THE LAW OF ASSIGNMENT FOR THE BENEFIT OF CREDITORS IN THE STATE OF ILLINOIS; Being an Analysis of an Act Concerning Voluntary Assignments, Approved May 22, 1877, in Force July 1, 1877, and Amended by Acts in Force July 1, 1879, and July 1, 1883, and a Collation of all the Decisions of the Supreme and Appellate Courts of Illinois in which the Act has been Construed. By SYDNEY RICHMOND TABER, of the Chicago Bar. Chicago: E. N. Myers & Co., Law Publishers, 1893.

This is a very creditable little volume of some one hundred pages, in which the author attempts to answer the inquiries: "What does the Illinois Assignment Act mean? how have its several parts been construed by the Courts? what are the rights and duties of insolvent debtors, of assignees, of creditors, and of the courts whose jurisdiction is invoked in this behalf? In a word, touching the subject of voluntary assignments, what is the law of Illinois?" In carrying out his purpose, Mr. TABER first gives the Assignment Act of Illinois of May 22, 1877, as amended by the Act of July 1, 1877, and the Act of July 1, 1883, in full. He then treats of the assignment proper, first giving an analysis of the statute and then a synopsis of the principal decisions of the Court. At the end of this chapter, on pages 40 to 45 inclusive, we find a very good table of leading cases. The second chapter deals with the assignor, the third with the assignee, the fourth and last with the Court. Of course, the book is only useful to Illinois lawyers. To these it will prove a very handy little volume on a subject of importance to the practitioner.

W. D. L.

# COMMENTS ON RECENT DECISIONS.

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## SUNDAY LAWS.

I beg to suggest that Mr. RINGGOLD, in his article in the November '92 number of the AMERICAN LAW REGISTER AND REVIEW, has overlooked a matter of history of great importance in the argument. Prior to the Revolution, not only Christianity, but Protestant Christianity, was established by law in this province. The Test Act was enforced in Pennsylvania. Has there been any abolition of this religion? Absolute toleration and a nominal equality exist, and as respects Christian sects, so far as a prohibition of exclusive privileges goes, there is a real equality before the law.

The gist of his argument is that the Sunday laws are passed in the interest of or as supporting the views of Christians, and this he contends is unconstitutional. Where does such reasoning lead to? Stated abstractly it is: "No legislation is lawful that has as its real motive the enforcing of any conduct because of a real or supposed obligation of Christianity."

The Sunday laws are doubtless the offspring of a very small part of Christendom. Puritanism is the parent, and nothing shows the power of the members of this little narrow-minded sect than the way they have

affected Catholic Ireland, contrary to the usages and traditions of their Church. I, at least, have been struck with the fact that Catholic and Protestant from that island do not differ in their notions of the mode of observing Sunday.

But if laws are unconstitutional because they are meaningless except as being the enforcement of a Christian duty or a duty of a Christian commonwealth, then all legislation, laws, customs and national habits, and usages that have grown out of our religion are alike brought under the ban.

To begin with, our oaths of office and in courts of justice, on what are they founded? Our law against polygamy, and our common law on the subjcts of concubinage and bastardy; our law of marriage, even with the caricature of our law of divorce, what are they all founded on?

Starting with a *tabula rasa* as to religion and the morality of Christianity, where will be found our elements of morality that are the basis of law to a large extent? It is quite generally supposed that the poor laws, and the provision for the insane, the sick and the injured, are the outcome of Christian teaching, and a sense of obligation that has thus come even to those among us who reject the abstract dogma of any revelation.

There is a sentence of a man of some mark among us, Mr. Justice DUNCAN—Christianity is part of the common law of Pennsylvania—and it was repeated with approval by SHARSWOOD, J, which might be translated thus: At common law Christianity was the religion of this Province, and while the power to exact adherence to its dogmas, as matter of belief is taken from the legislature, there has as yet been no legislative abolition of or change in the common law in respect of religion. "Therefore," said he, "we have retained the laws against blasphemy."

I therefore suggest that it might be as well to consider the foundations before we undertake to remove as unconstitutional the most marked national characteristic that we brought with us as colonists. Can any one doubt that the founders of our system would have been the most surprised of any people to learn that the religious liberty they proclaimed meant that it was to be illegal to be guided in legislation by the religious opinions of the people, and above all by their notions of morality derived from the religion of their forefathers?

## CONSTITUTIONAL LAW.

By constitution, the restriction of the supreme power of the State in the only mode in which a State can speak, as we have just been informed by the Chief Justice in 146 U. S., 25, McPherson *v.* Blacker, and this without dissent or qualification, is a political novelty of this century. The entrusting of a small body called the judiciary with the authority to disregard this expression of the sovereign will is an amazing novelty, but it is a logical necessity of an organizing constitution; it seems to be a category of the human mind; one cannot think outside of the limit or conceive of any other rule with our notions of the meaning of *law*. But it has always been supposed to arise out of this mode of organizing a government. When applied, as

originally it was, this authority involved no more and nothing else than a question of power. For years no one ever suggested any other condition. Power to be ascertained from two documents, the one only restraining, the other only granting. "It must be remembered, however," says TILGHMAN, C. J., in Comm. *v.* Smith, 4 Binney, at page 123, "that for weighty reasons it has been assumed as a principle in construing constitutions by the Supreme Court of the United States, by this Court, and by every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of *the Constitution* is so manifest as to leave no room for reasonable doubt." A power from without, or a restraint on legislation from without the written constitutions, was not dreamed of. Within these limits the reasons pro and con as to any measure are debatable before the judiciary, that body has nothing to do with the wisdom or folly of the legislature. They may bear on construction, but on nothing else. And why? If the folly, or injustice, or cruelty of a law is a ground for refusing obedience, it is plain the judiciary are by the Constitution made a part of the legislature, and to perform a function in its very nature legislative.

The judiciary, under the modern claim of right, must, then, limit the law-making power confessedly not by a restraint found in the Constitution, but by considerations of the propriety of exercising a power that is conferred or not restrained. For the existence of the power, unless restrained, is the postulate in every possible case arising upon an act of a State. In the case of the States it is never a question whether there is a grant of power, but is there a restraint. A restraint on a sovereignty derived by an inference from notions of right and wrong is essentially not judicial but legislative, and where are these notions to be ascertained, hidden as they may be in the mind of the unborn judge? If to these we add notions of political economy, will not all admit these are for the legislature to determine?

Let one attempt to frame a clause of a constitution in the line of this modern notion of constitutional law, *e. g.*, "The legislature shall have no power to enact any statute which is *foolish, unjust or cruel*," and can anything more chaotic be conceived than all future legislation? Still more preposterous, if we attempt to embody the high-sounding but meaningless phrases of the Declaration of Independence. Do but consider that an unconstitutional law is a nullity—it never was a law. It is as if it never had been. It leaves all men acting under it without justification or excuse. *Cf.*, the illustration by TILGHMAN, C. J., 4 Bin., 123, a thousand judgments become void, as a judge may years afterward deem a law impolitic. A sheriff may be converted into a murderer.

Is there a rule of law, the wisest and the best, that does not at times work the grossest injustice, and can a statute be framed that does not sometimes do this? Is the law to operate when it is just, and not otherwise? And what is just but legality? No lawyer from the time of the twelve tables has ever conceived of any other meaning of the word in the administration of law. What is meant by *justa causa possidendi?* Does it mean a righteous or honest cause?

Bad as it is, and always will be, to be at the mercy of a legislative

body, will there be any improvement by committing part of their trust to another body of the same kind of persons, and qualify them by writing "Judge" after their name, instead of "Senator." Does this change the reasoning faculty, or even enlighten it? Will there be anything conspicuous after the change, except universal uncertainty—a removal of the only element of certainty that exists—the meaning of the written word of the law, by substituting *ought to be* for *is* in the authoritative declaration of the rule by the State?

It cannot be supposed that there is anything in this paper that has not been familiar as their alphabet to all who have ever reached the position to pronounce on the validity of a law and compare it with a constitution, and as the result is plain that no effect is produced by these ideas, nor even a doubt raised, one cannot but feel how curiously constituted is that faculty called the reason. But one cannot cease to wonder at the very small space it occupies in the government of mankind, less even than Bishop BUTLER assigns to conscience.

After reading MARSHALL'S solution of the problem, it seems absolutely self-evident, but it is because of the basis or postulate of the argument. To one class of minds this is everything; to another it is evidently without meaning. The one recognizes the State restraining its officers by a document to be construed and understood. The other finds the restraint in the views that may be entertained as to the inconsistency of the law with an unwritten and undefined code of ethics, political economy or policy. And we have this marvelous product, that *public* policy, as the standard of law, is not to be found in the declared will of the State, but in the private opinion of the persons empowered to declare the law.

And thus we have a people which will not permit a man to dispose of his property by oral statements, even when undisputed, but who will permit the State to be shorn of its sovereignty by the notions of five out of nine unborn persons, to be selected from time to time by the President: and educated men believe this was intended. Truly our ancestors must have had a sublime confidence in the accuracy of the workings of the minds of the embryo judiciary in all matters of State, of morals and of politics.

A well-known story will bear repetition as illustrative of the divers orders of minds. Judge STORY found in modern philanthropy the basis of an antecedent eternal law, and deduced as the result: The slave trade is contrary to the law of nations, its guaranty by the Constitution for a limited period notwithstanding. Lord STOWELL said: How can I pronounce a practice to be contrary to the law of nations that has sedulously been protected by Acts of Parliament and treaties of my own country? To the one class laws and written constitutions are mere cobwebs to the will, which is mistaken for the reason; to the other, fetters and chains which bind them. So long as we persist in shutting our minds to the conception of there being still the same Common Law Constitution which we improved, modified and made compulsory in some particulars, but otherwise liable to modification by the legislature, so long probably shall we find instances of mistakes of the kind that it has been the purpose of this paper to point out.