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Georgetown Law Journal

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THE 125th ANNIVERSARY OF THE DRAFTING OF THE CONSTITUTION OF THE UNITED STATES, 1787-1912

From the 7th to the 12th of October was celebrated in Philadelphia "The Historical Pageant of 1912," in honor of the 125th anniversary of the drafting of the Constitution of the United States by the Federal Convention of 1787, which organized for business on May 25, and adjourned on September 17, after working 86 days. In celebrating that great event upwards of 5,000 costumed people depicted the principal episodes in the history of Philadelphia. The central episode was of course the drafting of the Constitution by an assembly whose immortal work constitutes a turning point in the history of the world. That assembly before its adjournment proclaimed an entirely new type of Federal Government, resting, as Tocqueville has expressed, "upon a wholly novel theory, which may be considered a great discovery in modern political science."

It is impossible to understand the nature of the "wholly novel theory" of government, partly Federal and partly National, thus proclaimed without a clear conception of the Federal system, which it superceded and set aside. The only Federal governments with whose internal organizations the builders of our Federal Republic were really familiar, and whose histories had any practical effect upon their work were those which had grown up between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of Switzerland and upon the plains of Germany. Down to the making of the second Constitution of the United States the Confederation of Swiss Cantons, the United Provinces of the Netherlands and the German Confederation really represented the total advance which the modern world had made in the structure of Federal governments. Such advance was embodied in the idea of a

Federal system made up of a union of States, cities, or districts,—representatives from which composed a single Federal assembly whose supreme power could be brought to bear not upon individual citizens but only upon cities or States, as such. The fundamental principle upon which all such fabrics rested was the requisition system, under which the Federal head was simply endowed with the power to make requisitions for men and money upon the States or cities composing the league for Federal purposes; while the States alone, in their corporate capacity, possessed the power to execute and enforce them. The first attempt made by the English Colonies in America along the path of Federal union ended with the making of the first Constitution of the United States, embodied in what is known as the Articles of Confederation. Up to that point nothing new had been achieved, the fruit of the first effort was simply a confederation upon the old plan with the Federal power vested in a single assembly which could only deal through the requisition system with the States as States.

As all the world knows our first attempt to construct a Federal government ended in failure and disappointment. Federalism, which as a system of government already stood low enough in the estimation of mankind, was put in no better plight by the first American experiment. By the end of the War of the Revolution cur first Federal Constitution, had practically disappeared. The only real bond of cohesion which then held the victorious States together was a man, and that man was Washington. As Luzerne wrote of him to Vergennes at a little later day, "More is hoped from the consideration of a single citizen than from the authority of the sovereign body." No Federal government that had existed anywhere in the world down to that time had ever been armed with the power to levy a penny of taxes on its own account. The Continental Congress like all its predecessors from the days of the Greek Leagues did not possess to the slightest extent the taxing power. It was entirely dependent on the old quota system through which it could only draw voluntary contributions from the States as States. Since February 3, 1781, Congress had been imploring the States so to amend the Articles of Confederation as to permit it to levy a tax on imports for the term of 25 years in such a way as to produce about one million a year. That prayer would have been granted had it not been for the action of Rhode Island, whose assembly on November 1, 1782, unanimously refused to concede to Congress the right to levy a tax on imports in any form.

From that attitude Rhode Island never receded, despite Washington's circular letter to the governors of all the States, urging the necessity of granting to Congress some power to provide a national revenue, and despite Congress's frantic appeal to the States, in the final resolution of April 18, 1783, for power to levy specific duties on certain enumerated articles, and 5 per cent on others.

The selfish motive that prompted Rhode Island's refusal leads us from the financial to the commercial question. Rhode Island had a customhouse, and she possessed the power to levy a tariff of her own. The maritime States had a great advantage in that regard. More than half the goods consumed in New Jersey, Connecticut, Vermont, and in the western parts of Massachusetts were brought to New York, with her splendid harbor, so capable of a world-wide commerce, and with rivers flowing directly to the sea, to Delaware and Chesapeake bays, to the Mississippi, and to the watercourse of the St. Lawrence. Each State was attempting to regulate commerce on its own account and in its own interest. Thus the country was distracted by commercial conflicts which made it imperative that Congress should be armed with adequate power to regulate trade. Something had to be done to prevent the enactments of one State to the injury of the trade of the other and to establish a system intelligible to foreigners trading with this country. The British ambassador at Paris, when he was notified by the American commissioners in 1784 that they had full power to negotiate a commercial treaty with Great Britain, replied, after consulting with English merchants trading with North America, that "the apparent determination of the respective States to regulate their own separate interests renders it absolutely necessary toward forming a permanent system of commerce that my court should be informed how far the commissioners can be duly authorized to enter into any engagements with Great Britain which it may not be in the power of any one of the States to render totally fruitless and ineffectual." In 1785 New York laid a double duty on all goods whatever imported in British ships, and in the same year Pennsylvania passed the first of a series of tariff acts designed to tax the whole community for the benefit of a few manufacturers.

As an economist and financier it was Pelatiah Webster's dream to create an entirely new system of Federal government—armed, first, with the independent power of Federal taxation; second, with the power to regulate trade betwen the States and with foreign nations.

In order to make way for his new system he knew it was absolutely necessary to wipe out as a whole the Articles of Confederation. In denouncing that impotent league (it was not a government) he said:

> But on trial of it in practice it was found to be extremely weak, defective, totally inefficient, and altogether inadequate to its great ends and purposes, for—
>
> 1. *It blended the legislative and executive powers together in one body.*
>
> 2. This body, viz, Congress, consisted of but one house, without any check upon their resolutions.
>
> 3. The powers of Congress in very few instances were definitive and final; in the most important articles of government they could do no more than recommend to the several States, the consent of every one of which was necessary to give legal sanction to any act so recommended.
>
> 4. *They could assess and levy no taxes.*
>
> 5. They could institute and execute no punishments except in the military department.
>
> 6. They had no power of deciding or controlling the contentions and disputes of different States with each other.
>
> 7. *They could not regulate the general trade;* or
>
> 8. Even make laws to secure either public treaties with foreign states, or the persons of public ambassadors, or to punish violations or injuries done to either of them.
>
> 9. *They could institute no general judiciary powers.*
>
> 10. *They could regulate no public roads, canals, or inland navigation.*

Impelled by such convictions, which are the best index to his work, completed two years later, Webster, as early as 1781—*when no one else had dreamed of anything beyond amendments of the Articles of Confederation*—proposed, as Madison tells us in his record of events, the entire abolition of the then existing Constitution. As Webster himself tells us at a little later time: "I was then pretty much at leisure and was fully of opinion *(though the sentiment at that time would not very well bear)* that it would be ten times easier to form a new constitution than to mend the old one." Thus, in the year in which the battle of Yorktown was won—a victory that marked the real end of the War of the Revolution—Pelatiah Webster, "after discussing the fiscal

system of the United States, and suggesting, among other remedial provisions, one including a national bank," was the first to indicate "the necessity of their calling a *Continental Convention* for the express purpose of ascertaining, defining, enlarging, and limiting the duties and powers of their Constitution." Having thus proposed in 1781, in advance of anyone else, the calling of the "*Continental Convention*" that finally met at Philadelphia in May, 1787, he set himself to work to devise and submit to the American people an entirely new scheme of Federal government as a substitute for the hopeless failure under which they were then living.

On February 16, 1783, Pelatiah Webster published to the world at Philadelphia, through the press of T. Bradford, in a pamphlet of 47 pages, the "great discovery in modern political science" now embodied in the existing Constitution of the United States. He perfectly understood that he was putting forth a new creation, because he has told us, in express terms, that it was his purpose to construct an entirely new constitution as a systematic whole His words are these:

> As the fate then of all governments depends much upon their political constitutions, they become an object of mighty moment to the happiness and well-being of society; and *as the framing of such a constitution* requires great knowledge of the rights of men and societies, as well as of the interests, circumstances, and even prejudices of the several parts of the community or commonwealth, for which it is intended; it becomes a very complex subject and of course requires steadiness and comprehension of thought, as well as great knowledge of men and things, to do it properly. *I shall, however, attempt with my best abilities, and hope from the candor of the public to escape censure, if I can not merit praise.* * * * I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect if my dissertation shall throw any light on the great subject, shall excite an emulation of inquiry, *and animate some abler genius to form a plan of greater perfection, less objectionable, and more useful.* * * *
>
> I hope the reader will please consider that these are the original thoughts of a private individual, dictated by the nature of the subject only, *long before the important theme became the great object of discussion in the most dignified and important assembly which ever sat or decided in America.*

That assertion is supported by the entire body of contemporaneous history. The silly statement often made that about that time (Feb. 16, 1783) such a scheme of government as Webster proposed was "in the air" is simply mendacious. There is not a scintilla of contemporaneous evidence to support such a Munchausen story. It was years afterwards before any proposals at all like it were made. Prior to Webster's publication there is no trace of any other plan or project of a new Constitution that can be placed in contrast or rivalry with his "wholly novel theory." Thus the great architect stands alone and isolated from all rivals in the solitude of his own originality. The epoch-making document in question is so systematic, so lucid, with every thought worked out in detail, that it is easy to follow the mental processes through which the "great discovery in modern political science" was evolved from the brain of the daring innovator who was at once statesman, economist, and financier. The overshadowing practical difficulty to be removed was that involved in the fact that the one-chamber Congress then existing possessed no power to tax. To use Webster's own words: "They could assess and levy no taxes." No Federal Government that had ever existed had been armed with the power to tax. Webster's fundamental concept, without a precedent in the history of the world, was a Federal government armed with complete and self-executing taxing power As a financier he argued out his novel proposal at length. He said:

I begin with my first and great principle, viz: That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it.

The supreme authority must have power of making war and peace, of appointing armies and navies, of appointing officers both civil and military, of making contracts, of emitting, coining, and borrowing money, of regulating trade, of making treaties with foreign powers, of establishing post offices, and in short of doing everything which the well-being of the commonwealth may require, and which is not compatible to any particular State, all of which require money and can not possibly be made effectual without it. *They must therefore of necessity be vested with power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury when ill used; yet, from the necessity of the case, it must be admitted.* * * *

To make all these payments dependent on the votes of 13 popular

assemblies, who will judge of the propriety of every contract and every occasion of money, and grant or withhold supplies, according to their opinions, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd. * * * *This tax can be laid by the supreme authority much more conveniently than by the particular assemblies, and would in no case be subject to their repeals or modifications, and of course the public credit would never be dependent on or liable to bankruptcy by the humors of any particular assembly.*

Out of that brilliant and daring proposal to arm a Federal assembly with "the supreme authority" to levy all kinds of Federal taxes, regardless of the "repeals or modifications" of the States composing the Union, arose the existing Constitution of the United States. The moment it was settled that such a supreme government was to be established it followed that such a government must be completely organized, with the authority to execute its own laws and decrees directly upon individuals through machinery adequate to that end. From the original concept necessarily resulted a completely organized government "with the usual branches, legislative, executive, and judicial; with the direct power of taxation and the other usual powers of a government; with its army, its navy, its civil service, and all the usual apparatus of a government, all bearing directly upon every citizen of the Union without any reference to the governments of the several States." (Freeman, History of Federal Government, ii, 11.)

The moment Webster saw that his new creation must be a strictly organized and self-sustaining government, he proposed to divide it into three departments—legislative, executive, and judicial—as that partial division then existed in the State constitutions. There never had been a Federal government so divided in the world's history. There was no such division in the government created by the Articles of Confederation. To use again Webster's words: "It [the confederation] blended the legislative and executive powers together in one body" [the Continental Congress]. It follows, therefore, that Webster's second proposal to divide a *Federal* government into three departments—legislative, executive, and judicial—was but little less bold than his first, which involved the arming of such a creation with the independent power of taxation. And yet some superficial critics have not had the acumen to draw the distinction between the dividing of the government of a single State like England or Virginia into three

departments, and the dividing of a *Federal* State into three departments. The division of the government of a *single* State in that way had long been known. It was Webster who first conceived the idea involved in the application of such a division to a Federal system, an innovation that resulted in momentous consequences.

As the Articles of Confederation did not provide for an executive of any kind, the people of this country had never heard of a President of the United States, much less of a President surrounded by a Cabinet council. Webster was the first to provide for both. He proposed that the executive power should be vested in a President, surrounded by a Cabinet or council composed of the "great ministers of state," such President to be elected by Congress, as the President of France is now elected. "The financier manages the whole subject of revenues and expenditures, the Secretary of State takes knowledge of the general policy and internal government, the minister of war presides in the whole business of war and defense, and the minister of foreign affairs regards the whole state of the nation, as it stands related to, or connected with, all foreign powers." Later on he says the "great ministers of state shall superintend all the executive departments and appoint all executive officers, who shall ever be accountable and removable for just cause by them or Congress, i. e., either of them."

Just as the State constitutions admonished Webster to split the new Federal government into three departments, executive, legislative, and judicial, so the bicameral State legislatures admonished him to split the one-chamber Congress of the Confederation into two chambers, an upper and a lower House. As the draftsman of the Articles of Confederation, Franklin was content to follow a model 2,000 years old. All Federal assemblies down to that time had consisted of a single chamber. Therefore Franklin made the Continental Congress to consist of only one chamber. In criticizing Franklin's work Webster said: "This body, viz, Congress, consisted of but one House, without any check upon their resolution." As an improvement he proposed "that Congress shall consist of *two chambers,* an upper and a lower House, or Senate and Commons, with the concurrence of both necessary to every act, and that every State send one or more delegates to each House. This will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal ambitions in the decision. These

two Houses will be governed by the same natural motives and interests, viz, the good of the Commonwealth and the approbation of the people."

An important count in Webster's indictment against the Articles of Confederation was that "they could institute no general judiciary powers." That difficulty he proposed to remove in his new system by creating a Supreme Court, with jurisdiction original and appellate, and such inferior courts of law and equity as the necessities of the country might require. He outlined the Supreme Court, with jurisdiction both original and appellate, in these terms:

> That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different States, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the States of Europe. It is well known to all men versed in courts that the first hearing of a cause rather gives an opening to that evidence and reason which ought to decide it than such a full examination and thorough discussion as should always precede a final judgment in causes of national consequence. A detail of reasons might be added, which I deem it unnecessary to enlarge on here.

Thus emerged, for the first time, the splendid conception of the Supreme Court of the United States as it now exists, armed not only with original jurisdiction "to terminate and finally decide controversies arising between different States," but also with an appellate jurisdiction "in causes of great moment on the same reasons that such appeals are admitted in all the States of Europe." As to the inferior Federal courts, he concluded with this declaration:

> To these I would add judges of law and chancery; but I fear they will not be very soon appointed—the one supposes the existence of law, the other of equity—and when we shall be altogether convinced of the absolute necessity of the real and effectual existence of both of these, we shall probably appoint proper heads to preside in these departments.

When our Federal judicial system, as thus designed by Webster, found a real expounder in Marshall, one of the gravest tasks he was

called upon to perform was that involved in the establishment of the constitutional supremacy of the Supreme Court over judgments of State courts denying Federal rights. In the great case of Cohens *v.* Virginia (6 Wheat., 264), presenting the solemn refusal of the Virginia Court of Appeals to obey the mandate of the Supreme Court of the United States, the ultimate question involved was the supremacy of Federal law. It is hard not to marvel when we see how perfectly Webster anticipated and provided for that very contingency when he said:

> (1) No laws of any State whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject. This is too plain to need any proof. (2) Laws or ordinances of any kind (especially of august bodies of high dignity and consequence) which fail of execution, are much worse than none. They weaken the government, expose it to contempt, destroy the confidence of all men, native and foreigners, on it, and expose both aggregate bodies and individuals who have placed confidence in it to many ruinous disappointments which they would have escaped had no law or ordinance been made; therefore, (3) To appoint a Congress with powers to do all acts necessary for the support and uses of the Union, and at the same time to leave all the States at liberty to obey them or not with impunity is, in every view, the greatest absurdity. Further I propose *that if the execution of any act or order of the supreme authority shall be opposed by force in any of the States* (which God forbid), it shall be lawful for Congress to send into such State a sufficient force to suppress it. On the whole, I take it that the very existence and use of our Union essentially depends on the full energy and final effect of the laws made to support it, and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase, we must give it up—the nature of the thing does not admit of any other alternative.

That splendid appeal for the supremacy of Federal law under the new system was the inevitable corollary of the primary concept of a self-sustaining Federal government with the independent power of taxation. What eyes save those of a seer could have thus foreseen all that was to come?

The splendid conception of a new and unique federal system, now embodied in the existing constitution of the United States, was on February 16, 1783, published to the world, *as his invention,* by Pelatiah Webster in a tract of 47 printed pages, entitled "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America, which is necessary to their preservation and happiness; humbly offered to the public by a citizen of Philadelphia." That publication came from the well-known press of "T. Bradford, in Front Street, three doors below the Coffee House," situated about four blocks from Independence Hall, in which the Continental Congress was then sitting. At the very moment Madison, then 32, and Hamilton, then 26, were actually present in Philadelphia as Members of the Congress, in which Charles Pinckney, then 25, took his place not long afterwards.

Certainly this ripe financier and trained political economist of 57 was far better equipped to solve a problem in its essence financial and commercial than either Madison, Pinckney, or Hamilton could have been at that time. The relations that existed between the mature man of contemplation and the younger men of action were just what they should have been. He formulated, in the light of his experience, the novel principles which they were to translate into a working system of government. There were only three plans of a new system of Federal government taken to the convention, the three so elaborately worked out by Madison, Pinckney, and Hamilton, months before their departure for Philadelphia. If any man of the convention was the author of the "new discovery," it was one of these three, no kind of a claim in that regard can possibly be set up in favor of any other member. Thus, it appears from the documentary evidence that the idea that the new convention emerged from the brains of many in some supernormal way after the convention met, is a pure chimera distilled during that half-century of mystery in which the records were under seal. The moment the convention was organized, its first act of business was the formal reception of the two plans drafted by Madison and Pinckney in which "the great discovery" was not only explicitly set forth in every detail, but worked by the hand of Pinckney into what he called in presenting it "a system" of government. From that moment to the day of adjournment, the single question before the convention was this: In what way and to what extent should "the great discovery" as embodied in the prearranged plans be so modified and

amended as to adapt it to then existing conditions as a working system of government? To the attainment of that one mighty end the entire wisdom of the Assembly was devoted from May 29, the day upon which the plans were presented, to September 17, the day of adjournment. An inspection of the three prearranged plans, drafted so carefully by Madison, Pinckney, and Hamilton, will reveal the fact that each one embodied in its own way every element of "the great invention," which consisted of a proposal (1) of a Federal government with the independent power of taxation; (2) of a Federal government divided into three departments—legislative, executive, and judicial; (3) of a Federal legislature of two chambers; (4) of a supreme Federal judiciary; (5) of a Federal government operating not on states as corporations, but directly on individuals.

In the "plan" which each took with him to the convention the five new and basic principles that constitute the discovery were stated, with variations of detail, of course, in each. Ch.-V. Langlois has well said:

> History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. There is no substitute for documents; no documents, no history.

The problem involved in this matter can be solved, through a comparison of four documents, with almost the precision of a mathematical demonstration. The trained student has only to spread before him the original document of February 16, 1783, and then place, side by side, beneath it the three "plans," or rather paraphrases of it, taken to the convention by Madison, Pinckney, and Hamilton.

The conclusion thus becomes irresistible that the three "plans" were drawn from the common source, equally accessible to each draftsman, unless we substitute for that normal conclusion the impossible assumption that, *in some miraculous way,* the "great discovery" was revealed, during the few months preceding the meeting of the convention, to three youthful statesmen working in isolation and far removed from each other. And here let it be remembered that no one of the three ever claimed to be the author of it. Such a claim upon the part of either would have put each at war with the other, a conflict that never existed. If they failed in any duty, it was in the negative one of declaring at the time that the work of each was based on a preexisting invention, to which no one of them made any personal claim

whatever. It is about time for serious men, especially those who claim to be historical scholars, to cease beating their heads against the stone wall now made of clear, explicit, and unimpeachable documents that relieve us of the absurdities imposed by the "inspiration theory" and the "miraculous theory."

And yet the fact remains that the practical result achieved, under the most difficult circumstances possible, was just as remarkable as the invention itself. The philosophers, statesmen, jurists, warriors, experienced men of affairs who composed the august assembly that wrought at Philadelphia in 1787 may be compared, as to genius and learning, with the master spirits of any age. No assembly so small—it numbered only 55 delegates—was ever dominated by so many men of the highest order. They need not strut in borrowed plumes; they need no fame that belongs to another. The most ardent worshipper of the master builders would only belittle their immortality if he fancied that it could be at all dimmed by the rendition of tardy justice to the great architect, the man of contemplation, who was their natural, perhaps their necessary, forerunner.

When we look back and view as a whole the entire procession of events, advancing in regular order from the time the tie that bound us to the mother country was severed until the present day, it appears that our constitutional history has been dominated by a great triumvirate—Washington, Pelatiah Webster, and John Marshall—whose achievements must be considered in connection with that of the Federal Convention of 1787. The great drama in the history of humanity that opened with the invention of the "wholly novel theory," February 16, 1783, closed in triumph with its final acceptance as a working system of government by the last of the 13 States, May 29, 1790. Its first act was one of creation, proceeding from a single mind that wrought a revolution in political science by making an entirely new combination of political principles without a prototype in history. Its second act was one of adaptation, proceeding from a deliberative body of marvelous men, at once so scientific and so practical as to be able to readjust a novel and highly complex political theory and then apply it as a working system of government under the most difficult of all circumstances. Its third act was one of coercion, proceeding from the combined pressure of compelling conditions backed by the driving force of an almost irresistible personality intent upon saving the States from anarchy by subjecting them to the yoke of an equitable and in-

destructible union. The most brilliant page in the history of Washington is that which records his almost superhuman efforts to force the States to accept the work of the convention—efforts that began with the unanimous ratification of loyal little Delaware on December 7, 1787, and closed with the sullen acceptance of disloyal little Rhode Island, coerced by the fear of isolation, on May 29, 1790. The intellectual side of the movement finds its source in a man of contemplation, who worked behind a curtain which, until now, has almost concealed him from the view of the world. The material and political side of the movement finds its driving force in the titanic form of a man of action, who without apparent effort, impressed all mankind from the outset with the grandeur of his achievements. Such is the relation in which Pelatiah Webster stands to Washington.

And yet Washington and Webster gave to their country only a marble Galatea which the hand of another genius had to quicken into life. The success of the American Constitution has resulted from its capacity to adapt itself rapidly to the changes that have followed each other like the pictures in a panorama during the very short period in which the 13 scattered communities that fringed our Atlantic seaboard toward the close of the eighteenth century have grown into an empire. In expanding with that expansion, in adapting itself to the changed relations resulting therefrom, the American Constitution has developed an elasticity, a growing power entirely beyond the cumberous process of amendments its terms provide. When the thirteenth, fourteenth, and fifteenth amendments, involving a single subject matter, are considered, as they should be, as a single transaction, the fact remains that the Constitution of the United States has been amended in a formal way only once since 1804, a period of 108 years. And yet during all that time it has been passing rapidly, despite its rigid and dogmatic form, through a marvelous process of unparalleled development, chiefly through the subtle agency of judge-made law ever flowing from a generous fountain—the Supreme Court of the United States. That fountain was unsealed by John Marshall, who, on February 4, 1801, took his place for the first time a Chief Justice, and as such sat in the midst of six associates for 34 years. Down to that time the judicial power, destined to become the mainspring of the new system, had proved a hopeless failure. During the first 11 years of its existence the latent powers of the Supreme Court were in eclipse. At the end of that time it was that Jay, on January 2, 1801, after his reappointment as Chief Justice, wrote to President Adams:

> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the National Government nor acquire the public confidence and respect which, as a last resort of the justice of the Nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system. (Pellew's Life of Jay, p. 339.)

That despairing cry with which Jay abandoned the headship of our Federal judicial system upon the assumption that it was impotent was a bugle call to Marshall, who became at once not only the dominating mind of the court but its mouthpiece in a sense in which no Chief Justice has ever been before or since. At the moment of his accession the time was ripe for the advent of a jurist and statesman clear visioned enough to sweep the entire horizon of Federal power and bold enough to press each element of it to its logical conclusion. The ultimate success of his life work was assured by the manner in which he solved the problem of problems that awaited him. In Marbury *v.* Madison (1803) he announced for the first time that the Supreme Court possessed the right, as well as the power, to declare null and void an act of Congress in violation of the Constitution; in Fletcher *v.* Peck (1810) he declared that it likewise possessed the power to put the stamp of nullity upon any State law that conflicted with the Constitution. The invincible logic employed in both demonstrations rested, necessarily, on the admission that the august right in question was a mere deduction from the general nature of a system of government whose constitution did not undertake to grant it in express terms. When the time came for a judgment to be pronounced in Cohens *v.* Virginia (1821), involving the supremacy of Federal law over State law, Marshall, in defining the new and growing sense of nationality, said:

> They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself or of the laws or treaties of the Nation, but that this power may be exercised in the last resort by the courts of every State in the Union.
>
> That the United States form, for many and for most important purposes, a single Nation has not yet been denied. In war we are one people. In making peace we are one people. In

> all commercial relations we are one and the same people. In many other respects the American people are one. And the Government which is alone capable of controlling and managing their interests in all these respects is the Government of the Union. It is their Government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a Nation.

In that great judgment we hear not only of the complete supremacy of Federal law, but of the "American people" as the "Nation." In McCulloch *v.* Maryland (4 Wheat., 316) we hear of "the American Constitution." Of the complete supremacy of Federal law we have heard long before in the prophetic words of the great architect, who foresaw everything, provided for everything. Pelatiah Webster, in defining the supremacy of Federal law, made John Marshall's career possible.

Since the Constitution was adopted it has been construed by the Supreme Court in about 1,400 cases, which, if printed separately in the official form, would fill about 15 volumes of the reports. Of that great mass of judge-made law, which determines what the Constitution really is, Marshall was the founder. Pelatiah Webster was potent in raising the framework of the new building; John Marshall was potent in bracing it and giving it its final form. All have been honored, all have been rewarded, except the great architect who made everything possible. While the priceless legacy bequeathed by the immortal document of February 16, 1783, has become the heritage of swelling millions, an humble and neglected grave at Philadelphia has been the only recompense so far received by its author. Every drummer boy, every foreigner, who rendered conspicuous service to the patriot cause during the Revolutionary era has been honored by a monument—only the architect of our Federal Constitution has been forgotten.

HANNIS TAYLOR.

LUTHER MARTIN AND THE TRIALS OF CHASE AND BURR

I. The Impeachment of Chase.

Some years ago, in examining the title to a valuable piece of real estate in Washington, the writer found in the pigeon holes in the office of an old lawyer of this District a bundle of papers relating thereto. The early title of the land in question was complicated by about every question of law which could arise since the abolition of feudal tenures. Among these papers was an exhaustive opinion upon the legal questions involved. The writing was beautiful,—clear and uniform as copper-plate engraving, but of a curious and characteristic type. The signature was apparently in the same handwriting as the body of the document, and the name appended thereto was "Luther Martin." But while the penmanship was attractive, the full and clear discussion of the intricate legal questions involved in the title were, to a lawyer, most fascinating. The opinion was so clear and convincing, so fortified by a wealth of common law authorities and, withal, so sustaining to one who felt himself much at sea on the questions involved, that it led to a study of the private and public life of its author.

Luther Martin, of Maryland, was, by the practically unanimous opinion of his contemporaries, awarded the position of the greatest common law lawyer in this country of his day. His entire life as a lawyer is full of interest to other lawyers; but the purpose of this article is to briefly sketch his connection with the two great State trials of our early history, in each of which he was the leading counsel for the defence.

The first is the impeachment of Samuel Chase. On February 4, 1805, the trial of the impeachment of Samuel Chase, an Associate Justice of the Supreme Court of the United States, began before the Senate at Washington. Less than fourteen years before, the respondent had been the leader of the anti-Federalist forces of the State of Maryland; he was to be tried on charges which were the outgrowth of his intense Federalism. His leading counsel was the man who had fought shoulder to shoulder with him in the battle against the Constitution, himself now wearing from Jefferson the title "The Federal bull-dog." The circumstances leading up to the impeachment and

trial of the only justice of our highest judicial tribunal who has been subjected to this ordeal, are interesting, and must be understood to appreciate the significance of the event. The question to be settled went beyond the mere individual interests involved; the independence of the Federal judiciary was at stake. Barely ten years had passed since the impeachment of Warren Hastings before the House of Lords; and men's minds were still full of the judgment rendered in that important case. In contrasting the two events, a modern historian says:

> The impeachment of Judge Chase was a cold and colorless performance beside the melodramatic splendor of Hastings' trial; but in the infinite possibilities of American democracy, the questions to be decided in the Senate chamber had a weight for future ages beyond any that were then settled in the House of Lords.

A sequence of events clearly establishes the fact that President Jefferson was dissatisfied with the jurisdiction over the executive and legislative departments assumed by the Federal judiciary. On February 24, 1803, Chief Justice Marshall had delivered the unanimous opinion of the Supreme Court in the case of Marbury *v.* Madison, in which, after deciding that the Court had no jurisdiction over the matter in issue, he proceeded to instruct the administration as to its limitations and to declare the memorable proposition that the Court had the power to set aside an act of Congress because of its repugnance to the Constitution. This opinion, Mr. Jefferson declared to be "an *obiter* dissertation of the Chief Justice and a perversion of the law." (7 Jefferson's Works, 290.) John Pickering, United States District Judge for New Hampshire, had in the same year been impeached and, after a trial before the Senate, which was arbitrary, illegal and infamous, had been found guilty and removed from the bench. The position assumed by the administration as to the Federal judiciary may be gathered from the remarks of the loquacious Senator, William B. Giles, of Virginia, an administration leader, which are reported by John Quincy Adams, in his memoirs. (Vol. 1, p. 322 *et seq.*) In the course of this conversation Giles

> treated with the utmost contempt the idea of an *independent* judiciary, said there was not a word about such an independence in the Constitution, and that their pretensions to it were nothing more nor less than an attempt to establish an aristocratic despotism in themselves. The power of impeachment was given with-

> out limitation to the House of Representatives; the power of trying impeachments was given equally without limitation to the Senate; and if the judges of the Supreme Court should dare, as they had done, to declare an Act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the undoubted right of the House to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them. * * * A removal by impeachment was nothing more than a declaration by Congress to the effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices* for the purpose of giving them to men who will fill them better.

It must be conceded that Samuel Chase was a shining mark for the assaults of the Republicans. He had been raised in a strenuous school of politics. At an early age he had distinguished himself while a member of the Colonial Legislature of Maryland, by his opposition to the royal governor; he had vehemently resisted the Stamp Act, being a leader of the assemblage of "Sons of Liberty," at Annapolis, that forcibly opened the public offices, destroyed the stamps and burned the collector in effigy. He was a signer of the Declaration of Independence, and when, in 1796, appointed to the Supreme Bench by Washington, he certainly failed to cast aside the ardent Federalist convictions which he had acquired or to repress them on all occasions. He was a stern and overbearing man, and, after his appointment to the Supreme Bench, had openly sympathized with and supported John Adams. On the other hand there is no question but that he was a man of great ability, absolute integrity and a fearless patriot. That his impeachment was sought personally by Jefferson would seem to be well established by the following letter written by the latter to Joseph Nicholson, a member of Congress from Maryland, who had managed the impeahment of Judge Pickering:

> You must have heard of the extraordinary charge of Chase to the grand jury at Baltimore. Ought this seditious and offiical attack on the principles of our Constitution and on the proceedings of a State to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration. As for myself, it is better that I should not interfere.

In order to secure the impeachment, the most able administration men in the House were appointed managers, with John Randolph, of Roanoke, at their head. The immediate grievance was the charge made by Judge Chase to a Federal grand jury in Baltimore, in which he severely arraigned Jefferson's administration; but to obtain more plausible grounds, the managers were compelled to go back five years to the trials of Fries and Collender for sedition.

Probably no lawyer ever entered a case with greater delight and zest than did Martin in undertaking the defense of Samuel Chase. The latter was a native of Somerset County, where Martin formerly lived and where he first displayed the legal ability which placed him at the head of the bar of his State. When, at the age of thirty, Martin received the appointment of Attorney General of Maryland, it came through the influence of Samuel Chase. Ten years later, when Chase became Chief Justice of the newly established criminal court of Baltimore, Martin, as Attorney General, prosecuted five thousand cases before him. Their friendship had been long and unbroken. Moreover, while the case against the Justice was, from a legal standpoint, decidedly weak, it was essentially a political trial and was to be tried before a tribunal in which twenty-five out of thirty-four Senators belonged to the party whose principles and practices Chase had criticised from the bench; a situation which surely inspired the "joy of battle" in the breast of so aggressive an advocate as Martin. Added to all this, it was almost a personal contest with Thomas Jefferson, and the feeling which Martin entertained towards Jefferson was only equaled by that which Jefferson entertained toward Martin. The severest condemnation Martin, whose range of expletives was not narrow, could bestow upon any man was to call him "as great a scoundrel as Tom Jefferson"; while during the Burr trial, Jefferson wrote to George Hay, the District Attorney, about Martin, as follows:

> Shall we move to commit Luther Martin as a *particeps criminis* with Burr? Graybill will fix upon him misprision of treason at least, and at any rate his evidenec will put down this unprincipled and impudent bull-dog, and add another proof that the most clamorous defenders of Burr are all his accomplices. It will explain why Luther Martin flew so hastily to the aid of "his honorable friend," abandoning his clients and their property during a session of a principal court of Maryland, now filled, I am told, with the clamors and ruins of his clients.

The trial was presided over by Aaron Burr, the Vice President, and to his love for the spectacular was probably due the arrangement of the Senate Chamber. On the right and on the left of his chair were two rows of benches covered with crimson cloth. On these the Senators were to sit in judgment. Before them was a temporary semi-circular gallery, raised on pillars and covered, front and seats, with green cloth. To this the women came in crowds. Under the gallery were three rows of benches rising one above the other, likewise covered with green cloth, and set apart for the heads of departments, foreign ministers, and the members of the House of Representatives. In front of this amphitheatre, and facing the right and left of the Vice President were two boxes covered with blue cloth. One was occupied by the managers, the other by the accused and his counsel. Among the Senators sitting in judgment on the case was the future President, John Quincy Adams, who steadily voted in favor of the accused, and many other wearers of historic names, such as Bayard, of Delaware; Breckenridge, of Kentucky; Dayton, of New Jersey; Giles, of Virginia; Tracy, of Connecticut; Pickering, of Massachusetts, and Sumpter, of South Carolina.

The chief manager of the impeachment on the part of the House was John Randolph, of Roanoke, then but thirty-one years of age, and already the leader of that body, yet more feared than loved by reason of his sarcastic eloquence. Hildreth aptly comments on his speeches in this case, as "tingling but desultory surface strokes." Of his associates Cæsar Rodney, of Delaware, was the most notable.

At the head of the counsel for the accused was Luther Martin, described by Professor Adams, in his life of John Randolph, as "most formidable of American advocates, the rollicking, witty, audacious AttorneyGeneral of Maryland; boon companion of Chase and the whole bar; drunken, generous, slovenly, grand; bull-dog of Federalism, as Mr. Jefferson called him; shouting with school-boy's fun at the idea of tearing Randolph's indictment to pieces and teaching the Virginian Democrats some law." Associated with him in the defence were Robert Goodloe Harper, who had been the Federal leader of the House during Adams' administration, and who was later a Senator from Maryland; Joseph Hopkinson, Philip Barton Key, and Charles Lee, who had been Washington's Attorney-General.

Martin's speech occupied parts of two days and was the best of

his career; at all events, the best that has been preserved. Professor Adams says in regard to it:

> If any student of American history, curious to test the relative value of reputations, will read Randolph's opening address, and then pass on to the argument of Luther Martin, he will feel the distance between show and strength, between intellectual brightness and intellectual power. Nothing can be finer in its way than Martin's famous speech. Its rugged and sustained force; its strong humor, audacity, and dexterity; its even flow and simple choice of language, free from rhetoric and affectations; its close and compulsive grip of the law; its good-natured contempt for the obstacles put in its way,—all these signs of elemental vigor were like the forces of nature, simple, direct, fresh as winds and ocean.

In one part of his argument Martin throws an important sidelight upon his conception of the old question in legal ethics as to the duty which a lawyer owes to his client. He holds that when counsel have done all that can be done to insure a *fair* trial for a client, if, according to the clear, undoubted evidence, the latter is guilty, it is the duty of counsel to submit his client's case to the decision of the jury without any attempt to mislead them, and this whether counsel is appointed by the Court or retained by the criminal. He adds: "The duty of a lawyer is, most certainly, in every case to exert himself in procuring justice to be done to his client, but not to support him in injustice."

In his history of the United States, Adams speaks of this speech of Martin's as the climax of his career. Justice Chase always remembered his services with gratitude. In the first volume of the American Law Review, published in 1866, it is related that some time after the acquittal of Chase, on the trial of a cause in the Federal Court at Baltimore, Martin, being overcome by an excess of drinking, was so insolent and overbearing in his deportment towards the Court, that it became unendurable; and the District Judge drew up a commitment for contempt, and handed it to Chase for his signature. Chase, after taking his pen, threw it down again, saying: "Whatever may be my duties as Judge, Samuel Chase can never sign a commitment against Luther Martin."

ASHLEY M. GOULD.

(To be continued.)

THE PATENT MONOPLY

When Does the Patentee's Right to Dictate the Resale Price of His Patented Article Terminate?

Prior to the year 1896 there was no apparent difficulty in answering this question. The lawyer then consulted on the subject felt safe, and justifiably so, in advising his client, on the faith of repeated pronouncements of the United States Supreme Court, that when a patentee, or his assignee, had manufactured and sold for a satisfactory price the machine or other article protected by the patent, that machine or article was thereafter "without the patent monopoly" and beyond control of the patentee to dictate its resale price. The lawyer seeking for the law on which to base his answer to the question propounded, prior to the eventful year mentioned, would have found that the Supreme Court had said:

> The patentee or his assignee having in the act of sale *received all the royalty or consideration which he claims,* for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee. Adams *v.* Burke, 17 Wall., 453, decided December 8, 1873.

Again:

> *When the patentee has once received his royalty,* he cannot treat a subsequent seller or user as an infringer. Morgan Envelope Company *v.* Albany Paper Company, 152 U. S., 425, decided March 19, 1894.

Again:

> Having manufactured the material and sold it *for a satisfactory compensation* * * * the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent. Keeler *v.* Standard Folding Bed Company, 157 U. S., 659, decided April 8, 1895.

Again:

> When the royalty has once been paid to a party entitled to receive it, the patented article then becomes the absolute, unre-

> stricted property of the purchaser, with the right to sell it as an essential incident of such ownership. (*Ibid.*, p. 664.)

Again:

> As between the owner of a patent on the one side, and the purchaser of an article made under the patent on the other, the payment of a royalty once * * * emancipates such article from any further subjection to the patent throughout the entire life of the patent. (*Ibid.*, p. 666.)

The doctrine of the foregoing quotations has never been overruled by the Nation's highest tribunal, and that court had as early as the year 1888 proclaimed itself the one and only final tribunal for the adjudication of questions arising under the patent statutes:

> A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been judicially settled by the highest judicial authority which can pass upon the question. * * * No question regarding patents in any such case, reviewable by this Court, can be regarded as finally settled, so as to establish the law for like cases, unless it has been determined by this court. Andrews *v.* Hovey, 124 U. S., 694.

In 1896 the Circuit Court of Appeals, in Heaton Peninsular Button Fastener Company *v.* Eureka Specialty Company, 77 Fed., 288, handed down a decision which has resulted in spreading over this question a cloud of doubt through which at the present day the vision of neither layman nor lawyer can safely penetrate. It was not what the *Button Fastener* case decided, so much as the general language unnecessarily used by the Court in its opinion, that gave rise to the resulting confusion and doubt. The *Button Fastener* case has been repeatedly cited as an authority for upholding the right of a patentee to control the resale price of the patented article after he has parted with every vestige of interest in that article. It decided no such thing. The question at issue in that case was really the right of a patentee to obtain his royalty out of the use of his invention rather than out of its original sale. The plaintiff owned a patent on a machine for fastening buttons on shoes. By the explicit terms of the patent, this device fastened buttons on shoes by the use of an "ordinary wire staple." In the actual operation of the machine, an ordinary unpatented and unpatentable wire staple was used. The thing patented was

the machine, not the staple. The plaintiff sold these machines at actual factory cost, subject to a stipulation, contained in a notice on each machine, that it could be used only with staples purchased by the user from the patentee. The question before the Court involved the enforcement of this stipulation. The decision upheld its enforcement. The defendant who disregarded the restrictive notice was held to be an infringer. While there is no escaping the conclusion that by this decision, and the many others in the various courts which have followed it, the protection of the patent monopoly was extended to include an unpatented article, nevertheless the result in the *Button Fastener* case may not unjustly rest upon the fact that the patentee when he parted with the machine did not obtain, in the language of the Supreme Court, all the royalty or consideration which he claimed for the use of his invention in that particular machine. The *Button Fastener* case related exclusively to the use of a patented machine. A simple statement of the facts shows conclusively that it had no relation whatever to the question of the resale price of a patented article after it had been sold by a patentee and after the patentee had obtained for the article all of the royalty or consideration which he claimed for it, or ever expected to get out of it.

On March 11, 1912, the Supreme Court of the United States handed down its decision in the case of Dick *v.* Henry, 224 U. S., 1, already widely known as the mimeograph case. That case involved facts indistinguishable from the *Button Fastener* case. The plaintiff owned letters patent on a rotary mimeograph, a device for duplicating typewritten matter; he supplied a Miss Skou, who operated a public stenographic and typewriting office in New York City, with one mimeograph; each mimeograph manufactured and sold by the plaintiff contained a notice restricting the purchaser's right to use the machine with ink and paper made by the patentee; the machines were sold at cost, or less, and the plaintiff depended upon the profit realized from the sale of ink and paper used with the machine; the defendant (Henry) supplied Miss Skou with ink of his own manufacture with the knowledge, and intending, that it would be used with plaintiff's patented machine in violation of the restriction upon its use; both Miss Skou and the defendant (Henry) had knowledge of the terms of the restrictive notice; and the plaintiff sued the defendant as a contributory infringer and sought to enjoin his supplying Miss Skou, and others similarly situated, with ink intended for use with the patented

mimeograph. The Circuit Court of Appeals entertained such grave doubts respecting the case, particularly in view of the decision in the *Button Fastener* case and the large number of cases in the inferior Federal courts that had followed, and extended, the decision of that case, that it certified the case of Dick *v.* Henry to the Supreme Court. The decision of the Supreme Court was written by Mr. Justice Lurton, who, as one of the judges of the Circuit Court of Appeals, had in 1896 written the *Button Fastener* opinion. The doctrine, which was a concept of his earlier judicial career, received careful nurture from him as a Justice of the court of last resort. The decision not only upheld the enforcement of the restrictive notice, but actually decided that that notice is enforcible under the patent statutes by the Federal government, and not under the laws relating to contracts by the courts of the different States. Undeniably the result of the decision is to extend the lawful monopoly of a patent to unpatented and unpatentable articles, for in the case of Dick *v.* Henry, the ink used with plaintiff's mimeographs is an article on which a patent has long since expired.

It was most unfortunate that a decision so far-reaching in its effect should have been actually decided by a minority of the Supreme Court. The case was argued after the death of Mr. Justice Harlan, and during the absence of Mr. Justice Day, who had been called from Washington owing to the serious illness of Mrs. Day. The opinion of the Court was delivered by Mr. Justice Lurton, with whom Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice VanDevanter concurred; a vehement dissenting opinion was delivered by Mr. Chief Justice White, with whom Mr. Justice Hughes and Mr. Justice Lamar concurred. After the opinion was delivered, the plaintiff in error (Henry) asked leave to file a petition for rehearing, and the Attorney General and the Solicitor General filed an application and brief on behalf of the United States for leave to intervene, and for a rehearing of the cause, these public officials taking this extraordinary action because of the wide public interest in and the grave effect of the decision. Both applications for rehearing were denied. Under a rule of the United States Supreme Court, a rehearing of a case which has been decided can not be granted unless one of the Justices who concurred in the majority opinion requests the rehearing. Thus we have presented a case of the gravest importance in which the law of the land, for the time being at least, has been settled by a minority of the court of last resort.

The *Mimeograph* case related solely to the *use* of a patented article, and the Court reiterated its previously announced doctrine that there is a well-grounded distinction between the grant of the right to make and vend a patented article, and the grant of the right to use it.

> Mr. Justice Clifford, in Mitchell *v.* Hawley, 16 Wall., 544, directed attention to what he termed "the well-grounded distinction between the grant of the right to make and vend the patented machine and the grant of the right to use it," which, he says, "was first satisfactorily pointed out by the late Chief Justice Taney, with his accustomed clearness and precision." Dick *v.* Henry, 224 U. S., 1, text, p. 20.

We are concerned in this article not with the right of the patentee to restrict the use of his invention, or to depend for his profit upon that use, but with the right of the patentee to restrict *the resale price* of the patented article, after it has been sold by him at a price satisfactory to him, and after he has obtained all that he claims for the article or its use, and has parted with every vestige of interest in it. The *Button Fastener* case, and already the *Mimeograph* case, are being used as authority for the right to restrict the resale price of patented articles,—indeed, since the decision of the Circuit Court of Appeals in the first of these cases patentees and patent attorneys have been exhausting their ingenuity to devise means by which a patentee may sell a specimen of his patented article, and at the same time keep it.

There is pending in the Court of Appeals of the District of Columbia[1] as this is written a case of resale price restriction, the facts of which we here set forth because that case is typical of a large number of patent monopoly price cases. The facts in that case are, briefly but completely stated, as follows:

Plaintiffs own letters patent on a product called "Sanatogen," a powder preparation sold for internal human consumption. They manufacture and sell this product. They sold a quantity of the product to jobbers, who paid to the plaintiffs the full price demanded therefor. The jobbers sold the said product to the defendant, a retail druggist, and he paid to the jobbers the full price demanded therefor. Each container of the product so sold by the plaintiffs to the jobbers and by jobbers to the defendant had pasted on it the following label:

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1. Bauer & Cie, et al. *v.* O'Donnell, Court of Appeals No. 2444, October Term, 1912.

Notice to the Retailer.

This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.

$1.00 THE BAUER CHEMICAL CO.

The defendant resold the product at a price less than that named in the label and is sued in this case—not for breach of contract—but for patent infringement.

It will be seen that, as above stated, the case involves the question of the right of a patentee to control, *by means of the patent statute,* the price at which the patented article shall be resold to the consuming public after the patentee has manufactured it and sold it for his price, and after the defendant has purchased it from the patentee's vendee, paying that vendee his price for the article.

While using the case of Bauer *v.* O'Donnell throughout this article, it will be understood that we are not discussing that case alone, but that case because it is typical of the cases involving the attempts to restrict the resale price at retail of safety razors, phonographs, phonograph records, patent medicines, and an innumerable variety of patented machines, instruments, and other articles.

Following the doctrine of the *Button Fastener* case,—indeed, extending that doctrine, but overlooking and ignoring what we contend to be the settled law as found in the Supreme Court's decisions,—the inferior Federal courts throughout the country, in some twenty-five price restriction cases, have issued injunctions restraining retailers from selling at prices satisfactory to them, patented articles which they had bought and owned—and this despite the fact that the retailers with grim humor are allowed to read in the decisions of the Supreme Court the unqualified pronouncement that "the owner of a patented article can, *of course,* charge such price as he may choose for it."[2] That the cases upholding the enforcement under the patent statute of these price restrictive notices do ignore the settled doctrine of the Su-

2. Bement *v.* National Harrow Company, 186 U. S. 70, 93.

preme Court is manifest from an examination of the Supreme Court cases which lay down that doctrine.

As far back as 1852, that Court, in Bloomer *v.* McQuewan, 14 How., 539, speaking by Chief Justice Taney, said:

> The franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented without the permission of the patentee. This is all he obtains by the patent. And when *he sells the exclusive privilege* of making or vending it, for use in a particular place, the purchaser buys a portion of the *franchise* which the patent conferred. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States, and the interest he acquires necessarily terminates at the time limited for its continuance by the law which created it. The patentee can not sell it for a longer time. * * *
>
> But the *purchaser of the implement or machine* for the purpose of using it in the ordinary pursuits of life, stands on a different ground. In using it, he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress and if his right to the implement or machine is infringed, he must seek redress in the courts of the State, according to the laws of the State, and not in the courts of the United States, nor under the law of Congress granting the patent. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the State in which it is situated.

We call attention to the clear distinction made in the two paragraphs of the above quotation, the first paragraph referring to the power of the patentee over his *patent rights,* and the second referring to the power of the patentee and the rights of a purchaser over the *patented article.*

The next important case is Adams *v.* Burke, 17 Wall., 453, de-

cided in 1873. The plaintiff in that case owned a patent on a coffin-lid. He assigned the whole right for a district comprised by a circle, whose radius was ten miles, having the city of Boston for its center; outside of that district, the plaintiff owned the patent, having neither sold nor assigned his rights in it. The defendant bought a quantity of the patented lids in Boston, took them outside the ten-mile circle and used them. The plaintiff sued for patent infringement. The Court, in an opinion by Mr. Justice Miller, after referring to the principles of earlier cases, said:

> The true ground on which these decisions rest is, that a sale by a person who has the full right to make, sell and use such a machine carries with it the right to the use of that machine to the full extent to which it can be used in point of time.
>
> The right to manufacture, the right to sell and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.
>
> But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the langauge of the Court, passes without the limit of the manopoly. Bloomer *v.* McQuewan, 14 How., 549; Mitchell *v.* Hawley (*ante,* 322). That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.

It is to be noted that emphasis is laid by the Court on the doctrine that when the patentee has "*received all the royalty or consideration which he claims for the use of his invention* * * * it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees." One of the points on which turned the decision in Dick *v.* Henry was that the patentee had not by the sale received *all* the royalty or consideration which he claimed for the use of his invention in the particular machine involved in that case; in Dick *v.* Henry, the patentee had received for the mimeograph only the bare cost of its manufacture; he depended for his royalty or consideration upon the profit from sales of ink and paper for use with

that machine. In the price restriction cases, there is no such claim. In these cases, in the sale by the plaintiffs, the patentees "received *all* the royalty or consideration" they claimed, or ever expected, or reserved any right to obtain for the articles which ultimately became the property of the defendants. The plaintiffs made a sale outright at a profitable price and parted with every claim of every character over those particular patented articles. The moment plaintiffs in Bauer *v.* O'Donnell, for instance, sold any number of packages of Sanatogen to the jobbers from whom defendant bought—or to defendant directly—they parted with every claim in those packages; they retained no future interest in nor any right to any pecuniary return from the use or *resale* of those particular articles. In Dick *v.* Henry, however, the patentee when he parted with the possession of the mimeograph did not get the price—the consideration—he asked for it, and hence it never was freed from the patent monopoly. What was the return to the patentee? What was the "royalty or consideration which he claims for the use of his invention"? It was the initial manufacturer's cost of the mimeograph, plus a continuing return in the shape of profits made on the sale of ink and paper used with the mimeogrph. Dick said to a purchaser, "You can have the *use* of my mimeograph upon payment to me of the actual cost of that machine and a royalty, that royalty to be the profit which I will make on the ink you will use in that machine. On these terms I shall give you with the mimeograph a license under the patent to use that mimeograph only with ink and paper purchased from me." Obviously the initial sale of the machine at cost was not what the patentee demanded under his patent—not in the language of the Supreme Court "*all* the royalty or consideration which he claims for the use of his invention"—and as decided repeatedly by that Court it was not until he received the price he demanded that the machine was relieved from the patent monopoly.

Continuing our examination of the doctrine of the United States Supreme Court, we find next in order the case of Chaffee *v.* Boston Belting Company, 22 How., 217, in which Mr. Justice Clifford, delivering the unanimous opinion of the court, said (p. 223):

> When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision in this court in the cases before mentioned, it then passes outside of the monopoly,

> and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated. Hence, it is obvious, that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair or improve upon it as he pleases, in the same manner as if dealing in property of any other kind.

In Morgan Envelope Company *v.* Albany Paper Company, 152 U. S., 425, decided 1894, the United States Supreme Court unanimously held that "when a patentee has once received his royalty, he can not treat the subsequent seller or user as an infringer" (syllabus). Referring to patented fixtures, the sale of which by the defendants the patentee sought to restrain, Mr. Justice Brown, speaking for the Court, said (p. 433):

> So far as fixtures sold by defendants, which had been originally manufactured and sold by the patentee to other parties, are concerned, it is evident that, by such original sale by the patentee, they passed out of the limits of the monopoly, and might be used or sold by any one who had purchased them from the original vendees. The patentee having once received his royalty upon such device, he cannot treat the subsequent seller or user as an infringer.

One year later, in 1895, came the illuminating decision in Keeler *v.* Standard Folding Bed Company, 157 U. S., 659. In that case the patentee had assigned his *patent rights* to various assignees for different specified territories. The defendant purchased from the territorial assignee in Michigan a quantity of the patented articles for the purpose of selling them in Massachusetts, for which State the plaintiffs were the exclusive assignees of the patentee. Plaintiffs obtained an injunction against the defendant who had purchased the patented articles from the Michigan assignee, and on appeal to the Supreme Court the decree granting that injunction was reversed. In the opinion, by Mr. Justice Shiras, the Court, after quoting section 4884 of the Revised Statutes, which specifies the grant that every patent shall contain, and section 4898 R. S., conferring on patentees the right to assign, in whole or in part, the franchise of the patent, said:

Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same. It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. As was said by Mr. Justice Clifford, in Goodyear *v.* Beverly Rubber Co. (1 Cliff., 348, 354): *"Having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to it, or impressed upon it, by the Act of Congress under which the patent was granted."*

Suppose, however, the patentee has exercised his statutory right of assigning by conveying to another an exclusive right under the patent to a specified part of the United States, what are the rights of a purchaser of patented articles from the patentee himself within the territory reserved to him? Does he thereby obtain an absolute property in the article, so that he can use and vend it in all parts of the United States, or, if he take the article into the assigned territory, must he again pay for the privilege of using, and selling it? If, as is often the case, the patentee has divided the territory of the United States into twenty or more "specified parts," must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made, in such a case, between the right to use and the right to sell? *Can the owner of the patented article* hold and deal with it the same as in case of any other description of property belonging to him, and, on his death, does it pass, with the rest of his personal estate, to his legal representatives, and thus, as a part of the assets to be administered, become liable to be sold?

> These are questions which, although already in effect answered by this Court in more cases than one, are now to be considered in the state of facts disclosed in this record. * * *

The Court reviews its earlier decision in the case of Adams *v.* Burke, and, referring to the langauge of Mr. Justice Miller in that case to the effect that the defendant, having purchased the patented coffins acquired the right to *use them,* freed from any claim of the patentee, the Court said (p. 664):

> It is obvious that necessarily the use made by Burke of these coffins involved a sale in every case. He did not put them to his personal use, unless we are permitted to suppose that he was himself buried in each one of the coffins. He bought the coffins for the purpose of selling them to others, and the legal significance of the decision upholding his defence is that a person who buys patented articles from a person who has a right to sell, though within a restricted territory, has a right to use and sell such articles in all and any part of the United States; *that when the royalty has once been paid to a party entitled to receive it, the patented article then becomes the absolute, unrestricted property of the purchaser, with the right to sell it as an essential incident of such ownership.*
>
> That this was the meaning of this decision, not only appears from the langauge used, and from the necessary legal effect of the conclusion reached as between the parties, but from the dissenting opinion of Justice Bradley, whose reasoning went wholly upon the assumption that such was its meaning.

Having summarized all of its earlier decisions, the Supreme Court in this case of Keeler *v.* Standard Folding Bed Company, enunciated its doctrine on the question we are here discussing in the following explicit terms (p. 666):

> This brief history of the case shows that in Wilson *v.* Rousseau, 4 How., 646, and cases following it, it was held that, as between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, *the payment of a royalty once,* or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, *emancipates such article from any further subjection to the patent throughout the entire life of the patent,* even if the latter should be by law

subsequently extended beyond the term existing at the time of the sale, and that in respect of *the time* of enjoyment, by those decisions the right of the purchaser, his assigns or legal representatives, is clearly established to be entirely free from any further claim of the patentee or any assignee; that in Adams *v.* Burke, 17 Wall., 453, it was held that, as respects *the place* of enjoyment, and as between the purchaser of patented articles in one specified part of the territory and the assignee of the patent of another part, the right once legitimately acquired to hold, use, and sell will protect such purchaser from any further subjection to the monopoly; that in Hobbie *v.* Jennison, 149 U. S., 355, it was held that, as between assignees of different parts of the territory, it is competent for one to sell the patented articles to persons who intend, with the knowledge of the vendor, to take them for use into the territory of the other.

Upon the dotrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion, *It is, however, obvious that such a question would arise as a question of contract and not as one under the inherent meaning and effect of the patent laws.*

The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.

It is to be borne in mind that in these patent monopoly cases no claim for the enforcement of a contract arising out of the acceptance by the retailer of the patented article with knowledge of the restrictive notice is set up. The patentees are in all of these cases careful to waive the question of contract, realizing that their attempt to keep up the retail sale price of the patented article must be enforced under patent authority or must fall as unenforcible, for under the statutes in many States, under the Federal Statutes, and under the common law, this price restriction under any sort of a contract is clearly illegal. Hence in these cases the plaintiffs seeking injunctions stake their hope

upon the monopoly of the patent and expressly waive all question of contract. They allege patent infringement, not contract breach.

Next in order is the case of Bement *v.* National Harrow Company, 186 U. S., 70, the most misunderstood and misconstrued case in the books, a case cited by the members of the patent bar, who are seeking to uphold the extra-statutory claims of patentees, as sustaining every contention which it did not decide, and which the Supreme Court in a later case expressly said it did not decide. Even the Supreme Court's extraordinarily explicit refutation in Bobbs-Merrill *v.* Straus, 210 U. S., 339, of the claim that it had in Bement *v.* Harrow Company held that a patentee had the right by restrictive notice to control the *resale* price of an article manufactured by him, seems to have had no effect whatever, for we find the *Bement* case cited in all the resale price restriction cases as an authority for the contention which Mr. Justice Day, in the *Bobbs-Merrill* case, said it was not an authority for. The *Bement* case involved restrictions upon the assignment of a portion of the patentee's *patent rights,* and it had no relation whatever to the question of a patentee's right to restrict the sale of the *patented article* after it had been manufactured and made an article of commerce by one sale. The distinction between the right of an owner of a patented article and the right of an owner of a patent is a distinction which the Supreme Court sought in Bement *v.* Harrow Company to make clear, and the doctrine of that case, so far as applicable here, may well be considered as disposed of by five lines in the opinion of Mr. Justice Peckham (p. 93):

> *The owner of a patented article* can, of course, charge such price as he may choose, and *the owner of a patent* may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

In Cortelyou *v.* Johnson, 207 U. S., 196, a patent case not decided on the merits because of failure of proof that the defendant had knowledge of the restrictive notice, the Supreme Court again sought to make clear its distinction between patent rights and patented articles. Here is what is said:

> While in E. Bement and Sons *v.* National Harrow Co., 186 U. S., 70, this Court held in respect of PATENT RIGHTS [observe not "patented articles"] that, with few exceptions, any

> conditions which are not in their very nature illegal with regard to this kind of property [viz., patent rights] imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article [note the distinction between the "right" and the "article"] will be upheld by the Court, it is unnecessary to consider how far a stipulation in a contract between the owner of a patent right [not article] and the purchaser from him of the machine manufactured under that right, that it should be used only in a certain way, will sustain an action in favor of the vendor against the purchaser in case of a breach of that stipulation.

And in Bobbs-Merrill *v.* Straus, 210 U. S., 339, the contention having been pressed upon the Supreme Court that it had by the *Bement* case upheld the right of a patentee to restrict and dictate the resale price of a patented article after he had sold it for a price satisfactory to him, the Court said (p. 345):

> In Bement *v.* National Harrow Co., 186 U. S., 70, the suit was between the owners of the letters patent as licensor and licensees, seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee. The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the State court, and, of course, does not dispose of the questions to be decided in this case.

On June 10, 1908, the Supreme Court of the United States, in a unanimous decision, seemed to throw a flood light on the question with which we are attempting to deal, and to strike down for all time the monstrous claim that a patentee might exercise the right to vend his patented article, obtain from its vending all the price he claimed for it, and yet retain the power to dictate its resale price during its career through the hands of an indefinite number of vendees.

The case of Bobbs-Merrill *v.* Straus, 210 U. S., 339, arose under the copyright statute, but an examination of the facts in it and the law under which it was decided show the utter absurdity of attempting to distinguish it from the restrictive price cases arising under the patent statutes. Because of its importance we purpose (1) to set forth the facts in this case, (2) to examine side by side that provision of the copyright statute which was before the Supreme Court and the analo-

gous provision of the patent statute, and (3) to set forth the decision in this case which, as stated, was a unanimous decision of the Court.

The plaintiff, the Bobbs-Merrill Company, brought suit against the defendants, Isidor Straus and Nathan Straus, partners, trading as R. H. Macy and Company, in the Circuit Court of the United States in New York, to restrain the sale of a copyrighted novel, entitled "The Castaway," at retail at less than one dollar for each copy. The suit was distinctly one for infringement, and, as in all the price restriction cases, all question of contract restriction was abandoned. The plaintiff was the owner of the copyright upon "The Castaway," obtained the 18th day of May, 1904, in conformity to the copyright statute of the United States. Printed immediately below the copyright notice on the page in the book following the title page is inserted the following notice:

> The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.
>
> THE BOBBS-MERRILL COMPANY.

The defendants "purchased copies of the book for the purpose of selling the same at retail." Ninety per cent of such copies were purchased by them at wholesale at a price below the retail price, and ten per cent of the books purchased by them were purchased at retail, and the full price paid therefor. It was stipulated that—

> Defendants, at the time of their purchase of copies of the book, knew that it was a copyrighted book and were familiar with the terms of the notice printed in each copy thereof, as above set forth, and knew that this notice was printed in every copy of the book purchased by them.
>
> The wholesale dealers, from whom defendants purchased copies of the book, obtained the same either directly from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that the book was a copyrighted book and were familiar with the terms of the notice printed in each copy thereof, as described above, and such knowledge was in all wholesale dealers through whom the books passed from the complainants to defendants. But the wholesale dealers were under no agreement or obligation to enforce the observance of the terms of the notice by retail dealers

or to restrict their sales to retail dealers who would agree to observe the terms stated in the notice.

The defendants have sold copies of the book at retail at the uniform price of eighty-nine cents a copy, and are still selling, exposing for sale and offering copies of the book at retail at the price of eighty-nine cents per copy, without the consent of the complainant.

We now proceed to an examination of the law under which "The Castaway" was copyrighted and under which "Sanatogen" was patented.

The power of Congress to grant letters patent to inventors and cppyrights to authors is found in the same section of the Constitution. The framers did not have in mind the granting of any more extensive right to one than to the other. The nature of the products of the creative genius of our inventors and authors necessarily requires some difference in the character of the rights conferred. Section 8, Article I, of the Constitution authorized the Congress, among other things:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

In the exercise of this constitutional power Congress has enacted the patent and copyright statutes. So far as the franchises these statutes grant are concerned, the former is found in Section 4884 and the latter in 4952 of the Revised Statutes. All that is here material in those statutes follows:

PATENTS.	COPYRIGHTS.
Sec. 4884. Every patent shall contain a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery. * *	Sec. 4952. Any citizen * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition * * * * and the executors, administrators or assigns of any such person, shall * * * have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same.

We have already seen that the Supreme Court has decided that there is a "well grounded distinction between the grant of the right to make and *vend* the patented machine and the grant of the right to *use* it." (Dick *v.* Henry, supra.) In this article we are alone concerned with the grant of the right to *vend*. A comparison of that grant in these two legislative enactments will enable the reader to conclude whether it is humanly possible to distinguish between them:

PATENTS.	COPYRIGHTS.
Sec. 4884. The patent statute confers on the patentee "the exclusive right to * * * vend."	Sec. 4952. The copyright statute confers on the author "the sole liberty of * * * vending."

We contend that these are "similar or equivalent powers, which must receive the same construction." We contend that the human intellect does not exist that is capable of distinguishing between "the exclusive right to vend" and "the sole liberty of vending." That one of these means precisely what the other means is too plain for argument.

With the foregoing facts and the copyright statute, as above quoted, before it, the Supreme Court decided that an author or publisher who has received his price for the book or other publication, can not invoke the copyright laws to protect a placard or notice attempting to restrict the power of alienation by a purchaser, or to prevent a resale at less than the price fixed in such placard or notice. Bobbs-Merrill *v.* Straus, 210 U. S., 339.

Thus far we have seen that in the Bobbs-Merrill case the book was copyrighted; that defendants knew this; that each book when it left the publisher contained a notice which attempted to restrict the retail sale price of the book to not less than $1.00; that defendants knew this, as did also the jobbers or wholesalers from whom defendants bought the copyrighted book. And we have seen that, despite the fact of the copyright and despite this knowledge, defendants sold the books for 89 cents each. The suit was for infringement. We shall now see how the case was disposed of by the Supreme Court in an opinion by Mr. Justice Day, announcing the unanimous decision of that Court (p. 343, *et seq.*):

> The present case involves rights under the copyright act. The facts disclose a sale of a book at wholesale by the owners of the

copyright, at a satisfactory price, and this without agreement between the parties to such sale obligating the purchaser to control future sales, and where the alleged right springs from the protection of the copyright law alone. It is contended that this power to control further sales is given by statute to the owner of such a copyright in conferring the sole right to "vend" a copyrighted book.

A case such as the present one, concerning inventions protected by letters patent of the United States, has not been decided in this court, so far as we are able to discover. * * *

We therefore approach the consideration of this question as a new one in this court, and one that involves the extent of the protection which is given by the copyright statutes of the United States to the owner of a copyright under the facts disclosed in this record. Recent cases in this court have affirmed the proposition that copyright property under the Federal laws is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article I, Section 8, of the Federal Constitution: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." American Tobacco Co. *v.* Werckmeister, 207 U. S., 284; White-Smith Music Co. *v.* Apollo Co., 209 U. S., I; following the previous cases of Wheaton *v.* Peters, 8 Pet., 590; Bank *v.* Manchester, 128 U. S., 244-253; Thompson *v.* Hubbard, 131 U. S., 123-151.

The learned counsel for the appellant in this case in the argument at bar disclaims relief because of any contract, and relies solely upon the copyright statutes, and rights therein conferred. The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant. * * *

It is the contention of the appellant that the Circuit Court erred in failing to give effect to the provision of Section 4952, protecting the owners of the copyright in the sole right of vending the copyright book or other article, and the argument is that the statute

vested the whole field of the right of exclusive sale in the copyright owner; that he can part with it to another to the extent that he sees fit, and may withhold to himself, by proper reservations, so much of the right as he pleases.

What does the statute mean in granting "the sole right of vending the same"? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.

The precise question, therefore, in this case is, does the sole right to vend (named in Section 4952) secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.

> This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work, a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.

Scribner's Sons *v.* Straus, 210 U. S., 352, involved facts similar to those involved in Bobbs-Merrill *v.* Straus, and followed the decision of that case.

The Supreme Court has not yet directly decided the question we are discussing *under the patent law* in any case where the attempt was to restrict by notice posted on the patented article the resale price of that article after it had once been sold and after the patentee had received for it all the compensation he claimed. The Supreme Court has, as we have seen, in the two last above referred to cases, decided this precise question when it arose with respect to books protected under the copyright laws. "The copyright laws cover manufacture or publication and sale, while the patent laws cover not only manufacture and sale but use also. It may be that a different construction should be given to these laws, where the use of a patented article is involved, and such use has been so granted that the patentee has reserved to himself some pecuniary interest by royalty or otherwise, arising from the use of the article, and that in such a case the patentee may be said not to have received his full price. That question is, however, not presented by this record. Where, as in the case at bar, the patentee has received the full price demanded by him for the article, where he has in

no way restricted its use, and where he has not reserved to himself any direct pecuniary interest in such article, the general rule applies and such article is freed from the patent monopoly. We contend that the "exclusive right to * * * vend" conferred by the patent laws (R. S., Sec. 4884) and "the sole liberty of * * * vending" conferred by the copyright laws (R. S., Sec. 4952) are similar or equivalent powers, which must receive the same construction; and that the question presented by this record has already been settled in our favor by the Supreme Court in the copyright decisions. We also contend that in Keeler *v.* Standard Folding Bed Company, 157 U. S., 659 (supra), the question here presented was practically settled, and that nothing in any of the subsequent decisions of the Supreme Court has in any manner modified or restricted the full force and effect thereof."[3]

Bobbs-Merrill *v.* Straus would leave nothing to be said on this subject were it not that patentees insist that Dick *v.* Henry sustains the resale price restrictions. We have seen that the restriction in the *Dick* case related to the *use* of the patented article; that the patentee had received for the patented article only the actual cost thereof to him, or less; that he had not "received all the royalty or consideration which he claimed," but looked to the use of the patented machine with ink and paper sold by him for his royalty and consideration; he had not sold the patented machine for "a satisfactory compensation"; the royalty to which he was entitled had not "once been paid." In the case of Bauer *v.* O'Donnell, and all like cases, the patentee and his assigns have "received all the royalty or consideration which they claimed"; the patentee "has once received his royalty"; the patentee has "manufactured the material and sold it for a satisfactory compensation"; "the royalty has once been paid to the party entitled to receive it."

Overlooking the distinction between the grant of the right to use, and the ability of the patentee to part with a portion of that right and at the same time reserve the undisposed portion of it, and the grant of the right to vend and the inability of a patentee to make and sell absolutely and at the same time reserve to himself any right to resell any portion of the article once sold, learned counsel for those seeking to enjoin violation of price restriction notices reiterate the argument that: "In selling *the article* the plaintiffs only withdrew the monopoly to the extent of allowing the article to be sold at retail at the prices designated in the respective notices, but they retain the right to sell *it* at all prices

3. W. H. Chamberlin, Esq., Illinois Law Review, Vol VI, January, 1912.

below those thus designated." Repeatedly we find the argument made that the patentees' vendees, or as is more often the case, the vendees of the jobbers to whom the patentees have sold, "are at liberty to make any use of the article within the limited immunity from the monopoly which was granted with the patent, but are not at liberty to trespass upon the portion of the monopoly reserved by the patentees, viz., the right to sell *the article* at a retail price below that designated in the notice."

The argument is untenable. Let us test it by the Bauer case. It was utterly impossible for plaintiffs to sell a package of the patented article to O'Donnell and reserve to themselves the right to sell that package to any one else at any price. The argument is that a patentee, after having manufactured his patented device, after having sold that device at whatever price he chose, can, under his statutory patent right, retain in himself the right to sell that particular article—that concrete embodiment of the patented invention—at some other or different price than that named in the label on the article. Or, to phrase it somewhat differently, the argument is that the patentee may part with the title to the concrete embodiment of the patented invention, receiving therefor the full price demanded for it, retaining no right to make any further profit out of it by virtue of the manner in which it is used or sold, but that under his patent, by means of the label affixed to the article, he licenses the purchaser of that article to sell that particular article at not less than the given price, retaining in himself the right to sell, not other embodiments of the patented invention at a different price, *but to sell that particular embodiment of the invention* at a different price. This argument can not be sound and it is only resorted to in an attempt to apply the inapplicable doctrine of Dick *v.* Henry to the wholly different situation presented by the price restriction cases.

Returning again to the argument above quoted (which is an actual quotation from a brief filed in a resale price restriction case), we find that the patentees' claim that in selling "the article" they withdrew it from the monopoly of the patent only to the extent of allowing "the article" to be sold at retail at the designated price or prices above that designated, "but they retained the right to sell it all prices below the designated price."

Now, to what does the *"it"* in the last clause refer? Does counsel mean to contend that after selling, say, one thousand bottles of Sanatogen, to O'Donnell, plaintiffs retain the right to sell that identical

thousand bottles to some one else at another price? This is an unthinkable paradox. Let us suppose those bottles to be identified by serial numbers running, say, from 1 to 1,000. Plaintiffs made and sold that quantity to O'Donnell. It is monstrous to say that Bauer & Co. retained the right to sell those identical bottles to some one else at, for instance, 99 cents. One can not resell that which one has already sold. Yet, the whole argument of the plaintiffs is made to hinge upon this supposed reserved right in Bauer & Co.

The indisputable fact in this case is that plaintiffs had reserved to themselves no interest whatever in the bottles of Sanatogen purchased by O'Donnell. They derived no profit from sales by O'Donnell, no matter how high the price received by him for the articles he sold. They sustained no loss on the sale of these articles owned by O'Donnell, even though the latter sold the product to the public at a price below the actual cost of manufacture. In Dick *v.* Henry, the patentee did reserve an interest in the particular machine sold to Miss Skou. Out of its use in the manner and with the materials specified in the restrictive notice, the patentee obtained the only profit to which he was entitled by virtue of his patent. He had an interest in the use of that machine. Bauer had no interest in the "Sanatogen" sold to O'Donnell. Bauer had no interest in the price, or any part of it, received by O'Donnell. And Baauer had no interest in the manner in which the stuff was used by O'Donnell's vendees. Indeed, the value of "Sanatogen," if it has any, is in its consumption. It perishes with its use.

We repeat, in Dick *v.* Henry the defendant deprived the plaintiff of the profits derivable from the supply of ink to the user of the mimeograph. There the plaintiff was shown to have charged only a nominal price for the mimeograph and under the arrangement was to realize the full royalty on the use of the patented mimeograph by the receipt of profits from the sale of ink. When the user of the patented machine purchased ink from A. B. Dick Co. in paying for the ink he at the same time paid a royalty on the use of the patented machine. Dick sold the machine at actual factory output cost, and, therefore, if the purchaser obtained ink elesewhere the Dick Co. would not realize any profit whatever in the nature of royalty for its patent. That is not the circumstance in the *Bauer* and like cases. The profits or royalty of Bauer & Co. were absolutely fixed and paid when the original sale was made. If O'Donnell had retailed the stuff at $5.00 per bottle Bauer would not

have profited in any manner. Had O'Donnell sold the stuff at 30 cents per bottle no loss whatever would have been suffered by Bauer & Co.

From any and all possible viewpoints the profits or royalties of Bauer & Co. are wholly independent of the retail price at which O'Donnell sells.[4]

To sum up on this phase of the subject Dick *v.* Henry related to controlling the *use* of a patented article of manufacture after it had been sold to the patentee, with an express stipulation restricting the manner of using. The patent confers on the patentee the exclusive right to make, use and vend, and in the *Dick* case the right to use was so granted that the patentee had reserved to himself a pecuniary interest arising from the use of the article, and he had not received from the article the full price or royalty to which he was entitled in virtue of his patent.

In Dick *v.* Henry, the majority opinion of the Supreme Court expressly approves the doctrine of the *Bobbs-Merrill* case, and in so doing Mr. Justice Lurton again lays stress on the distinction between the right to vend and the right to use, saying:

> While there are resemblances of the right of the author to "vend" his copyright production, and of the patentee to "vend" the patented thing, yet by the patent statute the inventor is granted "the exclusive right to make, *use* and vend the invention of discovery."
>
> The word "use" is italicised by the court. Mr. Justice Lurton further says that "there is no collision whatever between" the decisions in the *Bobbs-Merrill* case and the *Dick* case; he points out that the former had to do with the attempt to control the price where vending the copyright book, while the latter related to the *use* of a patented article, and says that each of these cases results "upon a construction of the applicable statute, and the special facts of the case." (224 U. S., 47).

The futility of attempting to apply the doctrine of Dick *v.* Henry to the case of price restrictions is demonstrated by the following argument made in the Bauer price restriction case:

> Plaintiffs'-Appellants' notice of the price restriction on its packages is therefore notice to all the world that the right to sell

4. Restraint of Trade in Patented Articles. By Frank Y. Gladney.

the article below the price stated on the packages ($1.00) is not granted and does not pass from the plaintiffs. *That portion of the monopoly which consists in the right to sell the patented article below the price of $1.00 is not removed from the article, but remains in the plaintiffs.*

Here we have counsel asserting that the patent law conferred upon the plaintiffs a monopoly, which consists in the right to sell the patented article below the price of $1.00. Counsel cites no authority for this contention, and there is none. The right to sell Sanatogen at $1.00, or at any other price, was not derived under the patent law. Let us test the soundness of the contention: Suppose the inventor had applied for a patent on the mixtures "to be sold at retail at not less than $1.00," no one imagines that the Patent Office could or would have included any such matter in the patent. The Government has no power or authority, in the existing state of the law, to confer on a patentee the right to fix the price at which others shall sell specimens which they have bought from the patentee, paid for and owns.[5]

The plaintiffs in these resale price cases had, in virtue of the patent statute, an exclusive right to vend. They exercised that right. In the exercise of the right, they enjoyed all that the patent statute conferred on them. After the original sale of the article, in any of these cases, with no interest in its future career retained by the patentee, it became an article of commerce subject to no restraint save that which the laws of the land imposed upon any chattel. If the defendant invaded any right of the plaintiffs, it was a contractual right. But the plaintiffs are careful to waive the question of contract, realizing that their attempt to keep up the retail sale price of the patented article must be enforced under patent authority or must fall as unenforcible. Hence they stake their hope upon the monopoly of the patent.

It is important to bear in mind that this is not a technical patent question to be dealt with by the patent law specialists only. It is a question of statutory construction, depending for its solution upon the ordinary rules by which legislative enactments are to be construed, interesting to, and to be considered by, the bench and bar generally. There is nothing sacred about the patent statutes differentiating them from any or all other statutes as regards their construction. The patent statutes are to be interpreted by the same well settled rules applicable to the interpretation of any other statutes.

5. Gladney: Restraint of Trade in Patented Articles.

Also, it should not be overlooked that the question propounded in the title of this article involves great and grave problems of economic public policy, affecting in its solution our ever important friend, the ultimate consumer. If unpatented articles can be brought under the protection of lawful monopoly, if prices can be maintained to an arbitrary standard by a legalized system that prevents competition after the patentee has enjoyed all the rights which the patent statutes intended should be his, then indeed has the time come for the overhauling by Congress of patent legislation.

Recently a celebrated scientist died in Washington, and by the terms of his last will and testament he bequeathed his brains to the cause of science. It is to be hoped that the scientific world will not be deprived of the opportunity of preserving for all posterity the human brain that succeeds in drawing a distinction between the exclusive right to vend, conferred by the patent statute, and the sole liberty of vending, conferred by the copyright statute.

FRANK J. HOGAN.

Washington, D. C., October 10, 1912.

GEORGETOWN LAW JOURNAL

A publication issued bi-monthly during the academic year by Georgetown law students. Subscription price, one dollar per annum; twenty-five cents per number. Remittances to be made payable to the Georgetown Law Journal.

What Would You Undertake?—*Cymbeline*

Undertakings are seldom launched without a reason. When reason and purpose are lacking, we are offered in their stead, an excuse. THE LAW JOURNAL begins its career without excuse, without apology, because its editors believe that it has a reason for existence, and is in a fair way to accomplish a definite purpose.

When a school has gathered to itself some thousand potential lawyers, its efforts in the line of literary endeavor should find some proper expression; when a law school has reached the rank to which Georgetown has attained, it should be represented by a review that would take a place as high; and when we scan the names that make up the list of Georgetown's faculty and the roster of her alumni, we can see no room for fear but that a journal representing her would take its proper rank.

Georgetown is not newly arrived among the leading law schools of the country. The publication of a review should perhaps have been earlier attempted. That it has not been sooner undertaken might at first glance carry the impression that there is at Georgetown an absence of proper spirit, or lack of enterprise, but such an impression would be a mistaken one. Our enrollment of over nine hundred represents the expansion of very recent years, and it is only in equally recent years that the launching of a self-supporting, properly representative, journal seemed feasible. To those who think that the resolution should have been sooner reached, we will only say: Be patient, gentlemen, we have been very busy growing.

BOOK REVIEWS

A SHORT HISTORY OF THE ENGLISH LAW: from the earliest times to the end of the year 1911. By *Edward Jenks.* Boston: Little, Brown & Co. 1912.

Professor Jenks has written a very interesting and instructive book. In spite of the several elaborate treatises we possess on the origin and development of the Common Law, there has long been need of a history covering its entire range in one volume. The other works, it is true, are admirable; their position in legal literature is secure, and no amount of the most perfect one-volume histories can displace them. Yet several of them cover only special periods of the English law, while, on the whole, the works to which we refer are not adaptable to that short and ready mastery which the exigencies of modern business life in many cases demand. By this very considerable class of readers, Professor Jenks' work will be received with gratification. Then, also, those, who being just initiated into the intricacies of the law, are not always prepared to appreciate the masterpieces of Pollock and Maitland, and Holdsworth, and the other great volumes whose pages have illuminated the chronicle of the Common Law. A certain amount of preliminary knowledge is necessary before that can be the case, and we can think of no better way of obtaining such preliminary knowledge than by the careful perusal of a book such as that before us. There the man in quest of knowledge will find the essential outlines of the English law summarized in a clear, orderly, and interesting manner. He will there acquire no small amount of valuable information and a fairly comprehensive idea of the development through its various periods of the Common Law, from the earliest times to the present day. And to those who are acquainted with the other works of Professor Jenks, it will be unnecessary to add that all this will be accomplished with no little pleasure to the reader.

We regret, however, that the author has purposely slighted the constitutional aspects of his subject. In our opinion the connection between the judicial and political evolution of England is so intimate as to render such separation undesirable.

BUSINESS LAW FOR BUSINESS MEN, COVERING ALL THE STATES AND TERRITORIES IN THE UNION. Prepared Especially for Busy Laymen. By *Utley E. Crane.* Philadelphia: John C. Winston Co. 1911.

We have no great faith in law books for laymen, and especially

busy laymen. We do not believe a law book for laymen, covering any extensive area of the law, to be practical. The book before us fully bears out our contention. It is a marvel of condensation. In it the author has compressed nineteen separate and distinct branches of the law into a little over six hundred pages. Such subjects as Contracts and Real Property are disposed of in some fifty-odd pages, while twenty pages is deemed sufficient to sum up the law of corporations. Needless to say the result is failure. In such space only the barest outlines of the subjects can be given. Even the primary principles can be little more than touched upon. There is no room for the finer points. But, as every one in any way familiar with the law well knows, even its most sweeping statements and its clearest cut principles admit too many exceptions and refinements and their terms demand too much explanation to tolerate any such treatment.

We need go no further than Mr. Crane's treatise on contracts to obtain several instances in point. On page 25 Mr. Crane sums up the general principle in regard to contracts with persons *non compos mentis:* "If at the time of entering into a contract one of the parties thereto was incapable of understanding the purport of his act, which fact was known to the other party to the contract, it would not be binding on the lunatic." As a statement of a general principle that is correct, but it is far from covering the subject. Mr. Crane, however, is content to let the matter rest there. He does not state specifically the effect if one party does *not* know of the other's insanity, although from his statement one might infer that in such a case it would be binding. But here ordinarily would come in the important question of the restoration of the status quo, concerning which the author has not space to tell us anything. Neither does he inform the reader of the effect of one party having been adjudged insane, except in Pennsylvania. In these and several other particulars of this phase of contracts, the authorities, while not, as is sometimes the case, agreeing only that they disagree, are decidedly inharmonious; and the business man who imagines that he has mastered the law with regard to the contracts of persons *non compos mentis* when he has mastered the sentence quoted from Mr. Crane, is very likely to find himself mistaken if he should put his supposed knowledge into practice. Again, contracts of corporations are dismissed with the bold assertion: "A corporation cannot enter into a contract not germane to the business authorized by its charter, such contracts being *ultra vires* and void."

This also will pass as a general principle. But although undoubtedly the author knows, yet he does not impart the information, that in a very large number of States, if not, indeed, in a majority, such contracts are not treated as absolutely void when founded upon a sufficient consideration, but frequently give rise to rights of action.

Space is, of course, found for the information that a seal imports a consideration. But the fact that in some States the common law effect of a seal has been abrogated and in others considerably modified, is completely ignored. If some business man in one of those sections of the country were to rely on Mr. Crane's book in that particular, we are afraid he might receive a not very pleasant surprise.

Many like examples are at hand, but enough has been said to show the utter inadequacy of Mr. Crane's dissertation on Contracts. His other chapters, on the whole, maintain the same standard. In fact, "Business Law for Business Men" need have no fear of the tragic fate of the Bobbins Lexiphone, so graphically described in the September *Green Bag*. On the contrary, we feel sure that were it to be extensively used by business men it would rapidly displace as the lawyer's best friend the individual, who, according to a well known writer on legal topics, now holds that position—the man who writes his own will.

THE LAW OF COMMERCIAL PAPER. By *Professor Leslie J. Tompkins.* New York: A. B. Crockett Co. 1912.

In his foreword to this small but not insignificant book, the author frankly states that "it is not a commentary nor is it a digest, but it does pretend to state the law as it is." We find little reason to disagree with that statement. The book certainly has no title to the dignity of commentary, and it does escape, by a not too wide margin, the slur of digest. It expresses the law of Negotiable Instruments in a terse, trenchant manner with a great number of helpful, practical examples and, best of all, quite a few forms of the various kinds of Commercial Paper. Some of its definitions, it is true, do not suffer from too great clearness, and certainly its arrangement is not all that could be desired. To have the chapter on Presentment for Acceptance come a hundred pages after the chapter on Acceptance violates at least our conception of logical order. But on the whole we believe the reader will find Professor Tompkins' book instructive, and, in comparison with other works of its class, not uninteresting. His omission, how-

ever, of a chapter on "Conflict of Law" seriously injures the book as fas as the law student is concerned, and, to our mind, is quite incomprehensible. Also we must take issue with Professor Tompkins when, speaking of holding good an instrument payable after the death of a certain party, he says: "It is submitted that on principle this is all wrong; negotiable instruments were invented to take the place of money, and the rules governing them should be as rigid. To throw on the payee or holder the burden of watching for the death of a person, in order to protect his rights against indorsers, is absurd. That death is certain no one doubts, but to compel a holder to ascertain from outstanding data the exact date of death is carrying the rule of diligence to an absurd extreme. As well say an instrument payable 'six months before the death of A' is good." We are unable to perceive the absurdity so manifest to the author. Certainly in the ordinary run of cases keeping track of another party's death is not a very great burden, especially when money is at stake. And if its ascertainment from "outstanding data" should be counted as invalidating circumstances, the result of such a rule, pressed to its logical conclusion, would be the outlawry of all notes due so many days after date. For ordinarily the time when such instruments fall due is discovered from outstanding data—usually the calendar. There is difference here not in the kind but simply in the degre of diligence necessary. And as for "as well say an instrument payable 'six months before the death of A' is good," we are afraid it is the author who has gone to an "absurd extreme." As a general rule it is not very difficult to discover the date of a person's death after it has been consummated, but with the present unsatisfactory legal status of clairvoyance we are doubtful whether the same can be predicated of the date of a person's death before the fact.

CIVIL JURY TRIALS. By *Austin Abbott*. Third Edition by *Charles Z. Lincoln*. Rochester: The Lawyers Cooperative Publishing Co. 1912.

Many changes and additions occur in the present edition of this admirable and justly popular work. A rearrangement of some portions has been made. Many chapters have been increased materially. New chapters on Special Verdicts and Special Questions, Control of Trials, Province of Court and Jury and Recording the Verdict and Entering Judgment have been added. —H. H. H.

RECENT CASES

WESTINGHOUSE CO. *v.* WAGNER CO., 225 U. S., 604.

Quoted from the opinion:

(*a*) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits.

(*b*) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. * * *

(*c*) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits "unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him." * * *

(*d*) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, "give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." * * * —J, J. K.

LIABILITY OF COMMON CARRIER FOR AGENT'S MISTAKE: INTERSTATE COMMERCE LAW. In the case of Louisville and Nashville R. R. Co. *v.* McMullan, 59 So., 683, plaintiff, a railroad corporation, sued defendant, a shipper of a certain consignment of oranges, for the difference in amount of freight paid by the shipper, and the amount which should have been paid according to the rates of the railroad company filed with the Interstate Commerce Commission. The error was due to the agent of the company, who had stated the rates at one

figure, when they should have been higher; and relying upon the information furnished by the agent, the shipper sent the products, and paid therefor at the rates so obtained from the agent.

The appellate court, reversing the court below, held that the company should be entitled to recover this difference owing to the provisions of the Interstate Commerce Law, requiring freight charges to be published, whereby the shippers and the railroad companies are to be guided; the intention of the law being to prevent the instability and the inequality of rates, so that one shipper might not be preferred to another, and thus check the evils incident to such irregular rates as had theretofore occurred.

The Court, quoting from Poor *v.* C. B. & Q. R. R. Co., 12 Interst. Com., 418, said:

> While shippers rely largely upon the rates quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. * * * To permit shippers to impute negligence to carriers in quoting rates and on that ground to enjoy the rate quoted, instead of paying the lawfully published rate, would open a broad and ample way for the payment of rebates and for other unlawful practices, and might, in its practical results, work a repeal of the essential features of this legislation.

The Court also found support for its holding in the case of Armour Packing Co. *v.* United States, 209 U. S., 56.

At first blush, bearing in mind the rule of law, where one with full knowledge of all the facts, accepts, in payment of a debt, a less amount than the sum actually due him, he will not afterward be permitted to claim the balance, it would seem a rather strange holding in this case. But the Court expressly recognized this rule of law, which it met and offset by the fact that the agent had not *full knowledge* of the facts, but merely the *means* of acquiring it, and also the policy of the Interstate Commerce Law, which is, as has been stated, to keep the rates uniform among the shippers. Thus, the court in which this case was tried puts itself on record that it will permit no such defence when it might result in the Interstate Commerce Law being evaded.

The seeming hardship is not so apparent when it is remembered that the rates are accessible alike to the shipper as well as to the agent; and when the evil practices which would be opened by a con-

trary decision are considered and weighed, the Court's decision is well founded and in accord with justice and public policy.

—B. J. L.

ARREST: AUTHORITY FROM SPECIAL OFFICERS. In Lewis *v.* State, 59 So., 577, defendant was convicted of murder in the first degree for shooting and killing a man who was in the act of arresting him. An appeal was taken upon the refusal of the lower court, among other things, to grant two prayers for charges to the jury: *First,* that if the deceased was not appointed a deputy by the sheriff, and the only authority deceased had for arresting defendant was a request of a deputy, the deputy not being present with deceased at time of arrest, then the deceased had no legal authority to arrest defendant; *second,* that a special deputy sheriff cannot, without being present, delegate his authority to another. He might call upon another to assist him, but cannot appoint another in his stead.

Solely upon these grounds a reversal was obtained, the other assignments of error being rejected. Had the deceased no authority to arrest defendant, the latter would be justified in resisting the arrest; and the determining of this fact might be of weight with the jury in deciding the case.

The law upon the subject of arrests seems to be that a private person may only make an arrest for a misdemeanor when called upon to assist a sheriff or other officer of the law; or when specially deputized by one having authority so to empower him. A special deputy, that is to say, one who had been invested with power to make one particular arrest, has no authority to appoint another in his place, although he may call upon a bystander to assist him, if that be necessary. The evidence in the case cited failed to show whether the person from whom deceased obtained authority was a regular deputy or a special deputy for the occasion, and upon the assumption that he was a special deputy was based the prayer of defendant. If the jury had found, as matter of fact, that he was only a special deputy, and that he had delegated authority which he had no legal right to delegate, under an instruction of the Court as prayed, they would have found that defendant was justified in resisting his arrest; and this fact might have so influenced their minds as to have resulted in a verdict of a lesser degree of homicide than first degree murder.

The prayers being based on good law, as it appears they were

(Coleman *v.* State, 121 Ga., 594, and State *v.* Ward, 5 Har. (Del.), 496), they certainly were of sufficient importance to warrant a new trial, and the appellate court, therefore, very properly remanded the case, ordering another hearing. —B. J. L.

LARCENY—VARIANCE BETWEEN ALLEGATIONS AND PROOF—"Cow." Marsh *v.* State, 57 S., 387. (Alabama.) In this case the defendant was indicted for the theft of three cows. The evidence, without dispute, showed the *asportavit* by the defendant of one cow and two steer calves or yearlings. The Court held that legally the word cow is restricted to the female of the bovine species, and that proof of the larceny of a bull caft is a fatal variance. In a former decision it had been held that "cow" might include an immature female, and proof of the theft of a heifer on an indictment charging the larceny of a cow was held sufficient to convict.

The Federal courts seem not to be quite so strict in determining that a discrepancy between the allegations and proof constitute a variance. In Bennett *v.* United States (194 Fed., 630), defendant was charged with inducing the interstate transportation for an unlawful purpose of Opal Clark. Evidence that she was known to defendant as Jeanette Clark and that her real name was entirely different was held not to constitute a variance, in view of the fact that the identity of the woman actually transported was clearly indicated by the record from which defendant must have known she was the one intended to be named.

In a recent case in Mississippi (57 S., 209), defendant was convicted on an indictment charging the murder of "Tobe Wallace." The bill of exceptions showed that he killed "Tobe Hollis." It was held that the variance was fatal and the point could be raised for the first time on appeal. —B. A. M.

WILLS—TESTAMENTARY CAPACITY—EFFECT OF BELIEF IN SPIRITUALISM. Irwin *v.* Lattin (South Dakota), 135 N. W., 759. In recent years quite a number of cases have arisen involving the question of the validity of wills made by believers in spiritualism. In practically all of these cases the beneficiaries are spiritualist associations or mediums. In this case the testatrix devised all her property to the National Spiritualists Association of the United States, with headquarters at Washington, D. C., to be used by the association for

spiritualist work. This will was made in 1904. In 1908 she was adjudged insane and committed to a hospital where she remained until her death in 1910. The will was filed for probate by a representative of the beneficiary and objection was made by the heirs and next of kin on the ground that testatrix lacked testamentary capacity. The trial court found that at the time of the execution of the will and for several years prior thereto the testatrix was possessed of the belief that she had frequent and continual communication with departed spirits who gave her directions regarding all her actions in the ordinary affairs of life; that she was obliged to follow, and did follow, such directions, and that she had been directed by spirits to bequeath all her property to the Spiritualists Association; that by reason of this belief the testatrix did not execute the will as her free and voluntary act, but as the result of the inducement and coercion of departed spirits, and that the association would not have been named but for the supposed direction of the departed spirits.

It is well settled, and the Court so held, that the fact of a belief in any particular religion or in regard to a future state of existence cannot of itself be evidence of an insane delusion or monomania. (Scott *v.* Scott, 212 Ill., 597; 72 N. E., 708.) There is a distinction between a religious belief and insane delusions which may grow out of such belief. In this case such delusions not only existed, but absolutely controlled the testatrix in the disposition of her property. While such delusions are more common among spiritualists, the rule applies alike to all religious beliefs and denominations. Sometime ago the Supreme Court of Nebraska had before it a similar case (McClary *v.* Stull, 44 Nebr., 175; 62 N. W., 501), and in the course of the opinion said:

> "Law," it is said, "is of earth, earthly," and that spirit wills are too celestial for cognizance by earthly tribunals is a proposition readily conceded. And yet, the courts have not assumed to deny to spirits of the departed the privilege of holding communion with those of their friends who are still in the flesh, so long as they do not interfere with vested rights, or by means of undue influence seek to prejudice the interest of persons still within our jurisdiction.

From the cases on this subject it seems to be firmly established that while a belief in spiritualism affords no conclusive evidence of an

insane delusion, a will, executed by one under such an extraordinary belief in spiritualism that he follows supposed directions of spirits in constructing it, is not admissible to probate. Nor will evidence be heard of the truth or untruth of the fact of communication with departed spirits—so it has not as yet been judicially determined that spiritualism is a fake, or that the contentions of the mediums are based upon actual and *bona fide* receipt and transmission of messages from the shades of the dead.

Most of the cases may be decided on either one of two grounds: that the will was made under an insane delusion or that undue influence has been brought to bear by a medium. —B. A. M.

VENUE IN CONSPIRACY; CONSTRUCTIVE PRESENCE; OVERT ACT OF AGENT. Hyde and Schneider *v.* United States, 225 U. S., 347. This case was brought to the United States Supreme Court on a writ of *certiorari* to the Court of Appeals of the District of Columbia. The Attorney General, assenting to the granting of the writ, stated that "the determination of this case depends upon the principles of law governing conspiracy" and that "it was of vital importance * * * that these principles be definitely settled by this court."

Hyde, Schneider and others were prosecuted in the District of Columbia on a charge of conspiring against the United States. The offense alleged was that they had fraudulently acquired title to "School Sections" of California and Oregon land and had conspired, by corrupting officials of the General Land Office at Washington, to facilitate an exchange of these sections, under the Act of March 3, 1891, for lands of the United States of greater value.

Under Paragraph 5440, Revised Statutes, not only the conspiracy itself, but also an overt act toward the common end by at least one of the conspirators is necessary to complete the offence. The conspiracy itself took place in California. Overt acts in furtherance of the conspiracy, if there were any, were those of agents of the conspirators in the District of Columbia. The indictment charged conspiracy and overt acts in the District.

On the question of jurisdiction the Court held, that overt acts in the District of Columbia, in furtherance of a conspiracy formed in California, gave the courts of the District jurisdiction, that "it is not essential where the conspiracy is formed, so far as the jurisdiction of the court in which the indictment is found and tried is concerned":

that a conspirator may be constructively present through the medium of his agent or attorney, and punishable, when apprehended, as though he had been personally present; and that an overt act by one of the parties, (personally or constructively present), gives jurisdiction as to all of them.—In effect, that the Government may prosecute a defendant for a conspiracy in any district where he or his associates have performed an overt act in furtherance of the common, continuing purpose, without regard to the place of the original conspiring.

Justices Holmes, Lurton, Hughes and Lamar, dissenting, refuse to "extend the fiction of constructive presence to a case like this" and quote with approval Regina *v.* Best, 1 Salk., 174, "The *venue* must be where the conspiracy was."

In the course of the opinion several other points were touched upon. Two of the defendants having been convicted in the lower court the Supreme Court refused to consider whether an instruction tending to permit the jury to convict one of several co-conspirators was or was not proper. A disclosure to the Government by one of the conspirators does not necessarily constitute his withdrawal from the criminal design; he may perform an overt act afterward which will bind him and his co-conspirators; the statute of limitations will run in his favor only from the last of such acts. Until there is an affirmative withdrawal from the conspiracy there is a "conscious offending" that prevents the statute from running. —J. J. K.

CONSUL AS ADMINISTRATOR; FAVORED NATION. Rocca *v.* Thompson, 223 U. S., 317. The Italian Consul General for California applied for letters of administration upon the estate of a deceased national, alleging that the "favored nation clause" of the Treaty with Italy of 1878 gave him equal privileges with those of Consuls of the Argentine Republic and that the Argentine Treaty of 1853 gave Consuls of that country the right of administration when one of their nationals died in the United States. The claim was contested by the public administrator, who was successful in the lower court (157 California, 552). The case came to the Supreme Court of the United States on a writ of error to the Supreme Court of California.

Whether the national government has the power to provide by treaty for the administration of the estates of deceased aliens, and to give the administration thereof to foreign Consuls, is left undecided. If the national government has such power then these treaty provisions would be superior to State laws.

In the Lobrasciano case, (77 N. Y. Supp., 1040), it was held that the favored nation clause of the Italian treaty carried the privileges of Argentine Consuls to the Consuls of Italy, and that the Argentine Treaty did give to Consuls of that country the right to administer the estates of their deceased nationals. Referring to the cases supporting this view the Supreme Court held that they followed the Lobrasciano case "without independent reasoning." That, under a proper construction, the Argentine Treaty merely gives the Consul the right "to intervene in administration and judicial liquidation * * * and presupposes an administration or judicial liquidation instituted otherwise than by the Consul, who is authorized to intervene." The term "intervene" in ecclesiastical law, in civil law, and in practice, supposes a third party interesting himself in a matter concerning distinct, original parties.

"In this country the right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to State law. It seems to be so regulated, in the State of California, by giving the administration of such property to the public administrator."

Whether the favored nation clause of the Italian Treaty would carry an existing privilege of the Argentine Consuls to the Consuls of Italy was left undecided.

If the Argentine Treaty had intended to give foreign Consuls the right to administer the estates of their nationals that purpose would have been made plain, as it was in the Peruvian Treaty of 1887 and in the Convention with Sweden of 1911. Even assuming the power of the national government to make such an agreement, the Argentine Treaty, properly construed, does not grant the power contended for. The lower court was upheld. —J. J. K.

CHRONICLE

The best equipped as well as the largest law school in the country! Such is the goal towards which are directed the earnest efforts of everyone at Georgetown; and even the casual observer needs no sixth sense to perceive just how close to that mark the school really is.

Oldtimers would fail to recognize in the imposing set of modern buildings the scene of their early legal training, while those who attended school last year were surprised to see in course of construction another addition which will double the present accommodations. The building was made imperative by the great annual increase in the student body, which is expected this year to bring the enrollment well over the thousand mark. The new addition will be in readiness for use on January 5th of the coming year.

When the structure is finished room will be found for the Morris Law Club, the Carroll Club, the debating societies and the JOURNAL sanctum. Here will be located also the much-needed auditorium and additional lecture and recitation halls, for the second and third year men. The library, too, has undergone a great change during the course of the summer, a change for the better, however, and twice the space and twice the number of books will now rejoice the searcher after legal truths and half-truths.

The seniors have been forced to drop some of their hard-earned dignity by trudging nightly up the stairs to the third floor where, temporarily at least, they are to hold forth. The Junior hall has not been changed; and the freshmen are battling for seats at the same old stand.

Blackstone is dead! Long live his successor! The decease and funeral of the venerable bug-a-boo occurred at a meeting of the Faculty held during the summer. No more will Georgetown freshmen plunge deep into the wells of old English diction in order to draw therefrom an inkling of the law of real property. For years Blackstone has been the classic, but alas, the day of the progressive is upon us. On the wheel of time comes Minor and Wurtz. Freshmen rejoice!

Upper-classmen are both sorry and glad alike at one faculty change that has been made: sorry that the Honorable Seth Shepard has stepped down from the chair of equity, and glad that his successor is the Honorable Ashley M. Gould. Chief Justice Shepard remains on the faculty however, as professor of Constitutional Law. In the place of Judge Gould, Judge Dan Thew Wright will be found handing down opinions on domestic felicity and otherwise. Judge Wright takes this chair in addition to the two he already holds, namely, Corporation Law and Criminal Law.

Professor D. W. O'Donoghue, who last year was judge in the moot court, this year enters the ranks of the lecturers, his subjects being Insurance and Common Law Pleading. Professor Wilson adds Common Law Pleading to his course on Agency, and Professor Hoehling will teach Real Property along with Evidence. Evidence is the additional attraction offered by Professor Hogan this year.

Five new men are on the Faculty in the persons of Prescot Gatley, Clinton James, Paul E. Lesh, James B. Horigan and H. K. Hickey. Mr. Gately will be one of the circuit judges in moot court, while Messrs. Lesh, Horigan and James will act as quiz masters. Mr. Hickey takes the place of Ralph Quinter as assistant secretary, Mr. Quinter relinquishing that office to become an instructor.

At the time this was written, Secretary Hugh J. Fegan reported fifty-three registrations above the number recorded at the same time last year. He expects many more, however, during the course of October.

THE MORRIS CLUB

Activities in the Morris Law Club started on the third Tuesday of October when an election of officers was scheduled to take place. President Horace Hagan announced that two vacancies existed in the membership, which it is expected will be filled by the end of the month.

There has been some talk among the members of increasing their number to twenty men. Action on this matter has not yet passed the formative period. It has been found rather difficult at times to have the desired number present at meetings, with the membership num-

bering just sixteen men. It is in the hope of rectifying this condition that the increase is to be made.

It is not improbable that a series of lectures on industrial questions will be given before the club by men prominent in that field. Promises have been received from several notables to give talks, and the Morris men are enthusiastic over the prospects.

CARROLL CLUB

The first meeting of the Carrol was announced for the second Thursday of the month. Sessions will be held twice a month this winter, as was the custom last year. A paper on some legal subject will be required of each of the twenty-five members and after these have been passed upon by the executive committee they will be read at the meetings. It is also planned to have every member preside at one or the other of the meetings to enable him to get practical experience in parliamentary law. President Cannon reports that he has had correspondence with prominent public men looking towards their appearing before the club this winter.

The Delta Chi Fraternity held an informal meeting and smoker on the evening of October 12th at the Fraternity House, 1422 Rhode Island avenue northwest, in which the Active and Alumni Chapters joined in a home party in celebration of Founders' Day. Mirth and good fellowship held sway and both before and after supper a splendid musical program was furnished by the Bowie Quartette and Mr. George O'Conner, of local fame. The Georgetown Chapter begins the year 1912 with an unusually large, active membership, and has every prospect of a most successful year. The officers are: "A"—Sidney F. Taliaferro; "B"—Addis E. Murphy; "C"—William E. Rhea; "D"—Roland A. Croxton; "E"—William A. Sheehan, and "F"—George Stegmaier.

Θ Λ Φ

The scholastic year 1912-13 has opened most auspiciously for the Theta Lambda Phi Fraternity. Because of the increased number of "house men" during the past year a larger home was made imperative. Accordingly the opening of school finds the Θ Λ Φ in large and commodious quarters at 1503 Rhode Island avenue northwest, with fourteen members housed therein and several on the waiting list.

The social year was opened during the last part of September with a smoker at which were entertained all of the members in the city together with several visiting brothers. For the ensuing year a program has been mapped out by the social Committee which will serve to take up all of the "spare time" of the boys. It includes a house warming in the last part of October, a series of smokers for its male friends, and a string of teas for the warming of the sympathetic hearts of its fair friends. Meanwhile, in the lull, "beauty unadorned" still lingers in Φ Λ Φ's halls and the "rose, blushing unseen," in its recesses.

Φ Λ Δ

With twelve fellows living at the house and more seeking entrance, the Phi Alpha Delta Fraternity is forced to seek new quarters, and if present plans carry, the new location will be a fine one near the commercial center of the city. The house on Fourteenth street which the members now occupy is inconvenient both in location and in size. Four alumni members have sent in applications for rooms in the new house, and from present indications someone is doomed to disappointment.

A Halloween party is scheduled for the latter part of the month at the Φ Λ Δ house, to give the fellows an opportunity to renew old acquaintances with the Washington fair ones and their half sisters, the seminary girls. The date for this function has not been definitely set.

While no date has been set, it is expected that the regular fall initiation will be held during the early part of November.

Open house will be kept for the visiting brothers on the day of the annual Georgetown-Virginia football game.