PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports for January.

Accretions, Rights of River-bed Owner

According to a recent decision of Power, J., of the Chancery Division of England, when a non-tidal river gradually changes its bed, and thereby adds land to or takes it away from one side, the rule that the riparian owner on that side enjoys the gain or has to bear the loss applies not only where two different persons own the opposite banks, but also where the river bed belongs to a separate owner, and not to the riparian owners; and further, the question whether any particular land is part of the bed of a non-tidal river at any particular spot or time is one of fact, to be determined not by any hard and fast rule, but by having regard to all material circumstances, including past and present fluctuations of the river, and the nature, growth and user of the land: *Hindson* v. *Ashby*, [1896] 1 Ch. 78.

Assault and Battery, Chastisement of Pupil by Teacher

In *Kinnard* v. *State*, 33 S. W. Rep. 234, the Court of Criminal Appeals of Texas has recently laid down some special rules in regard to the admissibility of evidence in a prosecution for assault and battery committed by a teacher in punishing his pupil, as follows:

(1) That in such a prosecution, an allegation that the assault was committed with a special instrument, (*e. g.*, switches,) has no effect other than to confine the state to the proof of such means;

(2) That when, in such a prosecution, the defence is that the defendant, as a teacher, had the right to chastise his pupil, evidence that the assault was so severe as to cause the blood to flow from the pupil is admissible;

(3) That statements made by the teacher, half an hour after the alleged assault, are not part of the *res gestæ*, and are not admissible in his favor;

(4) That though the evidence showed that the assault was so severe as to draw blood from the pupil in a number of places, and the pupil offered no resistance; yet evidence of the intention of the teacher in chastising the pupil is always material, and should therefore have been admitted.

A teacher has a right to punish his pupils for misbehavior; but this punishment must be reasonable, and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his private ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offence for which it is inflicted, the teacher will be guilty of an assault: *Vanvactor* v. *State*, 113 Ind. 276; *State* v. *Pendergrass*, 19 N. C. 365; *State* v. *Stafford*, 113 N. C. 635; s. c., 18 S. E. Rep. 256; *State* v. *Long*, (N. C.) 23 S. E. Rep. 431; *Spear* v. *State*, (Tex.) 25 S. W. Rep. 125. The punishment must be for some specific offence which the pupil has committed, and which he knows he is punished for: *State* v. *Mizner*, 50 Iowa, 145. If a person over the age of twenty-one voluntarily attends school, he thereby waives any privilege which his age confers, and may be punished for misbehavior as any other pupils: *State* v. *Mizner*, 45 Iowa, 248. A teacher has no right, however, to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy in such a case is to exclude the pupil from the school: *State* v. *Mizner*, 50 Iowa, 145; *Morrow* v. *Wood*, 35 Wis. 59.

The teacher has in his favor the presumption that he has only done his duty, in addition to the general presumption of innocence: *Vanvactor* v. *State*, 113 Ind. 276; *State* v. *Mizner*, 50 Iowa, 145; and in determining the reasonableness of the punishment, the judgment of the teacher as to what was required by the situation should have weight, as in the case of a parent under similar circumstances. The reasonableness must, therefore, be determined upon the facts of each particular

case: *Vanvactor* v. *State*, 113 Ind. 276. When a proper weapon has been used, the character of the chastisement, as regards its cruelty or excess, must be determined by considering the nature of the offence for which it was inflicted, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher: *Vanvactor* v. *State*, 113 Ind. 276; *Dowlen* v. *State*, 14 Tex. App. 61; and, since the legitimate object of chastisement is to inflict punishment by the pain which it causes as well as the degradation it implies, it does not follow that chastisement was cruel or excessive because pain was caused or abrasions of the skin resulted from the use of a switch by the teacher: *Vanvactor* v. *State*, 113 Ind. 276.

A teacher will be liable to prosecution, if he inflicts such punishment as produces or threatens lasting mischief, or if he inflicts punishment, not in the honest performance of duty, but under the pretext of duty, to gratify malice: *State* v. *Pendergrass*, 19 N. C. 365; *State* v. *Long*, (N. C.) 23 S. E. Rep. 431. But a charge to the jury that "malice means bad temper, high temper, quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant," is erroneous; for malice may exist without temper, and may not exist although the act be done while under the influence of temper, bad, high or quick. General malice, or malice against all mankind, "is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." Particular malice is "ill-will, grudge, a desire to be revenged on a particular person." This distinction should be explained to the jury, and the term "malice" should be accurately defined: *State* v. *Long*, (N. C.) 23 S. E. Rep. 431.

Attorney, Negligence, Liability to Third Person

According to a recent decision of the Supreme Court of California, an attorney employed to draw a will is not liable to a person who is deprived of that portion of the estate, which the testator instructed the attorney should be given to such person by the will by reason of the negligence and ignorance of the

attorney in the discharge of his professional duties: *Buckley* v. *Gray*, 42 Pac. Rep. 900.

Carriers, Expulsion of Passenger, Ticket not properly stamped by Agent

The Circuit Court of Appeals of the Ninth Circuit has recently decided a very interesting point of law in regard to the right of a carrier to expel a passenger who does not present a proper ticket. The plaintiff had purchased from the defendant company a round-trip ticket, one of the conditions of which was that the return coupon would not be honored for passage unless the passenger, before returning, was identified by the agent of the company at the place of destination, and unless the coupon was signed by him, and witnessed and stamped by the agent. This condition was printed on the face of the ticket. The plaintiff, when about to return, presented his ticket to the agent, signed it for the purpose of identification, and handed it to the agent, asking at the same time for a sleeping-car ticket. The agent took the ticket to the rear of his office, and on returning with it, handed it to the plaintiff, folded up with the sleeping-car ticket. He had, however, omitted to stamp it. The plaintiff put the two tickets in his pocket, without examining them, and did not discover the agent's omission to stamp the ticket, until he was on the train, returning homeward. On presenting the ticket, the conductor refused it, and demanded the payment of fare from the plaintiff; and on his refusal, ejected him. On these facts, the court held that the plaintiff had done all that was required of him; that, being justified by the circumstances in believing that the agent had duly stamped the ticket, he was under no obligation, when it was handed back to him, to examine it to see whether the agent had performed his duty; and that he was therefore a legal passenger on the train, and entitled to recover damages from the company for his expulsion: *Northern Pac. Ry. Co.* v. *Pauson*, 70 Fed. Rep. 585.

The case of *Bowers* v. *Pitts., Ft. Wayne & Chic. R. R. Co.*, 158 Pa. 302; s. c., 27 Atl. Rep. 893, was on all fours with this, except as to one very important element. In that case, the Supreme Court of Pennsylvania held that a condition like

the above, printed on the face of a ticket, was a valid condition, and it was the passenger's duty to have informed himself of its existence; and that he could not recover for expulsion from the train in consequence of a failure to present his ticket properly stamped. Nothing is said, however, as to whether he did or did not present the ticket to the agent to be stamped; but the inference is that he did not do so. If that is the case, the decision is correct; otherwise it is utterly indefensible.

As a general rule, a passenger has a right to rely upon the presumption that the ticket agent of a carrier will perform his duty, and is not bound to examine his ticket to see if it is correct, unless facts exist which put him upon inquiry. Accordingly, if the agent misdates the ticket, and the conductor or other person who collects fares refuses to accept it in consequence, the passenger may recover damages in case of expulsion for refusal to pay the fare demanded: *Ellsworth* v. *C. B. & Q. Ry. Co.*, (Iowa,) 63 N. W. Rep. 584; *Trice* v. *Chesapeake & Ohio Ry. Co.*, (W. Va.) 21 S. E. Rep. 1022. See *Laird* v. *Pittsburgh Traction Co.*, 166 Pa. 4; s. c., 31 Atl. Rep. 51; 36 W. N. C. 24.

Charity, Gift to Poor

A gift by will "to the poor and the service of God" is a good charitable gift: *In re Darling*, [1896] 1 Ch. 50.

Constitutional Law, Self-executing Provisions

The Court of Appeals of New York has recently held, that a constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law," is not self-executing, and is inoperative, until supplemented by statute: *Marshall* v. *Sherman*, 42 N. E. Rep. 419, reversing 32 N. Y. Suppl. 193.

Corporations, Purchase of all the stock of another, Liability for Torts of Latter

Judge TOXEY, of the Circuit Court of Jefferson County, Kentucky, has lately rendered, in the case of *Kaufman* v. *Louisville Gas Company*, a very interesting and important decision in regard to the responsibility of one corporation, which has purchased all the stock, property and franchises of another, and united its business with its own, thus practically

consolidating it with itself, for the torts of the latter, committed after the union of interests. The facts were as follows: The Louisville Gas Company, having been empowered to make, distribute and sell electricity for illumination, and to buy stock in other companies necessary or convenient for the conduct of its business, bought up all the stock of the Louisville Electric Light Company. All of the original directors of the latter company resigned, and a sufficient number of the directors of the former were elected in their stead, one share of stock being transferred to each to qualify him, the gas company retaining possession of the rest. The vice-president of the former was elected president of the latter, the latter's office was removed to that of the former, and the same office thenceforth served for both.

The gas company guaranteed the mortgage debt of the light company, assumed the payment of its floating debt, guaranteed its contracts for the purchase of machinery, bought and paid for machinery to be used in operating the light company's plant, and removed that plant to and incorporated it with its own plant. The boilers of the light company's plant, however, still continued to be operated at their former situation; and while so operated, one of them exploded, through the negligence of the fireman, who was ostensibly an employe of the light company.

Upon this state of facts, the judge ruled as follows:

"As an independent corporation, solely responsible for its torts while being thus used, the Electric Light Company has no legal existence. It is either merged or suspended as to its corporate existence by reason of the gas company owning it 'body and soul,' or it is a mere agent of the gas company in manufacturing, distributing and selling electricity; and if those theoretically the servants or employes of the Electric Light Company, in the line of the general business of the gas company conducted by it, should commit a tort, the law will hold the principal responsible according to the very right and in despite of the legal fiction of a separate artificial existence of the Electric Light Company. The Louisville Gas Company, since it purchased and became the owner of all the stock of the Electric Light Company, its plant, machinery and franchise, since it took control and management of the same for the purpose of manufacturing, distributing and selling electricity for illumination to the citizens of Louisville, has been held out to and been regarded by the public to be, as indeed it is in fact, the principal and owner in the manufacture, distribution and sale of electricity for illuminating purposes by the use of

the plant and machinery which formerly belonged to the Electric Light Company; and the law will hold it to maintain the truth of the situation, and estop it from using the fictitious theoretic existence of the Electric Light Company as a shield and defence against liability for the torts committed by employes in its business. From the foregoing it follows that if the Electric Light Company's corporate existence is suspended, the gas company is directly liable, if liability there be, for the explosion of the boiler in question; if the Electric Light Company's existence is not suspended, but it exists as a corporation, then, upon the facts heretofore stated at length, it is and was the agent for the Louisville Gas Company, which is liable for its torts."

Criminal Law, Hearing before Magistrate, Twice in Jeopardy

The Supreme Court of Alabama has laid down the broad rule, heretofore only acknowledged in case of a discharge, that an order of an examining magistrate, either committing or discharging the accused, is not a bar to a second hearing on the same charge: *Robinson* v. *Dickerson*, 18 So. Rep. 729. In this case, the defendant had been admitted to bail by a magistrate, and on failure to give bail, had been committed to jail. A second warrant was issued, and a second hearing had before another examining power, (the city court,) and the defendant was then committed without bail. An indictment was subsequently found against him for murder; and it was held, on application, that the defendant was not entitled to a release on giving the bail fixed at the first hearing.

Criminal Law, Insanity, Burden of Proof

In *Davis* v. *United States*, (not yet reported,) the Supreme Court of the United States has recently enunciated a most dangerous rule of criminal law,—that when the defence of insanity is set up, the burden of proof rests upon the prosecution to establish the fact of sanity, in spite of the presumption that every man is sane till proved insane.

"This view," says Mr. Justice Harlan, "is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged, the Government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of

capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof. It is a disputable or, as it is often designated, a rebuttable presumption, resulting from the connection ordinarily existing between certain facts—such connection not being 'so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence:" *1 Greenl. Ev.* § 38. It is therefore a presumption that is liable to be overcome or to be so far impaired in a particular case, that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life. In a certain sense, it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged. . . . . Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof, of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is estabtablished beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully and of malice aforethought, took the life of the deceased."

This doctrine is, in the highest degree, pernicious to the successful enforcement of the laws against crime. In spite of the feeble deprecation of that argument found at the end of the opinion in this case, the fact remains that never yet in a criminal case, has it been impossible for a defendant to procure

so-called experts, often of the highest professional standing, who were then ready to swear to his insanity, and six months later, on his application for release from an insane asylum, were equally ready to swear to his sanity. This being true, and the effect of professional dictatorialness on the lay mind being equally well known, it follows that, in such cases, there can never be a conviction, if the prosecution is required to prove insanity beyond a reasonable doubt, unless the jury, at their caprice, choose to disregard the evidence of the experts for the defence. For their evidence, positive as it always is, is enough to create an uncertainty in any mind, not fitted by the same special training to appreciate the basis of their opinions; and this uncertainty, as the language of Justice Harlan clearly implies, need not be a reasonable one; a mere doubt, however feeble, is, in his opinion, enough to throw the burden of proof on the prosecution, which is, in effect, to cast upon it, a load it can never throw off. However numerous its witnesses, they cannot counteract a doubt resting on matters of mere opinion, unless their testimony is reinforced by the prejudices of the jury. This is to leave us without any sure criterion, and at the mercy of the thugs who have made this country the one where human life is held cheapest. In short, the tendency of such a doctrine is to encourage the commission of crime, by rendering its punishment more difficult, and to remove another of the few remaining safeguards of society. Fortunately, however, this does not establish the law for the States; and there are still places where the sounder rule prevails, which this court, in its tender consideration for the murderer, has discarded.

Elections, Ballots, Preparation, Printing name of candidate nominated by two or more parties

Under the Ballot Act of Missouri (Acts Mo. 1891, p. 134, § 4,) which provides, that the names of candidates, nominated by each party, shall be grouped together on the proper ballot, and each group be headed by the name of the political party, by which the candidates comprising the group were placed in nomination, a person named as a candidate by different political parties is entitled to have his name appear upon the ballot in the group headed by the name of each party: *Williams*

v. *Dalrymple*, (Supreme Court of Missouri, Division No. 1,) 33 S. W. Rep. 447.

This is in direct opposition to the decision of the Supreme Court of Wyoming, in *Sawin* v. *Pease*, 42 Pac. Rep. 750; See 35 AM. L. REG. & REV. (N. S.) 9; but seems founded on better reason. The only valid objection urged, in the latter case, against the printing of the name more than once was the danger of its being counted twice on the same ballot. But of this there is little danger, since there is small likelihood that a voter would go to the trouble of marking the individual name twice, or that he would mark two groups. And, on the other hand, if it is not printed twice, the voter might mark a group in which it was not printed; and the danger that election officers would fail to count it, would then be far greater than that, in the other case, they would count it twice. Further, if it were printed twice, it could be counted as a vote, in case the voter did make the error of marking two groups, quite as easily as if it were only printed in one, and omitted from the other.

The provision in the ballot laws, that none but ballots provided in accordance with the provisions of the act, shall be counted, does not apply to ballots improperly prepared by the proper officers; and moreover, that such ballots are not "marked ballots" within the prohibition of the act: *People* v. *Wood*, (Court of Appeals of New York,) 42 N. E. Rep. 536.

Ballots, Validity

The Supreme Court of Indiana has lately ruled, that under the Revised Statutes of that state of 1894, § 624, which provides, that any voter who declares that, through inability to read, he is unable to mark his ballot, may have it prepared by the poll clerks, if a voter who cannot read, declares that he can, but asks the poll clerks to prepare his ballot for him, and they do so, the ballot will be good: *Montgomery* v. *Oldham*, 42 N. E. Rep. 474.

Illiterate Voter, Ballot marked by Election Officers

The provision of the ballot laws, that permits a voter to have assistance in marking his ballot, should be liberally construed, since it is that provision alone that saves those acts

from being unconstitutional. If no such provision existed, illiterate voters would be practically disfranchised. Such a provision is legal, and not in itself unconstitutional on the ground that it deprives electors, who are physically and educationally unable to vote, of the right to cast secret ballots, or because it establishes physical and educational qualifications for voters: *Pearson* v. *Board of Supervisors of Brunswick Co.*, (W. Va.) 21 S. E. Rep. 483. It has, accordingly, been held that the voter is the sole judge of his disability, and is not obliged to state its nature; that his declaration cannot be met and overthrown by proof of its falsity; and that the election board is not competent to try the question as to the truth of his declaration: *In re Beaver Co. Elections*, 12 Pa. C. C. 227; s. c., 2 D. R. 275. But the contrary view has met with more acceptance, and it has been held, under the same statute as in the preceding case, that the election officers must examine the voter as to the good faith of his request, if the fact of disability is challenged, and may refuse it, should the alleged disability prove to be a palpable mistake, fraud, or subterfuge: *In re Election Instructions*, 2 D. R. (Pa.) 1. So, in Michigan, where the ballot requires the voter to make oath to his disability, this provision is regarded as mandatory; and if it is not complied with, the vote should be rejected in the count, though no fraud was intended: *Ellis* v. *Reynolds*, 99 Mich. 538; s. c., 58 N. W. Rep. 483. In the absence of a statutory requisite as to the form of oath, however, any sufficient form of words will satisfy the statute: *State* v. *Gay*, (Minn.) 60 N. W. Rep. 676. The disability must also be such as is contemplated by the statute; drunkenness, or mere ignorance of the proper manner of voting, is not such: *In re Election Instructions*, 2 D. R. (Pa.) 1. Nor is it sufficient for the voter to allege that he usually uses glasses, but has not brought them with him: *State* v. *Gay*, (Minn.) 60 N. W. Rep. 676.

In the absence of statutory provisions, the voter is not restricted in his choice of an assistant, and the board of election officers has no right to so restrict him: *In re Beaver Co. Elections*, 12 Pa. C. C. 227; s. c., 2 D. R. 275. But if the statute requires that the assistance shall be rendered by any special

officer, this provision is mandatory, both on the voter and the officer; the former can have no other assistant, and the latter must assist the voter, if requested: *Pearson* v. *Board of Supervisors of Brunswick Co.*, (W. Va.) 21 S. E. Rep. 483. In such a case, a ballot is not invalidated by the fact that a judge of election, who, before his appointment, received money from a candidate and advocated his cause at the polls, prepared it in the interest of that candidate: *Hanscom* v. *Lockhart*, (Tex.) 31 S. W. Rep. 547.

If the statute requires two officers to assist a voter, who is unable to prepare his own ballot, the fact that he was, in fact, assisted by one only, will not affect the validity of the ballot, if there is no provision for the rejection of such a ballot: *Hanscom* v. *Lockhart*, (Tex.) 31 S. W. Rep. 547.

If the assistant prepares the ballot in any manner other than that authorized by the voter, the vote may, of course, be rejected, if the fraud is discovered; but when a voter, who could read, intending to vote for one candidate, directed his assistant to prepare his ballot, according to a written "guide" given to the assistant, and the latter marked it for another candidate, it was held that, in the absence of anything to show whether the mistake was due to the design of the officer or an error in the "guide," the vote should not be rejected for fraud: *Hanscom* v. *Lockhart*, (Tex.) 31 S. W. Rep. 547.

Electric Railways, Liability

If a telephone wire has been negligently allowed to drop across the trolley wire of an electric street railway company, the latter is jointly liable with the owner of the telephone wire for injuries to a third person accidentally coming in contact with it, carried by the current of electricity conveyed through it from the trolley wire: *City Electric Street Railway Co.* v. *Conery*, (Supreme Court of Arkansas,) 33 S. W. Rep. 426.

In *Strachan* v. *The Universal Stock Exchange, L'td*, [1895] 2 Q. B. 697, the Court of Appeals of England has

Gaming, Recovery of Wager, Stock Gambling, Margins

recently decided, that, under the Gaming Act of 1845, which enacts that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing . . . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," when it appears, in an action to recover back money deposited as cover for differences that might arise on gambling transactions in stocks and shares, it appeared that the money was treated by the defendants, to the plaintiff's knowledge, as appropriated to meet his losses to the defendants, and that the whole amount had been so appropriated before the plaintiff gave notice to terminate the gambling transaction, the plaintiff could not recover; for the statute applies equally to money or valuable things deposited with the other party to the bet, as to those deposited with a stakeholder.

Injunction, To Restrain Criminal Acts

We have been favored with a copy of the decision of Chancellor Martin, of the Chancery Court of Pulaski County, Arkansas, overruling the demurrer to the injunction issued by him to restrain the Corbett-Fitzsimmons prize-fight. The whole opinion is much to be commended for its sound commonsense and clear statement of legal principles; but is unfortunately too long to print *in extenso*. The following are the salient parts of it:

"The question of jurisdiction of the subject-matter is one about which, without investigation, there may exist a difference of opinion; but I think any lawyer, who will studiously and impartially investigate the question, and who will apply logic to research, keeping in mind the extraordinary powers of a Chancery Court, will conclude that such jurisdiction is not wanting.

The act of 1885 makes the Chancellor of the Pulaski Chancery Court a conservator of the peace throughout the state. Acts of 1885, p. 172.

And our Supreme Court says that what a judge of a court presided over by a single judge may do in vacation, the court may do in term time: *Patton* v. *Vaughn*, 39 Ark. 211; *Boon* v. *Bowers*, 30 Miss. 246.

'A conservator is a preserver; one who has the care or office of keeping from detriment.' Worc. Dict.

'A conservator of the peace is one who has an especial duty by virtue

of his office to see that the sovereign's peace be kept.' Bouv. Law Dict. p. 328.

'Under the act of 1885 and secs. 2380 of S. & H. Dig., I believe it is conceded that this court might have put Corbett and Fitzsimmons under bonds to keep the peace, in sums not exceeding $5,000; and from this, it is argued that no jurisdiction exists to do more. The section of the digest last referred to, applies to officers of courts of law particularly, though I doubt not this court also has the power to enforce it in a proper case. But is that remedy in a court of equity exclusive?

The bill alleges, and the demurrer confesses, that a bond of $5,000, the maximum bond which, under the statute, could be required, would not prevent the fight, and would not prevent the other acts complained of in the bill, among them the public nuisance, which is minutely described. It follows, then, as certainly as night the day, that unless the Chancellor could apply some other remedy than that of a mere bond to keep the peace, limited as it is to the sum of $5,000, that the power conferred, and the duty enjoined upon him, would fall far short of enabling him to adequately maintain the good order of the state government, whose peace he is to conserve.

It were the rankest folly, the sheerest nonsense, to direct an officer to conserve the peace throughout the state, and then deny him the necessary jurisdiction and power to do so wherever an emergency should arise which demands the exercise of such powers as may be necessary to accomplish the purpose. As I will show before I conclude, courts of equity have exercised jurisdiction by injunction to prevent the commission of certain crimes, indeed, they should of any crime involving the commission or maintenance of a public nuisance, as does the one charged in the bill in this case. And why not? The very objects of government are to restrain men's passions, to bridle improper and illegal impulses, to protect them in their civil and political rights of life, limb and property, to subserve the general welfare, and to induce, or make them, if necessary, respect the rights of others. 'Tis true, a court of equity, under our system of laws, cannot administer punitive justice, except for contempts; but it may preventive justice in proper cases; and I feel that if there were more preventive justice administered, a vast deal of misery would be spared to the innocent. Many a sorrowful wife and innocent, helpless child has been made to suffer the want of absolute necessaries of life, because of the father's condemnation to a sentence of punitive justice—under a jail or penitentiary sentence—but never, in the very nature of things, has one, and one never can, on account of the administration of preventive justice. In most cases, per force of circumstances, preventive justice cannot be enforced; because, first, the contemplated crime is not known; and if it were, it can generally be prevented by the statutory peace, bond proceeding in a court of law. But there are exceptions to the rule; and the exception proves the rule. Courts of equity will not, generally, interfere by injunction to prevent the commission of ordinary crimes, and this is upon the principle that an adequate remedy exists at law. But what have we here as shown by the complaint and confessed by the demurrer? A comparatively small part of the state in league

with a few prize-fighters and their trainers, bonded together in a collusive determination to openly violate the statutes of the state, flinging defiance in its face, and saying to the constituted authorities of the state government, 'we will be protected by local authorities, and you are powerless to vindicate the majesty of your laws, to preserve the good name of the state, to uphold its institutions, or to conserve its peace.'

The Governor has run the gamut of executive functions to find legal power or authority, lodged in him as the chief executive, to lay hold of the threatened infraction of the statutes, and by reason of the restrictive constitutional limitations upon his power, he could legally do nothing, without the aid of some court, to accomplish a proper conservation of the peace in that part of Arkansas' domain. The Attorney-General of the state for a few days preceding the day fixed for the fight was in the city of Hot Springs—on the ground—and on his return filed the bill in this case, which was by him duly verified.

He says in the bill of complaint "that in open defiance of the laws of the state, of its peace and good order, of its good name and general welfare, all the defendants herein, and many others whose names are to the plaintiff unknown, undertook such measures as were deemed necessary by them to bring about said fight in said Garland County, in or near said city of Hot Springs. They publicly, boldly and defiantly proclaimed that said fight would occur. They advertised the fact throughout the entire country that the fight would occur for the championship of the world, and in every way and by all means, sought to induce persons to come from all over the land to witness the fight, and openly stated that the attendance would be some fifty thousand people; that accommodations would be made to seat that number to view the fight."

He also avers in the bill 'that if said fight occurs, it will seriously endanger the lives of the participants who are gifted with extraordinary strength and skill, fight for a very large stake, as well as for the championship of the world, and entertain feelings of intense hostility towards each other. That it will bring together from all parts of the country a lawless, violent, turbulent and dangerous assemblage of many thousand of persons, and will cause riots and affrays, seriously endangering the safety of many others, to the prejudice of the good name and general welfare of the state. That the assemblage and fight contemplated would constitute a public nuisance, which would endanger not only the lives of persons not engaged or participating in it, but property generally; and if the Governor of the state exercises his power to call out the militia, its efforts to prevent the fight will be resisted and many persons will be injured, perhaps killed, as defendants, their aiders and abettors, now declare."

Can it be rationally conceived that any government would so frame its laws as to render itself powerless to maintain its peace and compel an observance of its statutes? Such a doctrine is utterly at variance with the idea of sovereignty. The three departments of government, executive, legislative and judicial, were created, *inter alia*, for purposes of maintaining order in society, and of enforcing sound and wholesome rules for its regulation; and the power to formulate and enforce measures

that are necessary to do this, must be lodged somewhere. It is conceded, under our law in its present state, not to be vested in the executive in a case like this; nor in the law courts, by reason of their want of power to do more than put the parties under bond to keep the peace in a sum which is wholly inadequate to accomplish the purpose. It follows, that unless a court of equity has jurisdiction to prevent the contemplated acts complained of, there is practically no remedy, and the state would be powerless to prevent its laws being treated with contempt, and unable to put a quietus upon a vaunted defiance of its sovereignty and authority. Moreover, as has already been stated, preventive justice is preferable to all species of justice, where it is obtainable. This proposition is sustained by reason, a sense of humanity, and an abundance of authorities: See *Champ* v. *Kendrick*, 130 Ind. 549; *Fletcher* v. *Humble*, 67 Ind. 444; *McAfee* v. *Reynolds*. 18 L. R. A. 211; *Moss* v. *Moss*. 44 Vt. 84; *English* v. *Smock*, 7 Am. Rep. 215.

However, we need not resort to any consideration of a public necessity to maintain the laws and dignity of the state, nor to that principle of equity jurisprudence, that courts of chancery will intervene to prevent a multiplicity of suits, to sustain the jurisdiction of the court over the subject-matter of this action. While conceding that courts of equity have no power to enforce the criminal statutes of the state, and no jurisdiction to injoin the commission of crimes ordinarily, yet where the crime arises from, or is a constituent part of a public nuisance, they should not fail to exercise their extraordinary powers to abate the nuisance; and in doing this, they may, by proper orders, prevent the commission of the crime. Vice-Chancellor Shadwell so thought when he delivered his opinion in *Attorney-General* v. *R. Co.*, 4 De G. & S. 75.

Chancellor J. Howard, in *Col. Athletic Club* v. *State*, 28 L. R. A. 727, in considering the question of injoining a prize-fight, says: "Extraordinary emergencies in many cases call for extraordinary remedies." In Chapter 29 of the work from which we have quoted, [REDFIELD ON RAILWAYS,] Judge Redfield, both in the text and in the notes, gives numerous instances of the interposition of equity to prevent threatened wrongs on the part of corporations. The rule to be observed in such cases is quoted at page 396 from Lord Chancellor Cottenham: "That it is the duty of courts of equity (and the same is true of all courts and of all institutions) to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights, for which there is no other remedy. . . . ."

The case of *Columbia Athletic Club* v. *State*, 28 L. R. A. 727, from which a number of quotations have been made, and in which several cases cited in this opinion are used, was one instituted to enjoin an athletic association from "pulling off" an industriously advertised prize-fight, and to put the property of the association in the hands of a receiver. The Chief Justice, who delivered the opinion of the court, affirmed the judgment of the lower court in making the injunction perpetual, and going a step

farther than I have gone in this case, by appointing a receiver to take charge of the club house and grounds of the association, in order to prevent the fighting of the pugilists, says: "It would be monstrous to adjudge that, because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetuate the gravest abuses, since, under such a rule, the graver the abuse the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that, because the abuse of its corporate privileges consist of committing crime, civil remedies are unavailable. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding by asserting its own infamy and insisting that redress can only be had under the laws punishing the crimes." A like conclusion was reached in Massachusetts, in the case of *Carleton* v. *Rugg*, 149 Mass. 550, 5 L. R. A. 193, the language of the court being: "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." See, also, Morawetz Priv. Corp., par. 1043. . . . .

"Judge Brewer, *in re* Petition of Debs, 158 U. S. 564, for the Supreme Court of the United States, says: The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed., Perkin's, 1740. Indeed, it may be affirmed that in no well-considered case has the power of the court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of that particular case. Story's Eq. Jur. par. 921, 923, 924; Pomeroy's Eq. Jur. par. 1349; High on Injunctions, par. 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed., p. 1636."

That the complaint filed by the Attorney-General in this case alleges facts which constitute a menace to the lives of citizens, with destruction of their property, the disturbance of the peace and tranquility of the community, the general welfare and reputation of the state, and a great public nuisance, calling for the exercise of all the legitimate powers of this court to abate and prevent the consummation of the threats alleged in the bill, I think, is not open to question. . . . .

Recurring to the remedy, I find that in cases of public nuisances, it must be either preventive or punitive, the one accomplished by injunction, and the other by an indictment on behalf of the public.

The most efficient, humane and flexible remedy is that of injunction. Under this form the court can prevent that from being done which, if done, would cause a nuisance; it can command an observance of peace before it is broken; it can save suffering, and sometimes disgrace, to those who are in no way responsible; in some instances, and I believe this case presents one of them, it can secure an obedience to the laws of the country that a court of law, pursuing the other remedy, could not do.

My conclusions are:

(1) That jurisdiction over the persons of such of the defendants as

voluntarily came into Pulaski County, and were summoned here, is given by the statute quoted in this opinion ;

(2) That the complaint charges such a state of facts as constitute a public nuisance in the eyes of the laws of this state ;

(3) That the demurrer admits the material allegations of the complaint to be true ;

(4) That a court of equity has ample jurisdiction to prevent, or abate by injunction, a public nuisance, in a civil action instituted by the sovereign on the relation of her Attorney-General ;

(5) That the power to prevent or abate the nuisance involves the jurisdiction to make all orders that may be necessary, and that of a preventative character, to effectuate the orders for prevention or abatement ; and this involves the jurisdiction to enjoin the commission of a crime which inheres in, or constitutes a part of the nuisance.

Insurance, Fidelity, Remedy of Insurer Against Employe

The Supreme Court of Minnesota, in *Fidelity & Casualty Ins. Co. of N. Y. v. Eickhoff*, 65 N. W. Rep. 351, has lately decided some very interesting points of law in relation to fidelity insurance,—a branch of the law which is as yet but poorly defined. The court held, (1) That a stipulation between the plaintiff, (the insurer,) and the defendant, the employe whose fidelity was assured, that the voucher or other evidence of payment by the plaintiff to the employer should be conclusive evidence against the defendant as to the fact and extent of his liability to indemnify the plaintiff, was void, as against public policy, in so far as it makes the voucher or other evidence of payment conclusive ; and (2) That, since the contract guaranteeing the employe's fidelity was executed at the request of the defendant, his obligation to indemnify the plaintiff was coextensive with the obligation of the plaintiff to indemnify the employer ; and that any provisions in the contract between the plaintiff and the employer which were binding on the plaintiff, in favor of the employer, were equally binding on the defendant, in favor of the plaintiff.

Insurance, Life, Suicide of Assured

In the opinion of the Circuit Court of Appeals, Third Circuit, the personal representatives of one who, when sane, deliberately kills himself, with the intent of securing to his estate the amount of insurance he has effected on his life, cannot recover the insurance money, though the policy contains no provisions

respecting suicide: *Ritter* v. *Mutual Life Ins. Co. of N. Y.*, 70 Fed. Rep. 954. One must read this case to be unconvinced.

Interstate Commerce, Peddlers, Agents

In a recent case in the Supreme Court of Indiana, it appeared, on a trial for peddling without a license, that the defendant was one of a number of so-called distributing agents, within the state, of a New York firm. These agents received orders for the goods sold by the firm, and sent them to the general agent of the firm within the state, who forwarded them to the firm in New York, and received the goods from there. He repacked them, (in the state,) and sent them to the distributing agents, who delivered them to their customers. On this state of facts, the court held that the defendant should be regarded as engaged in interstate commerce, since the goods never became mingled with the mass of property in the state, and therefore was not liable to the penalty imposed for the offence charged: *City of Huntingdon* v. *Mahan*, 42 N. E. Rep. 463.

When an agent merely solicits orders by sample for a foreign dealer, who, on receiving them, fills them and forwards the goods ordered directly to the purchaser, so that they are never in the possession or control of the agent, the agent is universally acknowledged to be within the protection of the interstate commerce clause, and is not liable to a penalty for failure to take out a license required by the laws of the state or the ordinances of the municipality, in which he carries on his agency: *Brennan* v. *Titusville*, 153 U. S. 289; s. c., 14 Sup. Ct. Rep. 829, reversing 143 Pa. 642; s. c., 22 Atl. Rep. 893; *In re Rozelle*, 57 Fed. Rep. 155; *State of Louisiana* v. *Lagarde*, 60 Fed. Rep. 186; *In re Mitchell*, 62 Fed. Rep. 576. On the other hand, it is equally well settled that an agent who sells goods, which he has previously received from a foreign source, whether as a general practice, or only on certain occasions, is not engaged in interstate commerce, and must take out a license, or pay the penalty prescribed for failure to do so: *Emert* v. *Missouri*, 156 U. S. 296; s. c., 15 Sup. Ct. Rep. 367, affirming 103 Mo. 241; s. c., 15 S. W.

Rep. 81; *State* v. *Snoddy*, (Mo.) 31 S. W. Rep. 36. There is, of course, a wide range of debatable ground between these two settled rules; but since it is also well established that when goods imported into the state in the original package are sold in that package, without breaking it, they are subjects of inter-state commerce, without regard to the manner of sale: *Leisy* v. *Hardin*, 135 U. S. 100; and when that package is, in any way broken, the goods become a part of the general mass of property in the state, and are subjects of inter-state commerce: *State* v. *Parsons*, 124 Mo. 436; s. c., 27 S. W. Rep. 1102; *Haley* v. *State*, (Neb.) 60 N. W. Rep. 962. See 34 AM. L. REG. & REV. (N. S.) 19, it would seem that an agent may sell goods previously shipped to him in the original package, by delivery at the time of the contract, without being liable to the penalty for failure to take out a license. In the case of goods previously delivered, therefore, the liability of the agent depends on the definition of an original package. If, however, the goods are only delivered in answer to orders given, and the agent acts merely as a medium of transmission between the vendor and the purchaser, the question of original package does not apply, and the agent is not liable, no matter how much that package is broken before the final delivery to the purchaser. Such was the case in hand.

There is a note on this subject, in 34 AM. L. REG. & REV. (N. S.) 569.

Judge, Disqualification, Taxpayer

The Supreme Court of Texas, while discarding the venerable rule of the common law, that a taxpayer of a municipal corporation has such an interest in a suit between the corporation and another party as disqualifies him to sit as a judge in the case, yet adopts substantially the same rule, under the provision of the Constitution of Texas, Art. 5, § 11, that "no judge shall sit in any case in which he may be interested," with the qualification that the interest that disqualifies, must be a pecuniary interest, *i. e.*, one that can be measured by a pecuniary standard. In that state, therefore, a judge who is a taxpayer in a

city is disqualified to sit in any case, in which a judgment for money can be rendered for or against the city, if he has a direct interest in that judgment, due to the fact of his being a taxpayer, no matter how slight that interest may be: *City of Austin* v. *Nalle*, 85 Tex. 520; s. c., 22 S. W. Rep. 668, 960. This has been recently extended to include a suit to annul the corporation and remove its officers: *State* v. *City of Cisco*, (Court of Civil Appeals of Texas,) 33 S. W. Rep. 244; but it does not apply to a case in which the interest of the taxpayer is remote and contingent; and therefore a judge, who is a taxpayer, is not disqualified to sit on the trial of an action against a city for personal injuries, caused by its negligence, nor on the hearing of an appeal in such a case: *City of Dallas* v. *Peacock*, (Supreme Court of Texas,) 33 S. W. Rep. 220.

This distinction seems rather far fetched. The distinction made between *City of Austin* v. *Nalle*, 85 Tex. 534; s. c., 22 S. W. Rep. 668, 960, and *City of Dallas* v. *Peacock*, (Tex.) 33 S. W. Rep. 220, is, that, in the former, the suit was to cancel an issue of bonds, which, if successful, would increase the taxes to be levied; while in the latter, no such result could be anticipated. But the only thing that went to show that the taxes in the first case would be increased was the fact that the total issue of bonds was about $1,400,000; if it had been only $5,000, there could have been no such presumption. So, in the second case, the only thing that showed that the taxes would not be increased, was that the recovery was for only $3,000; if it had been for $1,000,000 the presumption of increased taxes would have been as strong as in the first case. It is clear therefore, that the court, by failing to analyze its own *rationes decidendi*, committed the error of resting its decision on the very ground that it declared could not affect the decision,—the amount of the interest; for this, as is shown above, was the real basis on which the nearness or remoteness of the interest has been rested. This test, therefore, is fallacious, and the only solid ground on which we can rest, is either the broad principle that any interest disqualifies, or that no interest except such as is direct, immediate and personal, will have that effect.

Jurors, Disqualification, Affinity

It may, perhaps, prevent some unskilled practitioner from making a futile objection, to know that husbands, whose wives are second cousins, are not related by affinity, within a statute disqualifying persons related within certain degrees of affinity from serving as jurors on the trial of a cause to which their affinities are parties: *Tegarden* v. *Phillips*, (Appellate Court of Indiana,) 42 N. E. Rep. 549. The case contains an excellent resumé of the law on the subject.

Lotteries, Gift Enterprises

The Supreme Judicial Court of Massachusetts, in *Commonwealth* v. *Emerson*, 42 N. E. Rep. 559, has lately held, that the statute of that state of 1884, c. 277, which makes it a penal offence to sell property on any representation "that anything other than what is specifically stated to be the subject of the sale, is to be delivered," does not apply to nor prohibit the sale of tobacco under a promise to give a photograph to each purchaser of a package, though a purchaser is allowed to select his photograph from among a number.

Martial Law, Persons subject thereto

In *In re Craig*, 70 Fed. Rep. 969, the Circuit Court for the District of Kansas has decided, that the Act of Congress of March 3, 1873, § 11, (Rev. Stat. U. S. § 1361,) which provides that prisoners under confinement in military prisons to undergo sentences of court-martial, shall be liable to trial and punishment by court-martial, for offences committed during that confinement, is not in contravention of the Fifth Amendment, which declares that no person not in the land or naval forces, or in the militia, shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; and that that statute applies to a person confined in a military prison, though, at the time of his sentence to such confinement, he was also sentenced to be discharged from the service.

The Court of Appeals of the District of Columbia has lately reversed the decision of Justice Bradley, of the Supreme

Martial Law, Retired Officers, Arrest, Habeas Corpus

Court of that district, discharging Captain Armes from imprisonment under the Articles of War. The facts of the case are well known. Captain Armes sent to General Schofield a letter, charging him with persecution of the writer, alleging various wrongful acts committed by him, and demanding an apology. He was thereupon arrested, and confined at the Washington Barracks, from which he was released on *habeas corpus*.

The important parts of the decision of the Court of Appeals are as follows :

"This case is not that of a civilian ruthlessly imprisoned by arbitrary military authority. The appellee is an officer of the Army of the United States, entitled to wear its uniform and to draw pay as such, and by express provision of the statute law of the United States for the government of the Army, made subject to the Rules and Articles of War and to trial by court-martial for any infraction of those articles. (Rev. Stat. U. S. § 1256.) Nor is the force of the statute broken by the fact that the duties of a retired officer, such as the appellee is, are of an exceedingly limited character, being restricted substantially to drawing his pay, reporting his place of residence to the War Department monthly, and being assignable to duty at the Soldier's Home and at his own request to duty as professor in any college ; and that, subject to these restrictions, a retired officer of the Army may enter into any private business into which he chooses to embark, not inconsistent with his duties to the United States. In the nature of things, some of the Articles of War cannot apply to retired officers, for the reason that, either in express terms or by necessary implication, they concern the duties of those in active service. But, so far as the Articles of War can be applicable to the retired officers of the Army, the statute unquestionably makes these latter subject to them and to all the processes of the military law, for all offences committed by them in violation of these articles.

Now, it cannot reasonably be doubted that the charges against the appellee, in this case, are of offences against the military law of which retired officers, as well as officers in the active service, may be equally guilty. These are (1) Conduct to the prejudice of good order and military discipline ; and (2) Conduct unbecoming an officer and a gentleman ; and the specification under each charge is the statement of the exceedingly intemperate and improper letter, written by the appellee to the General Commanding the Army, which is set forth in full in the appellant's return to the writ served upon him. If there were any occasion to conjecture what the purpose of Congress was in holding retired officers of the Army to trial by court-martial for infractions of military law, and what the offenses were which it was contemplated they might commit, no better illustration could be afforded of the subject than the offenses here charged against the appellee. It would be difficult to conceive a case to which the statute would be more appropriate.

The appellee, therefore, being an officer of the Army, although on the retired list, and subject as such to trial by court-martial for violation of the Articles of War, and the charges against him being for offences against these Articles such as have been stated, his arrest to answer those charges was right and proper. Actual arrest, or some equivalent of it, is an essential prerequisite under our system of criminal jurisprudence to the exercise of jurisdiction by any court having cognizance of criminal causes. It is an elementary principle in our law that no man is to be tried for crime in his absence. The arraignment of an accused person in court to hear the charge against him and to respond to it, is essential to give validity to any proceeding thereon against him; and the only mode known to our law to secure the presence of such accused person for the purpose is by arrest. It is very true that an accused person may come in and voluntarily surrender himself; and that thereupon a court may proceed without the usual preliminary arrest. But upon his surrender, he is in fact and in contemplation of law under arrest, and subject to detention. This is the law with respect to offences cognizable by the ordinary tribunals of the common law; and we see no reason why it should not be held to be the law with regard to offences cognizable by court-martial. But we are not left to mere inference in this matter. For Article 65 of the Articles of War specifically provides that "officers charged with crime shall be arrested." It is vain to argue that the term crime here is to be taken in the technical sense of a felony; for no such distinction is justified by the Articles of War or by the dictates of reason.

It is very plain to us, therefore, that the appellee, as a retired officer of the Army of the United States, was subject to arrest and detention by the military authorities to answer before a court-martial on the charges preferred against him. Nor is this conclusion invalidated in the slightest degree by the proposition laid down by some of the writers on military law to this effect: "Arrest is not an essential preliminary to a military trial; to give the court jurisdiction it is not necessary that the accused should have been arrested: it is sufficient if he voluntarily, or in obedience to an order directing him to do so, appears and submits himself to trial;" for this means no more than that an officer may voluntarily place himself under arrest, just as any person accused of offence under the common law may come in and submit himself to authority without formal arrest in the regular way. It would be absurd to conclude that arrest is improper, because the accused might come in voluntarily or upon mere notice, and submit to trial without arrest.

But it is argued that the arrest of the appellee, in this case, was illegal, because he was taken by the military authorities from his own house and confined in military barracks belonging to the United States, which constituted the nearest military post. In this argument, it seems to be forgotten that the appellee is not a civilian, but an officer of the Army of the United States, subject to trial by court-martial, and to such arrest and detention as will secure his presence before such court-martial. It might well be questioned whether it would be proper for the military authorities to convert the appellee's residence into a temporary prison for his detention, and to station a guard before it. Such an exercise of the right of

arrest might subject the military authorities to grave criticism and censure. If the military authorities had the right under the law and the Articles of War to arrest the appellee, as we hold they had, and to detain him for trial before a court-martial, it is not apparent to us how the place of this detention can become a material question so as to affect the validity of the arrest.

Article 65 of the Articles of War, already cited, provides as follows:

"Officers charged with crime shall be arrested and confined to their barracks, quarters, or tents, and deprived of their sword by the commanding officer. And any officer, who leaves his confinement before he is set at liberty by his commanding officer, shall be dismissed from the service." . . . .

Arrest is one thing; custody or detention, another. Where arrest is authorized, and there is no specific or sufficient provision for detention, such reasonable means of custody may be used as are available. If there is no jail in a county or judicial district, or none available, a sheriff may confine a prisoner in his own house, or in any other place which may be reasonably proper under the circumstances for the purpose. And for the same reason, when an officer of the Army is arrested who has no barracks, quarters, or tents, it is not apparent why he should not be confined in the barracks, quarters or tents most available, those of the nearest military post. The military authorities are entitled to have the custody of his person; and there is no place where they can more properly have that custody than at their nearest military post.

Moreover, even if there is excess or abuse in the mode of the detention of an accused person, it does not follow that the excess or abuse may be remedied by the writ of habeas corpus. Such excess or abuse is not without remedy; but it must be a very grave and unusual case that would justify recourse to the writ of *habeas corpus* for the total discharge of the prisoner from all confinement. . . . .

But it is urged, in the next place, that the detention of the appellee, without the existence of charges, invalidated his arrest and confinement. If by this is meant that, before an officer of the Army of the United States can be placed under arrest and held for trial under the Articles of War, formal charges in writing, with specifications in due form, such as are set forth in the record in this case, must have been preferred against him, the position is not tenable for a moment. Lord Coke seems to have thought that, at the common law, indictment or information was necessary before there could be a lawful arrest. But that theory was repudiated long ago; in fact, very soon after it was advanced; and it has long been the settled law, both of England and the United States, that indictment or information is never required in any case as a pre-requisite to arrest and detention. Warrant is required in some cases, with affidavit or other testimony to support it, to justify an arrest; and in other cases, there may be an arrest without warrant.

There is no reason to hold that it is different in the military law. That law can not be more jealous of the liberty of its officers than is the common law of the liberty of its citizens. The fact of the commission of apparent crime or offence is the primary ground for arrest in either system

of jurisprudence. In either system, when an officer, charged with the duty of making arrests, has personal knowledge that an offence has been committed, he is entitled to arrest without warrant, or without the issue of formal order to that effect, as the case may be. The exigencies of the military service imperatively demand that, when an offence against the Articles of War has been committed in the presence of a commanding officer, he should have the right immediately to place the offender under arrest. Both the General Commanding the Army and the Secretary of War have the right; and whether the offence charged against the appellee be regarded as having been committed in the presence of the General Commanding the Army or of the Secretary of War, in both which capacities General Schofield was acting at the time, it is clear that in either capacity he was entitled to order the offender under instant arrest. The offence was flagrant. Whatever reason the appellee may have had for thinking that he had justification or provocation for his conduct, his letter on its face was a direct personal insult to his commanding officer, and a most grave offence against the military law, committed in the actual presence and in the personal knowledge of that commanding officer; and to hold that that officer was not entitled, if he so thought proper, to take immediate cognizance of it by directing the arrest of the offender, would be to nullify the Articles of War, to subvert the discipline of the Army, and to destroy the efficiency of that body. If the honor of an officer on the retired list requires vindication, it does not seem to us that, for that purpose, he is entitled to insult his commanding officer with impunity, and to escape arrest therefor and be at large, until specific charges therefor have been formulated and served upon him.

The provisions of Article 71 of the Articles of War fully corroborate this view. That article provides that "when an officer is put in arrest for the purpose of trial, the officer, by whose order he is arrested, shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest." Now, if the charges have already been formulated and communicated to him before his arrest, the service of a copy within eight days thereafter would be a work of most useless supererogation.

In this connection, also, the provisions of the Fifth and Sixth Amendments of the Constitution are invoked, which require that no man shall be deprived of life, liberty, or property without due process of law, and that in criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him. But even if it be conceded that these provisions apply to persons in the military service, with regard to which there seems to be some room for question, their requirements are satisfied if the arrest has been in accordance with law and military usage, and formal charges are preferred within a reasonable time after the arrest, which reasonable time the Article of War last cited has fixed at eight days.

The plain import of the law we conclude to be: 1. That when an officer in the military service commits an offence against the Articles of War in the presence of his commanding officer, or to the personal knowledge of that commanding officer, he may forthwith be ordered under arrest and

detained in suitable military custody, and there is no necessity for any formal announcement to him of the nature and cause of the accusation against him for he already knows it;

2. That where a commanding officer does not act upon his own knowledge, but upon statements communicated to him by others, and he prefers without personal investigation to act upon such statements, it is proper that a retired officer should, at or before the time of his arrest, and either verbally or in the order of arrest, be advised of the charge against him; but such charge need not then be formulated; and the failure to notify the accused in an informal way of the nature of the accusation against him does not render the arrest invalid; provided that in due time thereafter, that is, within eight days after the arrest, formal charges are preferred and a copy of the charges is served upon him, according to the requirement of the statute;

3. That when an officer in the military service is arrested by order of his commanding officer, with or without cause assigned at the time, and charges in due form are preferred against him within the prescribed time thereafter, the proceeding is regular, and the person so arrested is not entitled to be released upon writ of *habeas corpus*. While this writ may be used to relieve officers in the military service from illegal detention at the hands of their commanding officers or of military tribunals, such use must be with great caution, in view of the special nature of the military service and of the contract entered into by those who engage in that service, and who thereby deliberately and for a consideration surrender to a great extent their rights and immunities as citizens. . . . ."

It is to be hoped that a perusal of this decision will silence the jackals of the press, who, with their usual moral and mental obliquity, saw in General Schofield's just action nothing but an unwarranted invasion of what they are pleased to consider an inalienable privilege of mankind of their stamp,—that of libelling whomsoever they will at their sovereign pleasure, with the degree of irresponsibility only accorded in civilized nations to lunatics and imbeciles.

Master and Servant, Fellow-Servants,

A railroad engineer and a porter on the train are not fellow-servants: *Cincinnati, N. O. & T. P. Ry. Co.* v. *Palmer*, (Court of Appeals of Kentucky,) 33 S. W. Rep. 199.

The Supreme Court of Louisiana has recently decided, that the executive officers of the state government have no author-

Officers, Executive, Right to Disobey Statute

ity to decline the performance of purely ministerial duties imposed upon them by a statute, on the ground that it is unconstitutional; for laws are presumed to be constitutional and legal, until their unconstitutionality or illegality has been judicially established, and must be so treated and acted upon by subordinate executive officers; and it was certainly never intended by the founders of our system of government, that an executive officer should nullify a law by neglecting or refusing to act under it: *State* v. *Heard*, 18 So. Rep. 746. This decision is especially recommended to a gentleman named Bowler, who happens temporarily to hold an office under the United States, and to all others who, in the furore of their little brief authority, imagine that their official position invests them with authority to act according to their own caprice.

Railroads, Passes, Cancellation

A railroad company has the right to cancel a pass issued by it to an individual, in consequence of fraudulent representations by a third person, if the one to whom it is issued has knowledge of the fraud: and the fact that the conductor permits him to retain it, after informing him that he has been ordered to take it up, will not amount to a waiver of this right, when accompanied by a warning, which the holder of the pass does not act on, that he had better see about it at the railroad office. In such a case the conductor, on the passenger's refusal to pay fare on a subsequent trip, may take up the pass and eject him from the car, if he uses no more force than is necessary for the purpose: *Moore* v. *Ohio River R. R. Co.*, (Court of Appeals of West Virginia,) 23 S. E. Rep. 539.

Statutes, Passage, Adoption by one House of Amendment made by other

The Supreme Court of Florida has lately held, in accordance with the preponderance of authority, that when one house of the legislature originates and passes a bill through the three readings required by the constitution, and reports it to the other house, which passes it with the addition of amendments germane to its general subject, either to the body or title of the

bill, it is not necessary that the house in which the bill originated should do anything more than simply concur by vote in the amendments made. It is unnecessary in such a case to re-read the bill three times again in the house where it originated: *State* v. *Hocker*, 18 So. Rep. 767. There is a brief note on this point, in 35 AM. L. REG. & REV. (N. S.) 20.

The Court of Appeals of Kentucky, in *Smith* v. *Commonwealth*, 33 S. W. Rep. 419, has recently refused to set aside a quotient verdict, settling the amount of a fine in a criminal prosecution for libel, on the grounds, that there was no contention that the guilt of the accused was so ascertained; that there was no contention that the assessment finally agreed on was the result of any trick by which an excessive verdict was obtained; and that under the statutory jurisdiction of the court in criminal cases, it had no revisory power over the error complained of.

Verdict, Quotient, Criminal Prosecution

In *Redman* v. *Commonwealth*, 82 Ky. 333, it was decided that the Court of Appeals had no power of revision over a verdict obtained by lot.

In *Ellerson* v. *Westcott*, 42 N. E. Rep. 540, the Court of Appeals of New York has ruled, that if a devisee under a will kills the testator for the purpose of realizing under the devise, the devise is not thereby rendered void. The Court cites with approval, however, the case of *Riggs* v. *Palmer*, 115 N. Y. 514; S. C., 22 N. E. Rep. 188, as establishing the doctrine that equity may, in such a case, interfere to deprive the devisee of the fruits of his crime.

Wills, Devise, Validity, Murder of Testator by Devisee

There is a note on this subject, in 34 AM. L. REG. & REV. (N. S.) 636.

According to a recent decision of the court last mentioned, if a patient, who has been attended by two physicians at the

Witness, Competency, Privileged Communications, Waiver

same consultation, calls one of them to testify in her behalf in regard to the nature of the injuries received by her in an accident for which she sues, she thereby waives her right to demand that the other physician shall not testify to that matter; and the defendant may call him to testify in regard thereto: *Morris* v. *N. Y., O. & W. Ry. Co.*, 42 N. E. Rep. 410, affirming 26 N. Y. Suppl. 312.

ARDEMUS STEWART.