapidly extending. Why is this? Not because we originated this method. We transplanted an English root, and nurtured and developed it, while at home it was suffered to languish and die down. It was the great experiment in the University teaching of our law at Oxford, in the third quarter of the eighteenth century, and the publication, a little before the American Revolution, of the results of that experiment, which furnished the stimulus and the exemplar for our own early attempts at systematic legal education. The opportunities and the material here for any thorough work of this sort in the offices of lawyers were slight. "I never dreamed," said Chancellor Kent, in speaking of the state of things in New York, even so late as the period when he was appointed to the bench of the Supreme Court of that State in 1798, "of volumes of reports and written opinions. Such things were not then thought of. . . . There were no reports or State precedents. I first introduced a thorough examination of cases, and written opinions." [1] But wisdom, skill, experience, and an acquaintance with English books were not wanting in the legal profession here; and Blackstone's great achievement awakened the utmost interest and enthusiasm on both sides of the water, — his success in the really Herculean task of redeeming to orderly statement and to an approximately scientific form, the disordered bulk of our common law. "I retired to a country village," Chancellor Kent tells us, in speaking of the breaking up of Yale College by the war, where he was a student in 1779, "and, finding Blackstone's Commentaries, I read the four volumes. . . . The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer." As a student in the office of the Attorney-General of New York, in 1781 and later, he says that he read Blackstone "again and again." [2] Blackstone's lec-

[1] Green Bag, vii. 157.
[2] *Ib.* 153.

tures were begun in 1753, when the author, then only thirty years old, a discouraged barrister of seven years' standing, had retired from Westminster and settled down to academic work at Oxford. On the death of Viner he was made, in 1758, the first professor of English law at any English University; and he published his first volume of lectures in 1765. "There is abundant evidence," if we may rely upon the authority of Dr. Hammond, whose language I quote, "of the immediate absorption of nearly twenty-five hundred copies of the commentaries in the thirteen colonies before the Declaration of Independence. . . . Upon all questions of private law, at least, this work stood for the law itself throughout the country, and . . . exercised an influence upon the jurisprudence of the new nation which no other work has since enjoyed."[1] This great result, it should be observed, was the work of a young enthusiast in legal education, a scholar and a University man, who had the genius to see that English law was worthy to be taught on a footing with other sciences, and as other systems of law had been taught in the Universities of other countries.

Blackstone's example was immediately followed here, and was soon further developed in the form which he had urged upon the authorities at Oxford, but urged in vain, — that of a separate college or school of law. In 1779, the year after Blackstone had published the eighth and final edition of his lectures, and only a year before his death, a chair of law was founded in Virginia, at William and Mary College, by the efforts of Jefferson, then a visitor of the institution; and in the same year Isaac Royall of Massachusetts, then a resident in London, made his will, giving property to Harvard College for establishing there that professorship of law which still bears his name. In 1790, Wilson gave law lectures at the University of Pennsylvania. The Litchfield Law School, established about 1784, was not

[1] Hammond's Blackstone, ix.

a University school; yet if it be true, as is not improbable, that it was the natural outgrowth of an office overcrowded with students, it may well be conjectured that Blackstone's undertaking chiefly shaped and sustained it. At any rate his lectures appear to have been the chief references of the instructors at Litchfield. Hammond, in referring to a collection of *verbatim* notes of lectures at the Litchfield school in 1817, representing, as he conceives, "the exact teaching" of the professors of that time, says "that the references to Blackstone not only outnumber those of any other book, but may be said to outnumber all the rest together." [1]

In England little progress was made for a century. Blackstone's plan for a law College at Oxford was not carried out, and he resigned, disappointed, in 1766. The conservatism of a powerful profession, absorbed in the mere business of its calling, itself untrained in the learned or scientific study of law, and unconscious of the need of such training, did not yield to or much consider the suggestions of what had already been done at Oxford. The old method of office apprenticeship was not broken up. The profession was contented with Blackstone's Commentaries, as if these had done all that could be done and had made the full and final restatement of the law. The student simply added to his ordinary work the reading of these volumes.

But the more enlightened members of our profession in England have keenly felt the backward state of things there. One of the greatest of them, Sir Richard Bethell, afterwards Lord Chancellor Westbury, on taking his seat as president of the Juridical Society forty years ago, lamented the neglect of legal science in England and the strange indifference of the profession to the pursuit of it. Lawyers, he says,[2] "are members of a profession who, from the beginning to the end of their lives, ought to regard themselves as students of the most exalted branch of knowl-

[1] Hammond's Blackstone, x., note.
[2] 1 Jurid. Soc. Pap. 1.

edge, Moral Philosophy embodied and applied in the laws and institutions of a great people. There is no other class or order in the community," he adds, "on whom so much of human happiness depends, or whose pursuits and studies are so intimately connected with the progress and well-being of mankind." In enumerating the causes of this failure to appreciate the dignity of their calling, he names as one of the chief of them, "the want of a systematic and well-arranged course of legal education. . . . It belongs," he adds, "to the Universities of England and to the Inns of Court to fill the void; but for centuries the duty has remained unperformed." It still remains very imperfectly performed. But England is moving in the direction that Blackstone pointed, and in its own way will yet solve the problem. Admirable work is going forward there now; and how full a sympathy the leaders in it entertain for our own efforts is shown by the coming of Sir Frederick Pollock this summer to take part in the exercises at Harvard, on occasion of the celebration of Dean Langdell's twenty-fifth anniversary. He crossed the ocean for that mere purpose, and returned as soon as it was accomplished.

On this side of the water, while the training of our profession continued for a long time to be the old one of office apprenticeship and reading, the new conception — new as regards English law — of systematic study at the Universities, has had continuous life, and has borne abundant fruit. If it has sometimes languished, and here and there been intermittent, it has always lived and thriven somewhere; and at last it has so commended itself that there is no longer much occasion to argue its merits. Few now come openly forward to deny or doubt them.

This, then, is our American distinction, to have accepted and carried for a century into practice the doctrine that English law should be taught systematically at schools and at the Universities. President Rogers, the chairman of this Section last year, told us that there were then seventy-two schools of law in this country, of which sixty-five were asso-

ciated with Universities. I am informed upon good authority that the number is now not under seventy-five or seventy-six, and that the proportion of University schools is about the same as that just indicated.

It behooves us now to look squarely at the meaning of these facts, and at the responsibilities that they lay upon us. The most accomplished teachers of law in England have seen with admiration and with something like envy the vantage-ground that has been reached here. We must not be wanting to the position in which we find ourselves. Especially we must not be content with a mere lip service, with merely tagging our law schools with the name of a University, while they lack entirely the University spirit and character. What, then, does our undertaking involve, and that conception of the study of our English system of law, which, in Blackstone's phrase, "extends the pomoeria of University learning and adopts this new tribe of citizens within these philosophical walls"? It means this, that our law must be studied and taught as other great sciences are studied and taught at the Universities, as deeply, by like methods, and with as thorough a concentration and lifelong devotion of all the powers of a learned and studious faculty. If our law be not a science worthy and requiring to be thus studied and thus taught, then, as a distinguished lawyer has remarked, "A University will best consult its own dignity in declining to teach it." This is the plough to which our ancestors here in America set their hand and to which we have set ours; and we must see to it that the furrow is handsomely turned.

But who is there, I may be asked, to study law in this way? Who is to have the time for it and the opportunity? Let me ask a question in return, and answer it. Who is it that studies the natural or physical sciences, engineering, philology, history, theology, or medical science in this way? First of all, those who, for any reason, propose to master these subjects, to make true and exact statements of them, and to carry forward in these regions the limits of human

knowledge; and especially the teachers of these things. Second, not in so great a degree, but each as far as he may, the leaders in the practical application of these branches of knowledge to human affairs. Third, in a still less degree, yet in some degree, all practitioners of these subjects, if I may use that phrase, who wish to understand their business and to do it thoroughly well.

Precisely the same thing is true in law as in these or any other of the great parts of human knowledge. In all it is alike beneficial, and alike necessary for the vigorous and fruitful development of the subject, for the best performance of the every-day work of the calling to which they relate, and for the best carrying out of the plain practical duties of each man's place, that somewhere and by some persons these subjects should be investigated with the deepest research and the most searching critical study.

The time has gone by when it was necessary to vindicate the utility of deep and lifelong investigations into the nature of electricity and the mode of its operation, into the nature of light and heat and sound and the laws that govern their action, into the minute niceties of the chemical and physiological laboratory, the speculations and experiments of geology, or the absorbing calculations of the mathematician and the astronomer. Men do not now need to be told what it is that has given them the steam-engine, the telegraph, the telephone, the electric railway and the electric light, the telescope, the improved lighthouse, the lucifer match, antiseptic surgery, the prophylactics against small-pox and diphtheria, aluminum the new metal, and the triumphs of modern engineering. These things are mainly the outcome of what seemed to a majority of mankind useless and unpractical study and experiment.

But as regards our law, those who press the importance of thorough and scientific study are not yet exempt from the duty of pointing out the use of it and its necessity. To say nothing of the widespread scepticism among a certain class of practical men, in and out of our profession, as to

the advantages of anything of the sort, there is also, among many of those who nominally admit it and even advocate it, a remarkable failure to appreciate what this admission means. It is the simple truth that you cannot have thorough and first-rate training in law, any more than in physical science, unless you have a body of learned teachers; and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work. The main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject; and that requires, as regards any one of the great heads of our law, in the present stage of our science, an enormous and absorbing amount of labor.

Consider how vast the material of our law is, and what the subject-matter is which is to be explored, studied, understood, classified, and taught in our schools of law. It lies chiefly in an immense mass of judicial decisions. These, during several centuries, have spelled out in particular instances, and applied to a vast and perpetually shifting variety of situations, certain inherited principles, formulas, and customs, and certain rules and maxims of good sense and of an ever-developing sense of justice. It lies partly, also, in a quantity of legislation.

What does it mean to ascertain and to master, upon any particular topic, the common law? It means to ascertain and master, in that particular part of it, the true outcome of this body of material. In an old subject, like the law of real property, such an inquiry goes far back. In a new one, like constitutional law, not so far; but still, even in that we must search for more than a century, and if we would have a just understanding of some fundamental matters, it means much remoter and collateral investigation. As regards a great part of our law it is not comprehensible, in the sense in which a legal scholar must comprehend his subject, unless something be known, nay, much, of the great volume of English decisions that run back six hundred years to the days of Edward the First, when English

legal reporting begins. That is the period which is fixed, in the two noble volumes of "The History of the English Law" just published by the English professors, Sir Frederick Pollock of Oxford and Mr. Maitland of Cambridge, as the end of their labors; viz., the time when legal reporting begins. In giving the reasons for dealing with this as a separate period, they say "so continuous has been our English legal life during the last six centuries, that the law of the later Middle Ages has never been forgotten among us. It has never passed utterly outside the cognisance of our courts and our practising lawyers." Such is the long tradition that finds expression in the law of this very day, and of this place in which we sit. The volumes just mentioned, ending thus six centuries ago, themselves throw light on much which concerns our own daily practice in the courts; and they indicate the value and importance of much remoter investigation. You remember, perhaps, that the judicial records of England carry us back to the reign of Richard the First in 1194, seven centuries ago, and that there are scattered memorials of earlier judicial proceedings for another century, gathered for the first time by one of the most learned of our brethren in this association, Prof. Melville M. Bigelow.

Much of this vast mass of matter is unprinted, and much is in a foreign tongue. The old records are in Latin. As to the Reports, for the first two hundred and fifty years after reporting begins, it is all in the Anglo-French of the Year Books, and mostly in an ill-edited and often inaccurate form. To all these sources of difficulty must be added the generally brief and often very uninstructive shape of the report itself. A few of the earlier Year Books have been edited in thorough and scholarly fashion, accompanied by a translation and illustrations from the manuscript records. But most of them are in a condition which makes research very difficult. The learned historians just quoted have said that "the first and indispensable preliminary to a better legal history than we have of the later Middle

Ages is a new, a complete, a tolerable edition of the Year Books. They should be our glory, for no other country has anything like them; they are our disgrace, for no other country would have so neglected them." The glory and disgrace are ours also, for English law is ours. Efforts on both sides of the water to accomplish this result have as yet failed; but they should succeed, and they will succeed. I wish that my voice might reach some one that would help in securing that important result. It would bring down the blessing of legal scholars now and hereafter. After the Year Books, come three centuries and a half of reported cases in England; and one of these centuries, more or less, includes the multitudinous reports of our own country and of the English colonies, which continue to pour in upon us daily in so copious and ever-increasing a flood.

Now, will it be said, perhaps, that in bringing forward for study all this mass of material, past, present, and daily increasing at so vast a rate, I am recommending an impossibility and an absurdity? No, I am not; I speak as one who has seen it tried. It is not only practicable, but a necessary preliminary for first-rate work. One or two things must be observed here. Of course no one man can thus explore all our law. But some single thing or several connected things he may; and every man who proposes really to understand any topic, to put himself in a position to explain it to others, or to restate it with exactness, must search out that one topic through all its development. Such an investigation calls for much time, patience, and labor, but it brings an abundant harvest in the illumination of every corner of the subject. Another thing is to be noticed. Not all our law runs back through all this period. This great living trunk of the common law sends out shoots all along its length. Some subjects, like the law of real property, crimes, pleading, and the jury go very far back; others, like the learning of Perpetuities or the Statute of Frauds, not so very far; and others still, like our American

Constitutional Law, the learning of the Factors' Acts, of injuries to fellow-servants and other parts of the law of torts, are modern, and perhaps very recent. But be the subject old or new, or much or little, every man in his own field of study must explore this mass of material, — viz., all the decided cases relating to it, — if he would thoroughly understand his subject.

Before I pass on, let me say, as if in a parenthesis, a word or two more about the Year Books. These great repositories of our mediæval law have been the subject of many cheap and foolish observations, as to their mustiness and mouldiness; but never, so far as I know, from persons who had any considerable acquaintance with them. It has dwarfed and hurt our law that research has usually stopped short about three centuries back; as to what went before, it has been the fashion to accept Coke as the epitome, or to take the summaries in the Abridgments. Back of Coke, these ill-printed, unedited, untranslated folios, the Year Books, have stood like a wall, repelling for most men any further search. But not all scholars have been deterred; and those who have gone through these volumes have found a rich reward. Amidst their quaint and antiquated learning is found the key to many a modern anomaly; and the reader observes with delight the vigorous growth of the law from age to age by just the same processes which work in it to-day in our latest reports. There, as well as here, together with much that is petty and narrow, one remarks not only well-digested learning and thoughtful conservatism giving its reasons, but also growth, the vigor of original thought, liberal ideas, and the breaking out of what we call the modern spirit.

Coming back to the task of the student of our law, it spreads far beyond what I have yet set forth; it has been wisely said that if a man would know any one thing, he must know more than one. And so our system of law must be compared with others; its characteristics only come out when this is done. As to the examination of mediæval and

modern continental law, we have hardly made a beginning. When we trace our law far back, the only possible comparison with anything long-lived and continuous is with the Roman law. If any one would remind himself of the flood of light that may come from such comparisons, let him recall the brilliant work of Pollock's predecessor at Oxford, Sir Henry Maine, in his great book on Ancient Law. That is the best use of the Roman law for us, as a mirror to reflect light upon our own, a tool to unlock its secrets. And so the recent learned historians of our law have used it. In writing of the English system of writs and forms of action, for instance, they put meaning into the whole matter in pointing out that all this, beginning in the middle of the twelfth century, finds a parallel in Rome "at a remote stage of Roman history. We call it distinctively English; but it is also in a certain sense very Roman. While the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history."

Of the value of such comparative studies, and their immense power to lift the different subjects of our law into a clear and animating light, no competent person who has once profited by them can ever doubt. But, again, observe what this means. It means adding to the wide and difficult researches already marked out another great field of investigation. If it be said that our teacher of English law may profit by the labor of others, and has only to read his "Ancient Law," and his "History of English Law," I reply that the field is still largely unexplored; and, furthermore, that, for the scholar, such books are helps and guides for his own research, and not substitutes for it.

So much for this head of what I have to say. Over these vast fields the competent teacher of law must carefully and minutely explore the history and development of his subject. I set down first this thorough historical and chrono-

logical exploration, because in this lies hidden the explanation of what is most troublesome in our law, and because in this is found the stimulus that most feeds the enthusiasm and enriches the thought and the instruction of the teacher. The dullest topics kindle when touched with the light of historical research, and the most recondite and technical fall into the order of common experience and rational thought. Sir Henry Maine's book, like that of Darwin in a different sphere, at about the same time, created an epoch. Such books have made it impossible for the law student ever again to be content with the sort of food that fed his fathers, with that "disorderly mass of crabbed pedantry," for instance, as our recent historians of the law have justly called it, "that Coke poured forth as institutes of English law." Never again can he receive the spirit of bondage that once bent itself to teach or to study the law through such a medium.[1]

And now comes another labor for the legal scholar. After such researches as I have indicated, in any part of the law, the outcome of it is certain to be the necessity of restating the subject in hand. When things have once been thus explored and traced, many a hitherto unobserved relationship of ideas comes to light, many an old one vanishes, many a new explanation of current doctrines is suggested and many a disentangling of confused topics, many a clearing away of ambiguities, of false theories, of outworn and unintelligible phraseology. There is no such dissolver and rationalizer of technicality as this. A new order arises. And so when the work of exploration has been gone over, there comes the time for producing and publishing the results of it. Admirable work of this sort, and a good bulk of it, has already been done, — work that is certain to be of inestimable value to our profession. In some instances

[1] In saying of Coke what is just quoted, it will be observed that he is dealt with as a writer of Institutes of the law. Of course that great name stands for much else in our law and our constitutional history, — for much which is great and good and never to be forgotten.

it is but little known as yet; in others, it appears already in our handbooks on both sides of the ocean, and in the decisions of the courts.

The publishing of these results by competent persons is one of the chief benefits which we may expect from the thorough and scientific teaching of law at the universities. In no respect can more be done to aid our courts in their great and difficult task. There are many useful handbooks for office use and reference, and some excellent ones. But the number of really good English law treatises — good, I mean, when measured by a high standard — is very few indeed. They improve; and yet, to a great extent to-day, the writers and publishers of law books are abusing the confidence of the profession, and practising upon its necessities.

If I am asked to specify more particularly the sort of thing that may come out of the researches to which I have referred, and that has already been produced from the Universities, I am tempted to refer first to a foreign book about one of our English topics, — a book which is a little remote from our every-day questions, but full of value in any deep consideration of the subject, — the admirable History of the Jury by Brunner, professor of law at Berlin, published in 1872. That is a book of the first class, superseding all others upon the subject; and yet, to the disgrace of the English-speaking race, it has not yet been translated into our language. English and American scholars have supplemented the work of Brunner; and the material for a true understanding of the history and uses of the jury system, and for a wise judgment as to continuing or modifying the use of it, were never anything like so good as now.

Then there is that masterly History of the English Law by two English law professors of our own time, of which I have already spoken. In mentioning this book, it is only just to Professor Maitland, one of the finest scholars of our time, that I should quote the remark of his distinguished

associate, where he says in the preface that, "although the book was planned in common and has been revised by both of us, by far the greater share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required." Of other English work to be credited to the Universities, I have already mentioned the great performances of Blackstone and Maine, and I need only allude to the important works, well known among us, of Dicey, Holland, Markby, and Pollock. Less well known, but masterly in its way, is Maitland's editing of that selection from the judicial records of the thirteenth century which is known as Bracton's "Note Book," and of other unpublished material brought out by the Selden Society.

As to this country, I will not mention names. I need not refer to the famous and familiar books from our University schools of law, by our leaders, living and dead. I will simply say this, that in recent times the researches and contributions of our own teachers of the law, at the Universities in various parts of the country, — and I include now not less than seven of these institutions, — have produced most important material, which is already finding its way into the current handbooks of the profession, here and in England, — material which not only illuminates the field of the student's work, but lightens the daily drudgery of the bench and bar. The true nature of equitable rights and remedies; the doctrine of equitable defences; the history and analysis of the law of Contract, Torts, Trusts, and Evidence; the nature and true theory of the negotiability of obligations; the nature of the Common Law itself; the whole doctrine of Quasi-Contract; the doctrine of Perpetuities, — these things make only a part of this material. As I said, I do not speak of work done at any one institution or in any one part of the country merely.

But now suppose some one says, What is the use of carrying on our backs all this enormous load of the Common

Law? Let us codify, and be rid of all this by enacting what we need, and repealing the rest.

Well, I am not going to discuss codification. There is not time for that. And the word is an ambiguous one; some good things and some bad ones are called by this name. I will only say that as yet we do not well understand our law; it is our first duty to understand it. The effort to codify it, or systematically to restate it for purposes of legislation, — for any purpose other than a merely academic one, — should come later, if it come at all. To codify what is only half understood is to perpetuate a mass of errors and shallow ambiguities; it is to begin at the wrong end. Let us, first of all, thoroughly know our ground. I can say this with confidence, that as regards one or two departments of law with which I have a considerable acquaintance, I have never seen any attempt at codification, here or abroad, which was not plainly marked by grave and disqualifying defects. Good-will, strong general capacity, courage, sense, practical gifts, are indeed not wanting in some of these attempts; but a competent knowledge of the subject is wanting.

My honored friend, Judge Dillon, in his excellent address last year, said a word or two in connection with this subject which should be supplemented, I think, by a word or two more. In speaking of law reforms, he remarked that "no mere doctrinaire or closet student of our technical system of law is capable of wise and well-directed efforts to amend it. This must be the work of practical lawyers." If the expression "mere doctrinaire or closet student" refers to any class of pedants and incompetent persons who do not appreciate the nature of what they are studying, I should not wish to qualify that portion of the remark just quoted which reaches them. But if it may be supposed to allude to the class of legal scholars as such, to the experts in legal and juristic learning, this remark, at the best, is but half a truth. The practical work of carrying through any considerable measure of reform, of

getting it enacted, is indeed peculiarly a task for the practical lawyer. His judgment also is important in the wise shaping of such a measure; as his authority and influence will be quite essential in gaining for it the confidence of legislators and their constituents. But no "wise and well-directed efforts" of this character can dispense with the approval and co-operation of the legal scholar. I am speaking, of course, of competent persons, in both the classes referred to, and not of pedants or ignoramuses; and am assuming on the part of the systematic student of law, as on the part of the judge or practitioner, a suitable outfit of sense, discretion, preliminary professional education, and capacity to understand the eminently practical nature of the considerations which govern the discussion of legal questions. Perhaps I may be permitted to speak on this subject with the more confidence, as having been a busy practitioner at the bar of a large city for eighteen years, before beginning an experience as a professor at the Harvard Law School which has now continued for twenty-one years.

Professor Dicey has remarked, I believe, of the jurist's work in England, of the sort of work which he himself has so admirably done, that it "stinks in the nostrils" of the average English practitioner; and Sir Frederick Pollock, in his inaugural lecture, twelve years ago, as Corpus Professor of Jurisprudence at Oxford, in speaking of his associates there, Dicey and Bryce and Anson, says, with dignity, that they are "fellow-workers in a pursuit still followed in this land by few, scorned or depreciated by many, the scientific and systematic study of law."[1] That state of things is slowly disappearing in England, as well as here, with the gradual improvement in the legal education of the bar. One of the best and most important results of this improvement will be a more cordial respect and a closer co-operation between the different parts of our profession, the scholars

[1] Oxford Lectures, 38.

and the men of affairs. Nothing is more important to the dignity and power of our common calling.

Let me now finally come down to this question: If what I have been saying as to the scope of the work of the University teaching of law be true, what does it mean as regards the outfit and the carrying on of these schools?

It means several things. (1) Limiting the task of the instructors. Instead of allotting to a man the whole of the common law, or half a dozen disconnected subjects at once, it means giving him a far more limited field, — one single subject, perhaps; two or three at most; if more than one, then, if possible, nearly related subjects; to the end that his work of instruction may be thoroughly done, and that as the final outcome of his studies some solid, public, and permanent contribution may be made to the main topic which he has in hand.

It means (2) that instructors shall give, substantially, their whole time and strength to the work. In mastering their material and qualifying themselves for their task, they have in hand, say for the next two generations, much formidable labor in exploring the history and chronological development of our law in all its parts. On this, as I have indicated, a brave beginning has been made, and it is already yielding the handsomest fruits. They have also, of course, all the detail of their difficult main work of teaching; and this, when the work is fitly performed, calls for an amount of time, thought, and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give.[1]

[1] [Of methods of teaching at the Harvard Law School Professor Thayer has said: "Of teaching there has never been at this school any prescribed method. There never can be, in any place where the best work is sought for. Every teacher, as I have said elsewhere, 'in law, as in other things, has his own methods, determined by his own gifts or lack of gifts, — methods as incommunicable as his temperament, his looks, or his manners.' But as to modes of study, a very different matter, Dean Langdell's associates have all come to agree with him, where they have ever differed, in thinking, so far at least as our system of law is concerned, that there is no method of preparatory study so

It means (3) that the pupils also shall give all their time to the work of legal study while they are about it. There is more than enough in the careful preliminary study of the law to occupy three full years of an able and thoroughly trained young man. It is, I think, a delusion to suppose that this precious seed-time can profitably be employed, in any degree, in attendance upon the courts or in apprenticeship in an office. I do not speak, of course, of an occasional excursion into these regions when some great case is up or some great lawyer is to be heard, or of the occasional continuous use of time in such ways during these long vacations which are generally allowed nowadays. Nor do I mean to deny that attendance upon courts to witness the trial of a case now and then will be a good school exercise. I speak only of systematic attempts to combine attendance at law schools with office-work and with watching the courts. The time for all that comes later, or perhaps in some cases, before.

It means (4) that generous libraries shall be collected at the Universities suited to all the ordinary necessities of careful legal research; and it also means gathering at some one point in the country, or at several points, the best law library that money can possibly buy.

And (5), in saying that proper University teaching of law means all this, I am saying in the same breath that it means another thing, viz., the endowment of such schools. The highest education always means endowment; the schools which give it are all charity schools. What

good as the one with which his name is so honorably connected, — that of studying cases, carefully chosen and arranged so as to present the development of principles. Doubtless, the mode of study must greatly affect the mode of teaching; if students are to prepare themselves by studying cases, their teachers also must study them. And, moreover, while good teaching will differ widely in its methods, there is at least one thing in which all good teaching will be alike; no teaching is good which does not rouse and 'dephlegmatize' the students, — to borrow an expression attributed to Novalis, — which does not engage as its allies, their awakened, sympathetic, and co-operating faculties. As helping to that, as tending to secure for an instructor this chief element of success, I do not think that there is or can be any method of study which is comparable with the one in question." 1 Thayer's Const. Cas., Preface, vi.]

student at Oxford or Cambridge, at Harvard, Yale, Columbia, Ann Arbor, or Chicago pays his way? We must recognize, in providing for teaching our great science of the law, that it is no exception to the rule. Our law schools must be endowed as our colleges are endowed. If they are not, then the managers must needs consult the market, and consider what will pay; they will bid for numbers of students instead of excellence of work. They will act in the spirit of a distinguished, but ill-advised trustee of one of the seats of learning in my own State of Massachusetts, when he remarked, "We should run this institution as we would run a mill; if any part of it does not pay, we should lop it off." They will come to forget that it is the peculiar calling of a University to maintain schools that do not pay, or, to speak more exactly, to maintain them whether they pay or not; that the first requisite for the conduct of a University is faith in the highest standards of work; and that if maintaining these standards does not pay, this circumstance is nothing to the purpose, — maintained they must be, none the less. It has been justly said that it is not the office of a University to make money, or even to support itself, but wisely to use money.

If, then, we of the American Bar would have our law hold its fit place among the great objects of human study and contemplation; if we would breed lawyers well grounded in what is fundamental in its learning and its principles, competent to handle it with the courage that springs from assured knowledge, and inspired with love of it, — men who are not, indeed, in any degree insensible to worldly ambitions and emoluments, who are, rather, filled with a wholesome and eager desire for them, but whose minds have been lifted and steadied and their ambitions purged and animated by a knowledge of the great past of their profession, of the secular processes and struggles by which it has been, is now, and ever will be struggling towards justice and emerging into a better conformity to the actual

wants of mankind, — then we must deal with it at our Universities and our higher schools as all other sciences and all other great and difficult subjects are dealt with, as thoroughly, and with no less an expenditure of time and money and effort.

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