and there, and noting now a case in equity, now a case in evidence, it is our intention to take each month the cases in one or two departments of the law, and write what we hope will prove an instructive and entertaining resumé of the principal cases which have appeared during the previous three or four months. Each month we will take up two or three departments of the law. This month, for instance, we have dealt with the recent cases on insurance, corporations, and constitutional law.

Next month we hope to be able to deal with cases on other subjects. These editorial comments will not always be written by the editors of the magazine. We have a theory that a case on insurance should only be discussed by one who is familiar with the subject; that a case in equity should only be discussed by one who is familiar with equity, and that no one can be familiar with all branches of the law.

The old editors take pleasure in stating that, as will be seen on the first page of the cover of this number, they have associated with themselves Mr. William Struthers Ellis of the Philadelphia Bar.

EDITORIAL NOTES AND COMMENTS.

A PAPER BY PROFESSOR THAYER.

CONSTITUTIONAL LAW.

WE have received from Professor THAYER, of Harvard, an interesting pamphlet on the "Origin and Scope of the American Doctrine of Constitutional Law." The paper was read by the author before the Congress of Jurisprudence and Law Reform, held in Chicago, last August. Like all of Professor THAYER'S writings, this is of great value. It is, besides, because of the peculiar position taken, of exceptional interest to students of the subject. The origin of the doctrine that a court can set aside an act of the legislature which is repugnant to the constitution is pointed out in the first part of the article. This doctrine is peculiar

to America, and is the keystone of our constitutional law. It is, as Professor THAYER says, the outcome of the fact that the colonial assemblies owed their existence to charters of the crown, and were prevented from transgressing these from fear of forfeiture. When the people of the several States took the place of the crown of Great Britain, the courts, after much controversy, settled down to the position that the constitution of a State, or of the United States, was paramount law, and that acts of legislation which disregarded this law were null and void. Professor THAYER traces, in an entertaining manner, how this position was gradually assumed. His article is, in fact, a mine of information on the subject, containing a complete reference to authorities and other articles.

But the real *raison d'etre* of the article is to impress upon the reader the importance of a judge observing a particular canon of interpretation when he is called upon to decide whether a specific act of legislation is constitutional. The thesis maintained by Professor THAYER is that at all times, and under all circumstances, a judge should never declare an act of legislation unconstitutional, unless the constitutionality is beyond reasonable doubt. To enforce his argument, he has collected apt sayings from judges of note and authority. In so far as the article tends to impress upon us the fact that one must not expect the courts to remedy bad legislation, the paper will receive no criticism here. One of the most prevalent, as one of the worst tendencies of our political life, is our growing disposition to look to the courts for the redress of bad or foolish legislation. But we conceive that the real object of the writer was to establish the thesis above stated. As an illustration of what he means by not setting aside an act of legislature as unconstitutional, unless there exists no reasonable doubt of its invalidity, he quotes Mr. Justice BLACKBURN, in Cap. & Count. Bank *v.* Nenty, 7 App. Cas., 741, where that justice, in deciding an appeal in libel, intimated that the question was not whether the words were libelous, but whether it was beyond reasonable doubt that they were not libelous, the trial court having so considered them. Professor THAYER says, "The ultimate question is not what is the true meaning of the constitution, *but whether the legislation is sustainable or not!*"

If this criterion of interpretation is sound it must be good in all cases. A judge must approach, according to Professor THAYER, all questions of constitutional law in exactly the same spirit; a spirit of desire to sustain the law when by any possibility it can be sustained. With this position we cannot agree. Suppose the question involves the power of the Federal government to do something which by no possibility will interfere with the reserved powers of the States, or the individual liberty of the citizen; suppose it is a question of whether the Federal government could erect a bank, as in the case of McCulloch *v.* Maryland. Here, it seems to us, that the attitude of the court should be that contended for by Professor THAYER.

It should be one to sustain the law if possible, but not for the reasons which he gives. The law should be sustained if possible, because it is the powers of the government which has under its control the welfare

of a nation which are under discussion, not because it is a constitution which is being interpreted. On the other hand, take an act of the Federal or State legislatures, which it is claimed tramples on the individual liberty of the citizen. Take, for instance, that pernicious piece of legislation of the State of Iowa which enabled one to accuse another *ex parte* of selling liquor, and on the strength of this *ex parte* statement obtain from a court an injunction to prevent him from selling liquor; and again on another *ex parte* statement that the injunction has been violated, without trial by jury, the person might be committed for contempt. Where, we ask, would the protection for our liberty as individuals be if in the heat of local controversy such laws can be passed and the courts advance to the consideration of their constitutionality with the sincere desire to sustain the law if it can be sustained? When questions of civil liberty are at stake, it seems to us that the right attitude of the court should be to guard with jealous care the fundamental principles of that liberty as expressed in bills of rights. As a general proposition, of course, no one will dispute Professor THAYER'S statements that a judge ought to be convinced beyond reasonable doubt of the unconstitutionality of an act before he sets it aside, but the same is true of any other important decision. Before making it the judge should be convinced beyond reasonable doubt. The difference between constitutional interpretation and the interpretation of the meaning of an ordinary law is that the greater importance of the decision should make the judge more careful in his consideration of the subject. But the fact that it is a constitution which is being interpreted and an act of the legislature which is being set aside should not render the court desirous of upholding the law. Whether they desire to uphold the law or not depends as a matter of statesmanship on the subject with which it deals. However unwise, however foolish, if it is a question of the exercise of a power of government, those powers should be construed in no narrow spirit; but if, on the other hand, it is a question of the rights of individuals as it was intended they should be preserved by the constitution which have been violated, no pains, it seems to us, should be spared to protect the individual as against the legislature.

The article of Professor THAYER is timely because of the loose and careless way in which acts of State legislatures are set aside by State courts. This evil is due to the fact that the legislature actually passes many unconstitutional laws on the theory that the court is the only body competent to examine the constitutionality of a law. It seems to us that this is a great and increasing evil and calls for some very radical remedy; but that that remedy does not lie along the lines suggested by Professor THAYER, and that the introduction of the idea for which he contends would result in sustaining so many laws which trampled on individual liberty, that our condition would soon become intolerable.

CATTLE AND FENCES.

We have received the following interesting communication from Mr. ALBERT B. RONEY, of Philadelphia:

"In the December number of the AMERICAN LAW REGISTER there

is reported, under the Digest of Important Decisions, a new view of Constitutional Law. The case to which I refer is Smith *v.* Bivens, 352. The case arose in the Circuit for the District of South Carolina.

"For many years the State required the owners of cattle to fence them in—the law was changed as to the locality in question so as to require the owners of pasture lands to fence all cattle out.

"Judge SIMONTON, who has lately been nominated for the position of Circuit Judge for the Fourth District, holds that this amounts to depriving a man of his property without 'due process of law.'

"It may be of interest to call attention to the fact that for two hundred years the State of Pennsylvania required the owners of land to so fence them as to keep cattle out, yet no one ever suspected that this law deprived the owners of their property without due process of law, and it was only as the State became thickly settled that the rule was reversed and the owners of cattle required to fence them in. In many of the western States thousands of acres are devoted to pasture to every one devoted to tillage, and to require the owners of cattle to fence them in for the benefit of the few who cultivate the soil would be to destroy what amounts in some States to their principal wealth.

"But as a question of constitutional law this decision is but another illustration of the tendency to hold that legislation which in the opinion of the judges is unjust or unwise is therefore necessarily unconstitutional."

MR. COXE'S ESSAY ON THE JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION.

Just after writing the above commentary on Professor THAYER'S article, we received from the executors of the late BRINTON COXE, of Philadelphia, an essay of some 395 pages on the "Judicial Power and Unconstitutional Legislation." We understand Mr. COXE had been at work on this essay for a long time before his death. The manuscript, which has been very ably prepared by Mr. WILLIAM M. MEIGS, was in many places evidently nothing more than notes of what Mr. COXE would have written had he lived to complete his task. In spite, however, of the necessary shortcoming arising from the fact that death cut off the author before his work was done, nothing of equal value on the origin of the idea that a court can set aside the act of a legislature for unconstitutionality and that such exercise of power on the part of the court is the exercise of a judicial function has as yet come to our notice. The essay as a whole is cast in the form of a thesis, the text of the main proposition being that the Constitution of the United States contains, in Art. 2, §§ 3 and 6, a direction to the courts of the United States and of the States to hold the acts of the States or the United States contrary to the Constitution of the United States null and void. In other words, that the framers of the Constitution intended and clearly expressed their intention in the Constitution which they drew up, that the judicial power was to decide as a judicial question the constitutionality of the acts of Congress and State Legislatures.

That which seems to have led Mr. COXE to begin his investigation was mainly the celebrated pamphlet written by Mr. MCMURTRIE shortly after the decision of the Supreme Court in Juillaird *v.* Greenman, and in defence of this case, and in reply to the historian BANCROFT'S "Plea for the Constitution."[1] In this essay Mr. MCMURTRIE had impliedly maintained the following propositions:

First, That the power to declare legislation to be unconstitutional and void has been created and lodged by inference, and by inference only, in one branch of the government, to wit: the judicial.

Second, That there is no reference whatsoever to any such powers in the text of the Constitution.

Third, That no such exercise of judicial power had ever been heard of before in any other civilized countries.

It may be said that Mr. COXE'S essay is an attempted refutation of these positions.

Mr. COXE first takes up the last of Mr. MCMURTRIE'S assertions and examines more especially the constitutional history of France, Rome and England for the purpose of maintaining the negative. He points out that the Parliament of Paris prior to the Revolution, having the power, as is well known, to record the laws made by the king, frequently refused, and in some instances successfully refused, to sanction the king's legislation by recording his acts, thereby rendering such legislation of no effect.

Turning to Rome, he points out that the validity of the edict of the emperor went unchallenged by any judicial authority, but that at one time jurisconsults or prudentes had the right to determine the question whether the other class of imperial laws, known as rescripts, had the force of general laws or were simply to be held binding in particular cases. This, as Mr. COXE admits, was not holding a legislative act void, but it was holding that a legislative act was void of vigor in all cases except one.

He also points out that the Senate of Rome, acting as a judicial body, had the power to determine whether a law proposed by the magistrate at the rogation of a magistrate and accepted by the people was generally a law enacted with the proper solemnities. The interest of these extracts from mediæval French and Roman jurisprudence is great, but it is difficult to say what is the connection between them and the main argument of the author. It is true that the framers of the Constitution might have known—many undoubtedly did know—of the Parliament of Paris and its powers and the history of its controversies with the crown. But it would be going further than most of us would care to go to assert that this information was in their minds when they discussed and enacted the Constitution of the United States.

This, however, does not apply to the quotations from the writings of VATTEL, where that learned commentator on international law, in discussing the legislative power of a State and the authority of those entrusted with it, raises the question whether their power extends as far

[1] "A Plea for the Supreme Court," by Richard C. McMurtrie, Esq.

as to the fundamental laws so that they may change the constitution of the State. He maintains "that the authority of these legislators does not extend so far, and that they ought to consider the fundamental laws as sacred if the nation has not in express terms given them the power to change them." This argument of VATTEL is quoted and emphasized by VARNUM, the principal counsel in the celebrated case of Trevett *v.* Weeden, in which the judges, as a result of VARNUM'S argument, declared void an act of the legislature of Rhode Island, which deprived persons accused of certain offences of the right of trial by jury. That the case of Trevett *v.* Weeden influenced the framers of the constitution may be admitted.

Turning to England Mr. COXE first takes up the canon law and discusses those early cases, more especially the controversy between BECKETT and HENRY VII, over the Constitutions of Clarendon, in which the prelate successfully undertook to annul the statutes because they were *contra libertatem ecclesiasticam.* That acts contrary to ecclesiastical dignity or privilege, or contrary to the express mandates of the Pope were, practically, of no effect in England prior to the reign of Henry VIII, is, of course, undisputed. But we cannot see that the controversy between Church and State has any vital historical connection between the modern constitutional controversies between Federal and local authority. The conduct of the Roman church in the twelfth century in endeavoring to free ecclesiastical persons from the jurisdiction of civil courts may strongly resemble the decision in the case of Tennessee *v.* Davis, in 10 Otto, 257, in which the Supreme Court of the United States held a plea to an indictment for homicide in a State court good, which set out that the court had no jurisdiction, because the accused was a United States official, and the act charged was done in discharge of his duty. There may be some surface similarity in these two cases, but they have no historical connection, direct or indirect. On the whole, it would seem to us that these ecclesiastical cases do not add anything to the strength of the argument, that the power of the judiciary to set aside acts of legislation was familiar to the framers of the constitution, because history prior to the adoption of the constitution showed many examples of such judicial acts. The act of ecclesiastics in annulling the statutes which were in derogation of their independence of the common law was not a judicial act, but the act of an independent power in the body politic, which independent power was, after a long struggle, brought under the civil power of the State. The reign of HENRY VIII is the final culmination and successful issue of this struggle. The king and Parliament became supreme over all persons in England. The same criticism may be extended to the examples given by the author of the cases in England prior to the revolution of 1688, which, as the case of Godden *v.* Hales, declared that no act of Parliament could take away the power of the king to dispense with the laws, for the laws were his laws, and he was an absolute sovereign. This power of the judges to disregard an act of Parliament and to obey the king, rather than the Parliament, was finally and forever done away with by the Bill of Rights of 1688. That the framers of our constitution were familiar with these cases goes without saying, but that

a case like Godden *v.* Hales could have had any influence on their minds other than one of repulsion seems to us almost beyond dispute. The court in its controversy with the Parliament had, in the then most recent examples, invariably upheld the right of the oppressor—the kingly as opposed to the popular side. We must confess that an examination of the authorities submitted by Mr. COXE has not proved to us that the framers of the Constitution could have been by any possibility influenced in what they did, in regard to erecting the judiciary as the arbitrator of the constitutionality of legislation, by the constitutional or legal history of England.

When, however, the author turns to our own judicial history, prior to 1787, then it seems to us he has no difficulty in establishing the fact that the framers of the Constitution must have been perfectly familiar with the circumstance that the judges in several States had exercised the power of setting aside the act of the legislature as contrary to the constitution, both in cases where the constitution of a State was written, as in North Carolina, and where it was largely unwritten, as in Rhode Island. His examinations of the cases of Rutgers *v.* Waddington, from New York; of Bayard *v.* Singleton, from North Carolina, are excellent. In the discussion of the latter case he gives in full the text of Judge IREDELL'S letter to RICHARD DOBBS SPAIGHT, then attending the Constitutional Convention in Philadelphia, in defence of the court's decision, a great convenience, because of the scarcity of copies of the life and correspondence of IREDELL.

The discussion of the case of Rutgers *v.* Waddington is of especial importance from the new light in which Mr. COXE views the case. In that case, as those familiar with the general subject know, the New York court held that in interpreting the statutes of the State they should follow BLACKSTONE'S Tenth Rule of Construction, and refuse to regard an act as deliberately intending to repeal prior acts unless the legislature had introduced a *non obstante* clause, *i.e.*, unless they had used the expression, "all prior acts to the contrary notwithstanding." In other words, Mr. COXE points out that the court in New York took the English position that they would not construe an act as directly going contrary to the general principles of the law of the land, unless there were express words repealing the prior acts, as rules of law. He also points out that the ordinary oath of a judge on taking his office, not only involved the fact that the judge was to maintain the laws as enacted by the legislature, but the laws of the land, *i.e.*, those fundamental principles of law which had grown up with the history of English jurisprudence. The upholding of the law of the land, except where it was expressly set aside by acts of the legislature, was part of the judicial duty of the court. Therefore, when the Constitution of the United States said that the Constitution of the United States and laws made pursuant thereof should be the supreme law of the land, and the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, they used technical phrases which showed that they were addressing not only the judiciary of the United States but of the States, and laying on them an additional

judicial duty, *i.e.*, to consider not only the acts of State legislatures and the laws of the land, or of the State, but, as paramount law which could not be disregarded, the Constitution of the United States. There is a great deal of force in this argument, and it is by no means the least valuable of the many interesting and important suggestions which abound almost on every page of the essay.

That Mr. COXE intended, had he lived, to supplement this argument from the *non obstante* clause, with many others to prove that from a textual commentary of the Constitution one would arrive at the conclusion that the framers expressly intended that the judiciary should become, what they have since become, the interpreters of the Constitution, is evident. But this part of his work, as is said by Mr. MEIGS, the compiler, is so incomplete, that the exact line of his argument cannot now be made out, and any attempt to make a resumé of it would fail to do justice to what the author had in mind. Therefore, in one sense, Mr. COXE failed to disprove Mr. MCMURTRIE'S position that it is only by inference that we can come to the conclusion that a court has the power to declare an act of the legislature invalid. On the other hand, it may be said that he has probably put in the hands of a successor enough arguments, suggestions and material to enable such successor to accomplish the object which the author desired to attain.

There is one part of Mr. COXE'S essay, and one reason for his writing it, which we have purposely left out from this review until now, because we believe it would only serve to confuse the reader, as it confused us, when we read his work. This is, his deductions from the reasoning of the Court in the last of the legal tender cases, to wit: Juilliard *v.* Greenman. The Court maintained, if we have read that case aright, that since the United States government was the government of a sovereign and independent nation, it had all the powers which a sovereign and independent government ordinarily would have had which had not been expressly taken away by the Constitution, or which was not directly repugnant to the framework of our Federal State. The limitations we have mentioned are just as important as the general statement that the Federal government has all the powers of a sovereign government in respect to finance and defence.

The author, however, seems to have read the decision in the case as intending to confer upon Congress all the powers of the British Parliament; that nothing which any foreign nation has done the United States could not do, provided it is not prohibited. Thus, it is not expressly prohibited from declaring that the courts of the United States can hold a law of the United States void, therefore an act of Congress which declares that the Supreme Court and other courts shall not declare hereafter any of its acts unconstitutional is, if the argument in the case be sound, a valid act. We think that all persons, in going over this chain of reasoning, will cry out "*non sequitur*." It does not follow that because the court in the case of Juillaird *v.* Greenman bore in mind that it was the powers of a national government that they were considering, that they will forget from henceforth that we have in the United States a Federal government and a constitution, and it certainly does not follow, as would

seem to have been Mr. COXE'S position, that if you can prove that the Constitution of the United States expressly gave to the courts the power to declare an act of Congress unconstitutional, that therefore the decision in the later legal tender cases was wrong. Had the learned author lived to revise his manuscript and complete his work, we believe that more mature consideration would have led him to see that in spite of the fact that the legal tender cases and his disagreement with the decision of the court led him to undertake the work, that decision really had nothing to do with the main thought of the essay. We cannot help thinking, also, that he would have changed the form of the whole and made it, less a controversy in which he all through he maintains a certain proposition, and more distinctly what it really is, of one phase of the judicial power and its control over legislation before the adoption of the Constitution of the United States.

The executors of Mr. COXE and the able constitutional lawyer, Mr. MEIGS, have done an invaluable service to all lovers of constitutional law in publishing the results of the work of one who was at once an erudite scholar and a profound thinker.

As a final word to our readers, we should like to say that to one who is at all interested in the subject of this work, it will be invaluable. It may be incomplete, but it is none the less a mine of information and uggestion.

INJUNCTION TO KEEP MEN AT WORK.

We notice in the papers that a Western Circuit Court of the United States has issued an injunction restraining certain laborers who are the employees of a railroad in the hands of a receiver appointed by the Court, from going on what is technically termed "A Strike."

An injunction to restrain men from working is in plain terms an order on them to continue to work. This order, if it is correctly reported, goes much farther than any court has heretofore undertaken to go. The decisions of Judges TAFT and RICKS in the Ann Arbor cases, which will be found examined at length at page 481, Vol. 32 of the AMERICAN LAW REGISTER AND REVIEW, though they have a serface similarity, and are some of the steps leading up to the present decision, are in reality very different. Judge TAFT in that case decided that he could restrain by injunction, Chief ARTHUR, of the Brotherhood of Locomotive Engineers, from issuing a telegram ordering the employees of a particular railroad to refuse to handle interstate freight coming from another road. Judge RICKS decided that a man could not remain in the employ of a railroad and refuse to carry interstate freight. He had his choice of getting out or of carrying the freight. There was no attempt on the part of either judge to order an employee to perform his contract of service. There is a wide difference between ordering a man not to do an act which will interfere with interstate freight and ordering a man to continue to work for a particular employer. The fact that all the employees of the road intend to go on a strike in a body and that their act would cripple the road, does not seem to us to alter the legal aspect of the case.

The evil which may result from this extension of the equity powers

of a court is very well illustrated by a decision of Judge BREWER'S, when he was on the Circuit Court for the District of Kansas.[1] A certain road was in the hands of a receiver. There was a strike on the road. Judge BREWER issued an order prohibiting the strikers from interfering with the running of trains. After the order had been issued, the officers of the road complained that A. B. and C. had violated the court's order. The court investigated the facts and put the men in prison for a contempt of the injunction. The practical effect was to deprive the accused of the right of trial by jury. We believe that all these commitments for contempt on injunctions to restrain crime are unconstitutional.

The power of a court to commit for contempt is the outcome of the necessity for some peremptory power to enforce implicit obedience to the orders of the court made in the conduct of a case. To use this power to enforce criminal statutes is a gross abuse.

Violations of such injunctions, as we have elsewhere pointed out, should be tried in the ordinary way, the only effect of the injunction being to increase the penalty because the person who commits the crime has had warning.

To return to the more recent decision. Here it seems that because the receiver is an officer of the court and the property technically in the possession of the court, all the employees of the road are to be treated as if they were members of the United State army and had surrendered their will into the hands of the Federal judiciary. The number roads in the hands of receivers makes this decision of great moment and fraught with serious consequences. Without going into an extended argument here, we would like to throw out this suggestion. If the majority of roads in this country are going to pass, through the form of receiverships, under the control of one of the departments of government, the only department under which they should not come is the judiciary. The judiciary is our only safeguard against the acts of executive officers contrary to law. But if a judge is to be turned into a manager of railroads and an executive officer, we have no safeguard. If the judge as an executive officer commit a wrong, we can only appeal to the judge, as a judge, to right the wrong. At one time it might have been said that the receiver was the government executive officer, and the judge corrected, in his judicial capacity any wrong which he did. But this is largely a pleasing fiction. A few days ago we read in the paper that the employees of a certain railroad petitioned the court to order the receiver of a road not to reduce wages any more. The receiver in the Western case obtains an injunction from a Judge to prevent his employees leaving. The court, therefore, is turned into the real executive for the property of the road and its conduct. Our contention is that the legislative and executive departments of the government are the only departments which should manage property in the hands of the government. If the government is to run the railroads of the country, and the employees of the railroad are to be directed and treated as officers and servants of the government, then it is better that we should know it at once, and place the control of the railroads in that department of government to which it belongs, to wit: An *elected* congress and not an *appointed* judiciary.

[1] U. S. *v.* Kane, 23 Fed. Rep., 748 (1885).