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SOME OF THE LEADING FEATURES OF THE REFORMED PROCEDURE. The object of pleadings between contending litigants is to ascertain the nature of the controversy between them, so that the court may be enabled to apply the law to the facts pleaded and proved. Each of the parties, therefore, under most of the systems of pleading, is required to state his own case in his pleading. At common law actions at law are divided into classes:—as an action of *assumpsit*, which lies for a breach of promise; an action of debt, which lies for a liquidated or certain sum of money; an action of covenant, where a party claims damages for a breach of covenant; an action of detinue, where a party claims for the recovery of specific personal property; an action of trespass, where a party claims

damages for an injury committed against him;—trespass on the case where a party sues for damages for any wrong to which debt, covenant or trespass does not apply; an action of dower which lies in favor of a widow claiming the specific recovery of her dower, no part having been assigned to her; an action of ejectment, which lies whenever the claimant has in him the right of entry. It is frequently necessary to state the cause of action in different counts in order to meet the proof, as the power of amendment of the pleadings is quite restricted. The common law had no general form of action under which the party claiming to be aggrieved could state the facts in all cases showing his right to recover; hence the different forms of writs were adopted from time to time to prevent a failure of justice. The object, no doubt, was praiseworthy, but the effect in many cases was disastrous to the party seeking to recover. Thus, suppose the cause of action is brought in debt, when the proof shows it is founded on a breach of covenant, the plaintiff would fail, although he had a valid cause of action against the defendant. So in other cases. The cause of action, as a rule, must be within the class designated, or the party bringing the action will suffer the penalty—a dismissal of the case. A peculiarity of common law pleading is that the parties are required so to shape their allegations as to develop some issue or question upon which the case can be decided, without resorting to the previous pleadings to determine the matter in controversy.

The system of pleading under the chancery practice is, no doubt, derived from the civil law. Originally the petition briefly stated the facts constituting the cause of action, and prayed for the relief desired. The practice in the High Court of Chancery of England seems to have been confined to a few persons, who created a system of great complexity and technicality. There is but one form of bill, however, which is addressed to the chancellor, and contains the names of the defendants and a statement of the plaintiff's cause of complaint, with a suitable prayer for relief and subpœnas for the defendants named in the prayer. There are, or rather may be, nine parts in the bill: First, the address. Second, the name and description of the plaintiff, who usually is styled "your orator." Third, a narrative of the facts constituting the plaintiff's cause of action. Fourth, the charge of confederacy. This part may be omitted unless the facts will justify the statement. Fifth, the charging part of the bill, which alleges some defense which will be set up by the defendant. Sixth, the jurisdiction clause, which is now held to be unnecessary—that is, the jurisdiction of the court must appear from the facts pleaded, and cannot be conferred by the mere allegation that the court has jurisdiction. Seventh, the interrogatories propounded to the defendant. Eighth, the prayer for relief. This should be both general and special, for the reason that, if the court cannot grant the relief under the special prayer, it may do so under the general prayer. Ninth, the prayer for process, addressed to each defend-

ant named. The answer in chancery is always under oath, unless the plaintiff expressly waives the oath in his bill, in which case it will be without oath. Where an answer under oath of the defendant is required, and is responsive to the charges and allegations of the bill, and contains clear and positive proof thereof, it will prevail unless overcome by the testimony of two witnesses to the same substantial facts, or one witness and other substantial facts which will supply the place of a second witness.

I have thus passed rapidly over some of the leading features of common law and chancery pleading in order to point out some of the changes made by the reformed procedure. Under the common law procedure Law and Equity are distinct systems. Hence, if an action at law is brought, and on the trial it is found that it should have been brought in chancery, the case must be dismissed and brought in the appropriate tribunal. So if a suit is brought in chancery which should have been brought at law; and in an action at law an equitable defense is not admissible. These and other objections, some of which will be noticed later, led to the adoption of the reformed procedure. In 1846 a commission of three members was appointed by the State of New York to simplify the pleadings and procedure in the courts of the state. A leading member of that commission was David Dudley Field, an eminent lawyer, a brother and partner of Stephen J. Field, afterwards an eminent judge of the United States Supreme Court. The 69th section of the Code, prepared by this commission, declared that "the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a "civil action." This rule was applied to all actions at law and suits in equity.

The object was to provide a uniform system and establish one set of rules to govern every class of actions. Law and equity are blended together in one system, and are administered through the same forms and under the same appellation. The principles, however, by which courts determine the rights, duties and liabilities of the parties, are not changed. They remain as under the common law and chancery procedure. In other words, legal and equitable remedies are to be applied by the courts in each case so far as they are justified by the statement of facts in the petition, the prayer for relief, and the proof. The system of pleading, as a rule, is one of allegation merely, without reference to discovery. The plaintiff's pleading consists of a petition, in which is set forth the title of the court, the names of the parties plaintiff and defendant, which are made a part of the pleading and need not be repeated—a statement of the facts constituting the cause of action and prayer for relief. There is also a reply in certain cases which will be noticed later. Two or more causes of action of the same class, whether legal or equitable, may be joined together in one

petition, provided the relief sought is not inconsistent. In other words, the petition is divided into three parts, viz., the name of the court in which the action is brought and the names of the parties; the statement of the cause of action; and the prayer for relief. It is unnecessary to anticipate a defense and set forth facts to meet it. It is also unnecessary to plead inferences or conclusions from the facts set forth, as the court is required to apply the law to the facts pleaded and proved. In pleading conditions precedent, it is sufficient to allege, generally, that the plaintiff "has duly performed all the conditions on his part to be performed." If the plaintiff's right to recover depends upon the performance of conditions precedent, he must allege performance to entitle him to recover. The facts are to be stated in ordinary and concise language and without repetition. It is not permissible, therefore, to set forth the cause of action in two or more counts, but the pleadings may be amended to conform to the proof upon such terms as may be just.

Ordinarily, if care has been taken in bringing the action, no amendment will be necessary. If scandalous, irrelevant or improper language or words have been inserted in the petition or other pleading, they may be stricken out on motion, care being taken not to include words which should not be stricken out. So, if the pleading is vague or ambiguous, a motion will lie to make it definite and certain.

In most of the states having the Reformed Procedure, there are six grounds of demurrer to the petition, viz., for want of jurisdiction of the subject-matter (or the person of the defendant); for want of legal capacity to sue; that there is another action pending between the same parties for the same cause; that there is a defect of parties plaintiff (or defendant); that several causes of action are improperly joined; that the petition does not state facts sufficient to constitute a cause of action. No protestation clause is necessary, as under the chancery practice, but the party demurs to the pleading directly for the causes stated. The party demurring may state one or all of the grounds of the demurrer. If the demurrer is sustained, the plaintiff may amend his pleading upon such terms as may be just, if the defect can be cured by amendment. If the demurrer is overruled, the defendant will be permitted to answer if he has a defense to the action The word "answer," under the reformed procedure, means an entire pleading, and not one or more defenses set up as an answer. All defenses, however, are to be set up in one answer, and the word also applies to the several defenses as set forth in the answer. In answering a petition which contains several causes of action, each defense pleaded should refer intelligibly to the particular cause which it is intended to answer.

The answer is divided into two parts, viz., a general or special denial, and new matter constituting a defense, counter-claim or set-off. In denying, it is not sufficient to deny the indebtedness, but the facts on which the right to recover is based must be denied.

This denial, unless the pleading is to be used as an affidavit, may be upon the belief of the affiant. The oath is merely to obtain a truthful statement of the affiant, and does not require greater proof on the part of the adverse party. The new matter, which constitutes a defense, may consist of anything which could be a defense either at law or equity under those forms of procedure. A counter-claim consists of any claim which arises out of, or is connected with, the cause of action set forth in the petition. The cause of action out of which the counter-claim arises may be either on contract or tort, or both combined. A counter-claim may be a defense as well as a claim in favor of the defendant. Set-off is included in counter-claim in many of the states, and may be pleaded in any action where the damages are liquidated or may be computed. As all denials, defenses and counter-claims must be set up in one answer, the special answers or pleas of the chancery practice as separate pleadings are unknown. All causes of action in favor of the defendant against the plaintiff may be set up as counter-claim. This is much broader than the cross bill of the chancery practice. Where there is a controversy between two or more defendants over the subject-matter of the suit, the defendant who seeks relief against one or more co-defendants may do so by cross bill. This bill cannot introduce new and independent matter not connected with the original cause of action. The cross bill is auxiliary to the proceeding in the original action and is a dependency upon it, and both the original and cross bills constitute but one suit and are to be tried together. There is this exception, however, if the plaintiff should dismiss his bill after the pleadings between the defendants were made up, that cause would be permitted to proceed to judgment. The plaintiff may demur to one or more defenses or counter-claims of the defendant, and, if the demurrer is sustained, leave will be given to amend, if an amendment can be made.

The reply is the last pleading of fact of the plaintiff. A reply must be made to all the material allegations of new matter set forth in the answer, or they will be taken as true. The reply is broader than the replication of the chancery practice. Under that practice, if the defendant sets up facts which the plaintiff should have pleaded in his bill with facts avoiding the charge, the plaintiff must amend his bill, and cannot set forth facts showing an avoidance of the objection in his replication; but, under the reformed procedure, any facts showing a waiver or avoidance of the objections set forth by the defendant in his answer may be pleaded in the reply.

I have thus briefly reviewed some of the leading features of the reformed procedure. It is impossible to do justice to it in this limited space. It is governed by rules which are fair and just in their operation. In all cases it is the duty of the court to keep in view the rights of the parties, and, if possible, do justice between them. For this purpose all errors and defects which do not materially affect the rights of the parties are to be disregarded, and if a pe-

tition states a cause entitling the plaintiff to relief, either at law or equity, a demurrer will not lie. So of the answer. A thorough knowledge of common law and chancery pleading will be found a material aid in mastering the reformed procedure. But while it has borrowed from both—largely from the chancery procedure—it is a new system, and does not depend upon either or both of the old systems for its success. *Samuel Maxwell.*

House of Representatives, Washington, D. C.

DEFECTIVE LEGISLATION IN PENNSYLVANIA. The patron and friends of the bill which became the Act of June 14, 1897, making the single amendment in the second section of the Price Act (April 18, 1853), of the extension of its provisions to real estate upon which are limited vested remainders liable to open and let in after-born children, were so interested in securing its passage that they over-looked a material omission in its proviso.

Under the constitutional provision it was necessary, for the purpose of amendment, to recite the entire section of sixty-four lines for the insertion of fourteen words and the subsequent clause validating former sales. In the course of this enactment, by manifest inadvertence, the clause "And every power to sell in fee simple real estate" contained in the Price Act is altogether omitted from the Act of 1897. The omission may be readily located by reference to the first line on page 147 of the Pamphlet Laws of 1897.

Correspondence with the Secretary of the Commonwealth elicited the reply that "The Act as it appears in the Pamphlet Laws is correct in every particular; the words mentioned do not appear in the original roll."

It may be of interest to the profession to note this omission, and at the same time to inquire as to what is to-day the law upon the subject; *i. e.*, as to the extent and limitations of a power, created by deed or will, to sell real estate in respect specifically to reserve a ground rent. The Act of 1853 conferred it in terms. The Act of 1897 provides that the Act of 1853 shall be amended so as not to contain a mention of that power, but shall be, *quoad* the proviso, a mere jumble of words—a predicate without a subject.

It may, at first, be thought that the courts will supply the omission, as it is such an obvious one. But the courts are very careful about reading into an act words which it does not contain, for if, as in this case, they can read in ten words, in the next they may be asked to read in twenty, and in the next, words different from those omitted but which will "carry out the intent of the legislature." Such requests should not and do not meet with ready compliance.

In any event it will be as well for the next General Assembly to remove all doubt in the premises and make perfect the last enactment. *Geo. Bryan.*

INTEREST ON UNLIQUIDATED DAMAGES. *Kuhn* v. *McKay*, (Sup. Ct. of Wyoming, Dec. 15, 1897), 51 Pac. 205 is authority for allowing interest on unliquidated damages in cases where the demand is based upon market values susceptible of easy proof. The general rule unquestionably is that interest is not allowable on unliquidated damages, for the very simple reason that the person liable does not know the amount of his indebtedness, and can, therefore, be in no fault for delaying payment. But there is a clear, well recognized exception to this rule. Where the demand is based on the value of shares of stock, the amount of the damages is not so uncertain that no default can be predicated of any delay in making payment. The exception is stated in *McMahon* v. *Railroad Co.*, 20 N. Y. 463 (1859), as follows: "The old common law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified by general consent, so far as to hold that, if the amount is capable of being ascertained by mere computation, then it shall bear interest." See also *Van Rensselear* v. *Jewett*, 2 N. Y. 135 (1849); *Sullivan* v. *McMillan* (Fla.), 19 So. 340 (1896); *Richards* v. *Gas Co.*, 130 Pa. 37, 18 Atl. 600 (1887); *Swinnerton* v. *Development Co.* (Cal.), 44 Pac. 719 (1896). The evidence as to the market value must, however, be uncontradicted, else it may be that the demand cannot be said to be susceptible of easy proof.

NEGLIGENCE; ACTION FOR WRONGFUL DEATH; CONTRIBUTORY NEGLIGENCE OF SOLE NEXT OF KIN. *Consolidated Traction Co.* v. *Hone*, 38 Atl. 759 (Nov. 16, 1897), was an action to recover damages for death caused, it was alleged, by defendant's negligence, brought under the New Jersey Statute, giving the personal representative of a deceased person right to maintain an action for the benefit of next of kin, where the circumstances were such that the deceased would have had an action "if death had not ensued." The defence was interposed that the death in question was the result in part of the negligent conduct of the next of kin, and barred a recovery by him in his representative capacity for his individual benefit. It was conceded that such negligent conduct could not be imputed to the infant who was deceased, and the Supreme Court of New Jersey accordingly denied the defendant's contention: 35 Atl. 899. On appeal the highest court of the state was evenly divided.

Beasley, C. J., in the Supreme Court, said that the right to recover given by the statute depended on two questions only: First, could the deceased, if he had survived, have maintained an action? And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? He held that the question whether the father was instrumental in producing the accident by his want of care was utterly immaterial.

In Pennsylvania, under a statute similar though not identical, it is held that the contributory negligence of the parent is a bar to

recovery: *Smith* v. *Hestonville, &c., Railway Co.*, 92 Pa. 450 (1880).

In Iowa a conclusion has been reached similar to that in New Jersey: *Wymore* v. *Mahaska Co.*, 78 Iowa, 396; S. C., 43 N. W. 264 (1889).

The refusal to allow a recovery in such a case is not on the ground of imputability of negligence to the persons injured (who were children in all the cases cited), but because it would be inequitable to allow a plaintiff to recover for an injury which his own negligence has made possible. And although the parents are barred, the child would not have been: *Glassey* v. *Railway Co.*, 57 Pa. 172 (1868); *Williams* v. *R. R.*, 60 Tex. 205 (1883); *Battishill* v. *Humphreys*, 64 Mich. 494 (1887).

In one respect the decision of the New Jersey court was correct, inasmuch as the statute of that state was interpreted according to its very letter. But as the intention of the legislature was undoubtedly to give a right of action only to those persons, who, on general principles of law, are justly entitled to it, it is submitted the court was wrong in allowing a recovery. See cases collected in note, 4 Amer. & Eng. Encyc. of Law, p. 84, *et seq.*

PARTIAL PAYMENT OF JUDGMENT; STATUTE OF LIMITATION. In the case of *McCaskin* v. *McKinnon*, 28 S. E. 265 (Supreme Court of N. C., Nov. 16, 1897), a judgment was rendered in September, 1886, in favor of the plaintiff to recover the sum of $3000 and interest, and decreeing the foreclosure of the mortgage which had been executed to secure the debt.

The judgment was "retained for further direction" and final judgment was rendered as to foreclosure in June, 1897, at which time the commissioner's report was confirmed and the judgment was credited with $1500, the proceeds of the foreclosure sale.

On February 15, 1897, the plaintiff made a motion to issue execution for the unpaid part of the sum adjudged due, claiming that the judgment of September, 1886, was interlocutory only and that there was no final judgment until June, 1897, and that, therefore, he was not barred by the statute of limitations.

The order in the lower court denying the motion was affirmed by the Supreme Court, November 16, 1897. It was held that a judgment in foreclosure proceedings "retained for further direction" is final as to adjudging the recovery of money, and that the statute of limitations begins when it is rendered, and that the statute's running is not arrested by a partial payment of the judgment. Clark, J., held that the judgment of 1886 was final as to adjudging the recovery of money, but interlocutory as to foreclosure.

If execution had been regularly issued every three years a motion to issue execution for the unpaid part would not be barred: *Williams* v. *Mullis*, 87 N. C. 159 (1882). The payment entered upon the judgment in June, 1897, did not arrest the running of the statute: *Hughes* v. *Boone*, 114 N. C. 54; 19 S. E. 63 (1893).

The payment must be a voluntary one, thus being a voluntary admission by the debtor that the debt is then due: *Roscoe* v. *Hale*, 7 Gray, 274 (1856); *Roosevelt* v. *Mark*, 6 Johns. Ch. 292 (1822.)

If the decree upon a bill for foreclosure of a mortgage leaves nothing to be adjudicated or reviewed by the court, it is final; but if it does not ascertain the amount due, or does not give any direction as to the distribution of the proceeds of the sale, or if it directs the cause to stand continued for further order and decree upon the coming in of a master's report then it is merely interlocutory. As interlocutory means "not final" it is difficult to see how a decree can be both one and the other at the same time: Black on Judgments, § 48.

However, the case of *Malone* v. *Mariott*, 64 Ala. 486 (1879), holds that a decree of foreclosure and sale under bill filed by a mortgagee is partly final and partly interlocutory. It is so far final that an appeal will lie from it, and it is interlocutory inasmuch as further proceedings are contemplated and necessary to carry it into effect.

MARRIAGE OF LUNATICS; VALIDITY. The Supreme Court of North Carolina decided in the case of *Sims* v. *Sims*, 28 S. E. 407 (Dec. 7, 1897), that the marriage of a lunatic was void *ab initio*, and being so could not be cured by cohabitation after restoration to reason. The court held that the only remedy in such a case, aside from having the inquisition of lunacy set aside for fraud, was by a new marriage. The question might be raised in such a case whether or not the continued cohabitation of the parties after full restoration to reason, with the intention of marriage, would not of itself constitute a common law marriage. If the original ceremony was void and therefore a nullity, might not the subsequent acts of the parties constitute a valid marriage without reference to the original contract?

It has been held in New York by Chancellor Kent in *Wightman* v. *Wightman*, 4 Johns. Ch. 343 (1820), that when a marriage ceremony was performed while one of the parties was insane and had never been ratified or consummated since the return of reason, the contract, having been originally absolutely null and void, had never since obtained any validity. But it would seem to follow from the reasoning that had plaintiff ratified or consummated the marriage after return of her reason, the court would have refused to set it aside as a nullity. In fact, the chancellor cites *Ash's Case* (Proc. in Ch. 203, 1 Eq. Cas. Abr. 278, pl. 6), the marriage of a lunatic having been controverted in the Spiritual Court, the Lord Keeper declared, in that case, that if a party contracted marriage with a lunatic, and the latter agreed to it, and consummated it, in a lucid interval, it would be good.

In *Cole* v. *Cole*, 5 Sneed (Tenn.), 57 (1857), it was held that a lunatic upon regaining his reason may affirm a marriage celebrated while he was insane, and this without any new solemnization.

Bishop on Marriage, Divorce and Separation, Section 624, says that if at any time after the mental capacity has returned, the parties give their concurrent consent to the marriage, it is thenceforward good and indissoluble. He adds: "To one who, like the author, has read all the cases, the nearly universal though mostly silent acquiescence of the tribunals in this proposition places it beyond room for cavil."

It would seem that this view is reasonable and proper and one that comports with sound public policy.

CHARITABLE CORPORATIONS; BEQUEST OF PROPERTY IN EXCESS OF THE AMOUNT WHICH SUCH CORPORATION MAY TAKE AND HOLD. The Supreme Court of Maine, on June 4, 1897, handed down a very able presentation of the opposite view to that upheld by the New York Court of Appeals in the Cornell University case, in regard to the capacity of a charitable corporation to take as a devisee property in excess of the amount prescribed by its charter or the general statutes.

The Maine case is that of *Farrington* v. *Putnam*, 90 Me. 405 (June 4, 1897), where Farrington, the president of the Maine Eye and Ear Infirmary, willed to that institution two-thirds of his property. The general statute under which the infirmary was organized allowed it to take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value at any one time. R. S. Ch. 55, § 1. It already had the full amount of property. The action was a bill in equity brought by and in behalf of the several heirs at law of the testator against his executors and the infirmary to have the offending provision of the will declared to be inoperative and void.

It was held by the court, Peters, Ch. J., delivering the opinion, that a charter was a contract between the state and the corporation, and for any misuse or abuse of its privileges or powers the corporation was amenable to the state only, and no individual had any right to complain. Furthermore, the general statute under which the infirmary was organized was not expressly prohibitory, but rather regulative and directory, since no penalties were attached. Accordingly the bequests and devises were not absolutely void as the complainants contended, but merely voidable at the option of the state. Whether they shall be declared void or not by the state is a governmental question to be determined in a direct proceeding brought by the state's officials, and not a judicial one to be determined in a collateral proceeding brought by or for the benefit of some individual. Hence, in this case, the state alone and not the heirs can take advantage of any violation of its charter on the part of the infirmary.

The following cases are relied on as authorities: *Jones* v. *Habersham*, 107 U. S. 174 (1882), where Mr. Justice Gray said, " . . . Restrictions imposed by the charter of the corporation upon the amount of property it may hold cannot be taken advan-

tage of collaterally by private persons, but only by the state which created it;" *National Bank* v. *Whitney*, 103 U. S. 99 (1880); *Vidal* v. *Girard's Executors*, 2 How. 127 (1844); *Hanson* v. *Little Sisters of the Poor in Baltimore*, 79 Md. 434 (affirmed January, 1897, in *Congregational Church Building Society* v. *Everett*, Maryland Appeals, 36 Atl. 654); *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36 (1878); *Hamsher* v. *Hamsher*, 132 Ill. 273 (1890); Pritchard on Wills (1894), note 13, section 153; *Davis* v. *Old Col. R. R. Co.*, 131 Mass. 258 (1881); *Case* v. *Kelly*, 133 U. S. 31 (1890).

Chief Justice Peters criticises the decision in *Trustees of Davidson College* v. *Chamber's Executors*, 3 Jones, N. C. Eq. 251 (1857), and approves the dissenting opinion of Nash, C. J.; and shows that the North Carolina courts have ameliorated that rigid doctrine in *Mallett* v. *Simpson*, 94 N. C. 37 (1887). He attempts to distinguish the Cornell University case, in 111 N. Y. 66 (1888), entitled *Matter of McGraw*, because there it was held that the statute in question was intensely prohibitory. To determine whether this is the correct view or not involves a reading of the two statutes *in extenso*. The language of the Cornell University charter was: "The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate." Sec. 5. This is almost identical with the language of the Maine statute. Consequently it seems that the two cases are diametrically opposed.

The view adopted by the Maine court is, however, consonant with the modern view of the courts all over the country. Cases are being decided every day where corporations are held on their *ultra vires* contracts in collateral proceedings, the state alone being considered as the proper party to take advantage of the corporate sin.

The following is quoted from an article contributed by Mr. George Wharton Pepper to the AMERICAN LAW REGISTER, Vol. 36, N. S. p. 1, since it is directly in point: "If the state really has a restriction which it is important to enforce, why not deal with the corporation directly in a proceeding instituted for the very purpose? The law of *ultra vires* would then become exclusively a branch of public law, and *ultra vires* cases would be, as they ought to be, cases in which the state is a party and the corporation a defendant. We are gradually coming to the conclusion that the business of supervising corporations and their operations is primarily a legislative and executive matter and not a judicial one. We are electing boards of railroad commissioners. We are creating insurance departments with insurance commissioners to preside over them. We have banking departments and examiners to exercise visitatorial functions. Why not carry out this excellent modern development to its legitimate conclusion and suffer the question of abuse of corporate power to be raised only in proceedings instituted by the state at the instance of the appropriate officer? Undoubtedly, the economic as well as the legal tendency is in this direction."

CONTEMPT OF COURT; FEDERAL QUESTION. In view of the increasing number of commitments for contempt, the case of *In re Edgar*, 51 Pac. (California) 29, (Dec. 21, 1897) presents some unusual features. One Ebanks had been convicted of murder in the first degree, and on appeal the decision was affirmed by the state court of last resort and the day fixed for execution. He then made application to the District Court of the United States for a writ of *habeas corpus*, alleging that he was restrained of his liberty by the warden of the state prison at San Quentin, in violation of his rights under the Constitution of the United States. To support this allegation he claimed that he was put on trial under information and not indictment. The District Court denied the petition, and an appeal was taken to the Supreme Court of the United States. Certified copies of all the papers relating to the appeal were served upon John C. Edgar, as acting warden of the state prison, before the execution, or the expiration of the time limited. At this point the opinion of Henshaw, J., proceeds as follows: "The acting warden was thus placed in a most trying and difficult position. He was called upon to decide at his peril, whether or not Ebanks' appeal to the Supreme Court of the United States operated to stay his hand as an executive officer of the State of California. If the appeal did operate as a stay, and he decided that it did not, and proceeded with the execution, he would be guilty of unlawfully taking the life of a human being. If, upon the other hand, the appeal did not operate as a stay, and he decided that it did so operate, he stood liable to be punished for contempt, for violation of the order of the Superior Court." Under the circumstances, Edgar decided that it did operate as a stay, whereupon he was adjudged guilty of contempt. The Supreme Court, however, discharged the warden, having reached conclusion that a federal question was presented by the petition to the District Court under the clause of the Fourteenth Amendment of the Constitution of the United States which declares: "Nor shall any State deprive any person of life, liberty or property without due process of law."

This proposition was passed upon and treated as a federal question by the United States Supreme Court in the *Hurtado Case*, 110 U. S. 516 (1883). But where the record contains no exception and the manifest object of bringing the appeal is to delay execution, the stay on the state court terminates: *In re Shibuya Jugio*, 140 U. S. 291 (1891); *In re Wood*, 140 U. S. 278 (1891); see, also, *Virginia* v. *Rives*, 100 U. S. 313 (1879); *Neal* v. *Delaware*, 103 U. S. 370 (1880); *United States* v. *Gale*, 109 U. S. 65 (1883); *Ex parte Royall*, 117 U. S. 241 (1886); *In re Savin*, 131 U. S. 267 (1889); *Stevens* v. *Fuller*, 136 U. S. 468 (1890); *McNulty* v. *California*, 149 U. S. 645 (1893); the same question was also passed upon in the recently decided Durrant Case (not yet reported).

THE INHERITANCE TAX IN THE WEST. Apropos of the article by Mr. Landreth upon the Constitutionality of the Pennsylvania

"Direct Inheritance Tax Law," which appears in this issue, it is of interest to note that by a very recent decision (*Gelsthorpe* v. *Turnell*, 59 Pac. 267, Nov. 15, 1897), the Supreme Court of Montana declared constitutional a statute which seems to be identical with the Pennsylvania Act in many details, and which, according to Mr. Landreth's views, is objectionable for similiar reasons.

The act establishing a tax on direct and collateral inheritances was approved by the Montana Legislature, March 4, 1897. The law substantially provided that "all property" which should pass by will, or by the intestate laws of the state, should be subject to a tax at a fixed rate on the market value of such property: provided that an estate valued at a less sum than $7500 should not be subject to any such "tax or duty." It also provided, that the tax should be levied upon all estates which had been probated before, and should be distributed after the passage of this act; and, again, that the act should apply to all estates remaining undistributed at the time the law took effect, and that in such estates the tax should be determined and collected as in other cases.

The question came before the courts in both states in about the same manner. The local authorities, in Montana, attempted to collect the inheritance tax out of an estate of a person who died a year prior to the passage of the act, but the proceeds of whose estate had not been distributed until after the law had gone into effect. The court below held that as applied to the estates of persons who might die after the law took effect, the statute was constitutional, but that where the decedent died before the passage of the act, the tax or assessment could not be collected, for as to such case the law was invalid. On appeal the lower court was reversed and the act was declared to be constitutional on all the several grounds.

As to the first objection, that the law attempts to impose a tax upon property, it was decided that an inheritance or succession tax is a duty or bonus exacted in certain instances by the state upon the right and privilege of taking legacies, gifts, and successions intended to take effect at or after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. The statute provides for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheriting can be valued. The court quoted with approval the statement made by Judge Wallace, in *Wallace* v. *Meyers*, 38 Fed. 184 (U. S. C. C.), 1889, that "Such a tax is no more one upon the bonds than an income tax is one upon the property out of which the income is derived, or an excise tax is one upon the articles manufactured and sold. The bonds are the subject of appraisal, but the privilege is the subject of the tax. Inasmuch as it is lawful for the state to withhold altogether the privilege of acquiring property within its dominion by will or inheritance, it is lawful for the legislature to annex any

conditions to the privilege which may seem expedient and do not conflict with the organic law of the state, or the Constitution or laws of the United States." In support of its contention on this point the court cited the following cases: *State* v. *Hamlin*, 86 Me. 495 (1894); *Eyrie* v. *Jacob*, 14 Grat. Va. 422 (1858); *Strode* v. *Com.*, 52 Pa. 181 (1866); *State* v. *Dalrymple*, 70 Md. 294 (1889); *Minot* v. *Winthrop*, 162 Mass. 113 (1894); *In re Hoffman Est.*, 8 Howard, 490 (1850); *United States* v. *Perkins*, 163 U. S. 625 (1896); *State* v. *Ferris*, 53 Ohio St., 314 (1895).

On the question as to whether the tax violated the principle of equality and conformity prescribed by the state constitution, it was held that there was nothing in the Act violative of that provision. The legislature is not prevented by the constitution from the exercise of discretion as to what classes of rights or privileges it may enumerate as subject to taxation, provided the tax is uniform within the class and provided the classification is based upon a reasonable, and not a mere arbitrary ground. See Cooley on Taxation (page 570); *In re McPherson*, 104 N. Y. 306 (1887); *State* v. *Alton* (Tenn.), 30 S. W. 750 (1895); *State* v. *Hamlin, supra.*

It was further decided that, though the right to a distributive share in an estate vests in those entitled, directly upon the death of the testator or intestate, such vested rights are held subject to the conditions, formalities and administrative control prescribed by the state in the interest of public order and policy.

The state, during the period of administration and control, may impose and collect the tax upon the vested right to receive, before the legatee has actually received under decree of distribution. The right of the state to tax in any reasonable manner arose simultaneously with the vesting of the legatees' right, that is, at the death of the testator: *Arnaud's Heirs* v. *Executors*, 3 La. 336 (1831); *Succession of Ayon*, 6 Rob. (La.) 504 (1844); *Carpenter* v. *Com.*, 17 Howard, 456 (1854); *Prevost* v. *Greenaux*, 19 Howard, 1 (1858).

The exemptions do not make the Act objectionable as "class" legislation because the cost of administering smaller estates is proportionately greater than in the case of large ones, and this operates to diminish amounts received. Furthermore, the laws of the different states and nations which levy taxes on devises, legacies and inheritances have usually made exemptions.

This language of the Montana court is especially interesting in view of the present tendency toward legislation such as that here under discussion. Economically there is much to be said for the legacy and succession tax, and there should be some way of securing valid legislation on the subject.

THE APPOINTMENT OF MR. JUSTICE MCKENNA. The opposition to the confirmation by the Senate of Mr. Justice McKenna recently made by the bar of the Pacific Coast, reminds some of the older politicians and practitioners of a similar circumstance arising in

connection with the confirmation of the late Justice Miller. At the time of Mr. Justice Miller's appointment by President Grant he was a lawyer of only a few years' practice, having previously failed in life as a physician. His appointment aroused the indignation of almost all the lawyers in the country, but his subsequent career on the bench fully demonstrated the president's wisdom in making his selection. No greater authority in matters of constitutional law ever honored our Supreme Court.

While Mr. Justice Miller was absolutely inexperienced in judicial practice, Mr. Justice McKenna has had several years training as a judge in the Circuit Court of California, but his work in that court has been rather sharply criticised.

It is to be hoped, however, that the apprehensions which have been aroused by President McKinley's action in this case will prove to be as ill-grounded as those occasioned by the appointment made by President Grant, and that the career of Mr. Justice McKenna as a Supreme Court jurist will prove to be as successful and illustrious as that of Mr. Justice Miller.

DEGENERACY OF THE BAR; IGNORANCE OF RULES OF PRACTICE. The complaints which have recently been raised concerning the deterioration of the bar are discounted by some as the usual lamentations of those to whom nothing is good except that which is past. These observers say that a narrow inspection of former periods of our history would reveal as many pettifoggers, as much ignorance, as much underhand meanness as can be found to-day. But it certainly is a question whether the abolition of the old forms of pleading by the codes has not resulted, with all its good effects, in a certain loss of keenness on the part of the lawyer and a looseness of practice which was unheard of in the earlier days. Two recent cases arising under the New York code strikingly illustrate the tendency referred to. We give these cases with comment substantially as they appeared in the legal column of the New York *Evening Post*. In one case a jury was waived in the trial below, and the decision handed down in favor of the plaintiffs. An order denying a motion for a new trial upon the judge's minutes was entered, from which and the judgment the defendant appealed. In the Appellate Division of the Supreme Court, First Department, Rumsey, J., said: "The trial having been had before the court without a jury, it was not regular to move for a new trial upon the judge's minutes, which could only be done after a trial by jury. Code of Civil Procedure, section 999. An appeal from the order denying a new trial, therefore, raises no question which can be reviewed here, but every question, both of law and fact, is brought before us by the exceptions which were filed to the decision. The only way in which questions of law and fact can be made ready for review, where there has been a trial by the court without a jury, is by filing exceptions to the decision; and when that is done, if the decision is a short one, the whole question is at large before