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Year Book of the Selden Society, Volume 2, Part 2 (June 1938)

The
YEAR BOOK
of
The Selden Society

June, 1938

University of South Carolina
SCHOOL OF LAW

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A LAW SCHOOL HABIT *Lingers on*

● Do you recall those after-class discussions with some favorite professor? The profundity of his knowledge was reflected in the earnestness in his voice as he cleared the uncertainty from your mind. How careful he was to impart the REASON which, as has been so well said, "is the life of the law."

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THE

YEAR BOOK

OF

THE SELDEN SOCIETY

VOLUME II PART II

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1937-1938

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Wm. H. Blackwell ..... *Recorder*
Osborne H. Rhodes ..... *Warden of the Exchequer*

Foreword

In an effort to more closely coordinate and synchronize legal education with the practice of law, The Selden Society of The University of South Carolina School of Law sponsors this Year Book. We feel that treatments of current problems of the Bench and Bar of our State by law students will result in a practical viewpoint to the student and at least thought provoking moments to the practitioner.

The diversification of topics may suggest complete disorganization. However, it was thought wise to sacrifice coordination of topics to the sincere interest in selection by voluntary writers. None of these articles are made compulsory but rather are the results of genuine interest in the particular problem chosen. It is to be hoped that the Bar will receive our attempts in this light.

The biographies of the leaders of the Bench and Bar presented herein have embodied in these short articles many of the primary sources which are available at this time since the men are comparatively recently deceased. These facts are placed in this semi-permanent form so that they might be available to more capable writers who might record the lives of these men more exhaustively in the future.

Any comments, criticisms, or contributions which the profession feels will aid in more nearly accomplishing our aims are earnestly requested. Such communications should be addressed to Mr. W. H. Blackwell, care of the Law School, whom we are proud to announce as the editor for next year.

H. L. B.

Dedication

JUDGE J. LYLES GLENN

To the memory of the late Judge J. Lyles Glenn, this issue of the Year Book is dedicated. The ideals of justice which he personified so magnificently will have a lasting effect on the Bench and Bar of our State and Nation. To him the Law was not an exact science founded on immutable principles but rather a formula involving human lives and rights which could only be solved with a generous portion of human understanding in an effort to render the greatest justice.

It is futile to attempt an adequate expression of our appreciation of J. Lyles Glenn. It is only to be hoped that the indelible impression made upon the administration of justice in South Carloina by this noble servant will, in some measure, compensate for the irreparable loss this State has suffered by his untimely death.

Implied Warranty of Quality in Sales of Personal Property in South Carolina

WILLIAM H. BLACKWELL, '39

From an early day, the rule that "a sound price warrants a sound commodity" has been followed in South Carolina in the sales of personal property. Declining to follow the maxim "caveat emptor," our court has said "in this State, not 'caveat emptor' but 'caveat venditor' is the rule."[1] Just why the rule of the civil law was adopted rather than that of the common law has been a matter of speculation. In the earliest reported cases wherein the problem arose, it was expressly stated that the civil law rule prevailed in South Carolina. Later, in some of the cases, the judges have made the statement that we did not adopt the rule of the civil law, and have attempted to explain the difference by saying that at the time the doctrine was first applied the common law was in an unsettled state both in this country and in England, and that our judges simply adopted the rule that seemed to them most consonant with honesty and fair dealing. Justice Nott was of this opinion, for he declared in the case of *Smith vs. McCall*[2] that as the common law was unsettled and fluctuating on this point at the time, the judges over here simply came to different conclusions from those of the English judges. He attempts to justify it as a common law rule by stating that at common law, where the consideration has failed, the contracting party can get his money back, and that where personal property has been sold which had an unknown defect that later renders it worthless, there is nothing more nor less than a failure of consideration which entitles the buyer to have the contract rescinded and his money returned.

That the rule is one of the common law of this State is again asserted by Richardson, J., in the case of *Missroon vs. Waldo*.[3] Therein he states: "The whole doctrine, though sometimes thought new, is nothing more than the practical use of the plain moral maxim, that honesty is the best policy. I deem it, in truth, the common law rule and no more; dispensing with what may be justly called the habit of the common law decisions, in requiring direct proof of a warranty, expressed at the time of the sale . . ." Thus Justice Richardson does not give credence to the belief that the doctrine was adopted from the civil law.

It appears that the law as to implied warranties was unsettled in England until about 1778, when Lord Mansfield said in the course of his opinion in *Stuart vs. Wilkins*[4] that " . . . there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action." This opinion was affirmed and followed in the later case of *Parkinson vs. Lee*[5] where the action was assumpsit to recover for the sale to the plaintiff by

1. Barnard vs. Yates, 1 Nott & McCord 142. (1818).
2. 1 McCord 220. (1821).
3. 2 Nott & McCord 76. (1819).
4. 1 Douglas 18. (1778).
5. 2 East 314. (1802).

the defendant of some damaged hops. The defect was due to the fraud of the grower and was unknown to both of the parties. The court refused to hold that there was implied warranty that the goods were of merchantable quality.[6] Now, at the time *Stuart vs. Wilkins* was decided, the American revolution was going on, and it is possible, as some have contended, that when the point came to be settled in this State, the judges not having heard of this case took their own view of the subject and decided upon the rule that seemed to them most just.

The influence of the French Huguenots has also been suggested as a possible reason for the adoption of the civil law rule. Without underestimating the influence of the Huguenots, it is difficult to see why they should have the cause of the divergence from the common law upon this particular point and upon no other.

First, let us look briefly at the rule of the common law, then at that of the civil law, and finally the application of the doctrine in our own State. In the very early history of the common law, there was neither implied warranty of title nor of quality.[7] "By the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty either in deed or in law; for caveat emptor."[8] That part of the doctrine relating to title was early repudiated in England, however, giving place to the rule that where one sells property in his possession representing himself to be the owner thereof, he warrants the title which he purports to pass, whether there is an express warranty or not.[9] This is the prevailing doctrine as to title everywhere today, both in England and the United States, whether the seller is in possesssion or not.[10]

In the absence of express warranty, and where there has been no fraud in concealing defects, the seller at common law is not bound to warrant the quality of the thing sold, for the common law "very reasonably requires the purchaser to attend, when he makes his contract, to those qualities of the article he buys, which are supposed to be within the reach of his observation and judgment, and which it is equally his interest and duty to exert."[11] Thus the common law rule is that of "caveat emptor." meaning "let the buyer beware." If no warranty of quality is given, and the seller has acted in good faith, he is not liable for subsequent defects in the thing sold, whether known or unknown to him at the time of the sale. Of course, if the seller fraudulently withholds knowledge of some defect from the

6. Groce, J., " . . . It is the fault of the buyer that he did not insist on a warranty; and if we were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy, which existed before the case in Douglas (Stewart vs. Wilkins). . . . Lord Mansfield . . . said that there must either be an express warranty of soundness or fraud in the seller, in order to maintain the action." See McClain, "Implied Warranties in Sales" 7 Harv. L. R. 213.
7. 1 Williston 195.
8. Coke; Litt. 102a.
9. 2 Bl. Comm. 451; 2 Kent. Comm. 478.
10. Moore & Nesbit vs. Lanham, 3 Hill 299, (1837), where it is said that both by the civil law and the common law, there is an implied warranty of title on the part of the vendor of personal property, for breach of which the vendee is entitled to redress.
11. 2 Kent. Comm. 478.

buyer, he is liable, but not on an implied warranty of quality, but on the fraud or deceit. If the defect were patent and could have been discovered by an ordinary examination of the thing, then the seller will not be held to warrant the subject of the sale against the defect. Likewise, if the defect be latent and unknown to him, he will not be held, and the loss falls on the buyer. But even under the common law, if the seller has withheld knowledge of some defect which would not have been discovered by an ordinarily prudent examination, then the transaction savors of fraud on his part and the buyer is entitled to a rescission of the contract of sale and to be made whole by the seller. Today, the common law rule of caveat emptor with modifications prevails in all the States of the union except Louisiana and South Carolina. In the former, of course, the civil law is followed exclusively, and in the latter this particular rule of the civil law has been adopted into the body of existing law.

As has been stated above, the civil law implies a warranty of soundness where a sound price has been paid. This is true as to unknown as well as to known defects. If the seller knew of defects and failed to inform the buyer thereof, then the element of fraud comes in, and the buyer can elect either to rescind the contract and recover the purchase price paid, or treat the contract as existent and recover damages for the deceit. Such defects as will entitle the buyer to a rescission of the contract are termed rehibitory defects.[12] If, however, the seller was not guilty of fraudulent conduct, he is not subject to damages beyond making the buyer whole. The reasoning of the civil law is that it would be unjust to allow the seller to retain a sound price, having given in return therefor an unsound article. "The Romans had regard to the intrinsic value of the property itself and when it was unsound considered the seller liable, although he was ignorant of the unsoundness, upon the principle that 'a sound price always entitles the purchaser to sound property'. . ."[13]

Although now followed in the two States mentioned above only, namely, Louisiana and South Carolina, it appears that at one time the civil law rule of a sound price was followed in Connecticut[14] and in North Carolina,[15] briefly, at least. It is clearly not law in those States now, however.[16]

The Uniform Sales Act has never been adopted in South Carolina, though it is in effect in practically all the other States. Under that Act, there is no implied warranty of equality or fitness for any particular purpose except under clearly defined instances.[17]

The first reported case in this State wherein the rule that a sound price

12. 1 Williston on Sales 247.
13. From Law Notes of Thos. Gaillard, taken while he was a law student under Judge Nott.
14. 2 Kent Comm. 481. "The same rule (sound price requires sound goods) was for many years understood to be the law in Connecticut; but if it ever did exist, it was entirely overruled in Dean vs. Mason, 4 Conn. 428, in favor of the other general principle which has so extensively prevaded the jurisprudence of this country."
15. Story on Sales 370. In footnote, it is said that the civil law rule is followed in North Carolina, citing Galbraith vs. White, Haywood 464 (sic 601), where it is said that a full price warrants a sound article. This case apparently stands alone in North Carolina, and was overruled by Thompson vs. Tate, 1 Murph. 97, and numerous other subsequent decisions.
16. Both States have now adopted the Uniform Sales Act.
17. "(1). Where the buyer, expressly or by implication, makes known to the seller the

warrants a sound commodity was applied is that of *Timrod vs. Shoolbred,*[18] decided in 1793. From the language of this decision, and from that of others following, one infers that the doctrine of implied warranty of quality had been followed for many years previous in nisi prius cases. In the Timrod case, action was brought by the seller to recover the price of a family of negroes sold to the defendant at public auction. The chief object of the purchase was Stepney, a negro plowman. The day after the sale, Stepney broke out with the smallpox and died. The indications were that he was infected with the disease before the sale, although such was unknown to either of the contracting parties. It was held that the plaintiff could not recover for the negro, upon the rule that a sound price raises in law a warranty of the soundness of the thing sold, which extends to all defects, whether known or unknown to the seller. Therefore, if the negro had the seeds of the disorder about him at the time of the sale, and later died from the disease, the loss would properly fall on the seller and not on the buyer, who had given a full price and entitled to a sound article in return.

Would the same result have been reached had the case been decided under the general common law rule? It would seem not, for the rule of caveat emptor would have applied, assuming the sale to have been untainted by fraud on the part of the seller, as it undoubtedly was, and the defect being unknown to him at the time of the sale, the loss would have fallen upon the buyer. For, under the common law, the seller is not taken to warrant the property sold free from latent defects, the existence of which he is unaware.

In *State vs. Gaillard,*[19] it was declared that the rule that a sound price raises in law an implied warranty against all defects whether known or unknown to the seller had been borrowed from the civil law, and had been incorporated into the common law of this State. There, the action was upon a bond given for payment of a tract of land purchased by the defendant at public sale made by the commissioners of forfeited estates. A plat was introduced at the sale which represented a fine stream of running water and a favorable location for a mill seat on the tract. On the strength of these representations the defendant was induced to buy,

particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2). Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.

"(3). If the buyer has examined the goods, there is no implied warranty as regards defect which such examination ought to reveal.

"(4). In the case of a contract to seller or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

"(5). An implied warranty or condition as to quality or finess for a particular purpose may be annexed by the usage of trade.

"6). An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

18. 1 Bay 324.

19. 2 Bay 11. (1796).

intending to erect and operate a mill there, as the land was valuable chiefly on account of its timber. In truth, the "copious stream" of running water was only a gully, dry during the greater part of the year. The buyer therefore found it impossible to carry out the purposes for which he had bought the land. It was held that the defense was good; the contract would be set aside on the ground of fraud or misrepresentation. It was said: "Receipt of a full or valuable consideration in law raises an implied warranty against all faults known or unknown to the seller; with this difference, that in cases of wilful concealment, the party guilty of the fraud is liable for damages in addition to all legal and just charges."

Had the case been decided under the common law rules, probably the same result would have been attained, for the misrepresentations bespoke fraud. At any rate, if the contract were enforced, the buyer would be entitled to damages for the misrepresentation. The action there would be more of the nature of fraud and deceit than of any implied warranty, however.

That there were attempts to subject the rule to abuse early appears. In *Whitefield vs. M'Leod*,[20] where a purchaser of a ship attempted to avoid the contract, which had been fairly made with knowledge of all the material circumstances, the court, while recognizing the rule of the civil law to be a salutary and wise one, admitted that it had been "bandied about in our courts" and had "vibrated from the extreme of rigour on the one hand to the extreme of laxity on the other." The purpose of the rule was to "guard against fraud, circumvention and those latent defects which neither party knew of." But the rule would never be extended to "aid men in getting rid of contracts fairly made, under a full knowledge of all the circumstances relating to the subject matter of such contract on both sides." It would be overstretching the doctrine if it were extended to help one out of a contract, fairly made, which turned out to be a losing one because the thing for which he had bargained had simply not come up to his expectations.

In *Vanderhorst vs. MacTaggart*,[21] one of the basic guides in the application of the rule is set forth. There, the seller sued the buyer to recover the amount of the purchase price of fifteen barrels of rice. The buyer had examined the rice in two of the barrels and found it all right. The rice was shipped to Alexandra, Va., and upon delivery there, was found to be bad. The court said that in such cases as this, the purchaser is bound to examine and determine once and for all the quality and condition of the goods before shipment to distant markets, where such examination can be easily made as it was in this case. Otherwise, the door might be opened wide to fraud and imposition. It was held that there was no implied warranty, for the buyer had bought depending upon his own judgment gained from an examination of the thing sold. At first glance it would seem that the rule of caveat emptor had been applied, but upon closer examination, the real ground of the decision appears to be that buyer relied upon his own judgment of the quality of the goods, rather than trusting the judgment of the seller. Thus, even under our rule of a sound price,

20. 2 Bay 380. (1802).
21. 1 Brev. 269. (1803).

if the buyer choose to rely on his own judgment, having the opportunity to make a full examination, there will be no implied warranty.

From the case of *Champneys vs. Johnson*,[22] is taken the following: "There is no implied warranty by the common law; but by the civil law, which seems to have been adopted among us, there is always an implied warranty of the soundness, quality and qualifications of the subject of the sale, according to the venture of the contract and understanding of the parties." It is further said that it is needless to inquire when and by whom the civil law was adopted in this State. If the defect in the thing sold is unknown to both parties, then upon a discovery the purchaser is bound to give notice to the seller, and return or offer to return the goods within a reasonable time.[23]

In 1810, Thos. Gaillard, then a law student under Judge Nott, in his notes referring to the civil law says: ". . . this principle has been adopted by our courts and may now be esteemed the law of the land. We may now consider the person who sells for a full price, as warranting the soundness of the property; and as such, liable for all defects existing at the time of the sale, whether known to him or not." He expresses the belief that where one pays money for a consideration which has failed, then the money is received for the use of the buyer, and an implied promise to repay it is raised in law, and that such could be recovered in an action at law. Whether or not this trust theory is sound, I do not venture to say. Certainly, however, it does not seem important, for today, one would sue on the breach of the implied warranty, and not upon any presumption that if the property turns out to be unsound, the seller holds the purchase price in trust for the buyer.

Where the parties expressly agree that the buyer shall take the goods at his own risk, then the seller will not be answerable for unsoundness. In *Thompson vs. Lindsay*,[24] the buyer in defense to an action for the purchase price of a quantity of tobacco, set up that the seller had misrepresented the tobacco to him, by telling him that the whole of the tobacco was as good as that at the end of the hogshead, by which the defendant buyer was put off his guard and did not examine the tobacco as thoroughly as he otherwise would have done. It was expressly agreed by memorandum that the buyer took the tobacco at his own risk. It was held that the defense was not good; that while the rule is that sound price requires a sound commodity, if the parties expressly agree that the buyer shall take the property at his own risk, the vendor will not be answerable for unsoundness.[25] Clearly, the same result would have been reached in all other

22. 2 Brev. 268. (1809). Quotation is taken from syllabus.
23. As to duty to notify the seller, see Greenwood Cotton Mill vs. Tolbert, 105 S. C. 273, 89 S. E. 653, (1916), referred to farther on in this paper.
24. Brev. 305 (1812).
25. Followed in Young vs. Plumeau, Harp. Law 543, (1827), where suit was brought upon a note representing the purchase price of a negro, the defense being unsoundness of the negro. Held, that the stipulation against warranty of soundness freed seller of any implied warranty, J. Johnson, saying: "I apprehend that there is no case in which an implication can arise in direct opposition to an express stipulation. Unless restrained by positive enactments, parties are left free to make the law of their own contracts; and it would involve a contradiction if they were to be rendered liable contrary to it. One may, therefore, stipulate against a liability which the law would raise without such stipulation."

States. It is to be noted, however, that for the seller to relieve himself of the implied warranty of quality in South Carolina, he must express his refusal to warrant in the contract in just so many words, else he will be held. Our Supreme Court has held that the seller impliedly warranted goods sold, where the contract of sale expressed no warranty and contained express language to the effect that the writing expressed "the entire agreement" between the parties.[26] In that case, it seems clear that the parties intended that there should be no warranty. If there is fraud, the stipulation against a warranty will not free the seller, it seems.[27]

An interesting case is that of *Barnard vs. Yates*.[28] There, the action was brought upon a note given for the purchase price of some "blubber oil" sold to the defendant. It turned out that the "oil" was only "blubber" and was practically worthless. To aid in the deception, about a half-gallon of "oil" had been added to each barrel of "blubber." The court, in holding for the defendant, stated that while the rule that a sound price warrants a sound commodity had been subject to abuse, it was a wise and safer rule than that of caveat emptor. The rule in this State is caveat venditor, it was said. In no case ought a contract to be enforced where the contracting parties have entered into it under a misapprehension and ignorance of such defects as would have prevented the making of the contract had they been known at the time. The buyer and the seller were both honestly mistaken in the nature and quality of the thing sold. To the contention that the defendant examined the product, and that he bought with his eyes open, the court said that while it was true that both parties acted with their eyes open, "their vision was imperfect, both saw darkly. The hidden defects of the article could not be detected but in its use."

In *Missron vs. Waldo*,[29] the action was for the purchase price of a number of barrels of bread sold to the plaintiffs. It appeared that the barrels were packed with good bread of English stamp at either end, but the bread in the middle was musty and inferior in quality. The bad bread was separated from the good and amounted to four barrels. The plaintiff purchasers sought a return of their money for these four barrels. The jury found a verdict for the defendants which was reversed on appeal. The court stated that the rule that a sound price warrants a sound commodity was well settled in this State; that there had been a failure of consideration to the extent of the four barrels of bad bread, for which the purchasers were entitled to have their money back, and that there was a suspicion of fraud in the transaction.

In *Smith vs. McCall*,[30] wherein Justice Nott expressed the opinion that the rule in this State was really the common law rule, the action was for the purchase price of a negro slave. The defense was set up that there was a breach of an implied warranty, in that the slave had an inveterate habit

26. Liquid Carbonic Co. vs. Coclin, 166 S. C. 400, 164 S. E. 895. (1932).
27. Young vs. Plumeau, supra 25, Johnson, J., saying: "It (validity of an express stipulation against warranty) is not, however, to be understood as affording a protection against fraud and imposition. If there had been any concealment or misrepresentation on the part of the plaintiff, his refusal to warrant would not have protected him."
28. 1 Nott & McCord 142. (1818).
29. 2 Nott & McCord 76. (1819).
30. 1 McCord 220. (1821).

of running away. The court held that the implied warranty of soundness extended only to physical soundness; it guarded against physical and not moral defects.[31]

A case worthy of note is that of *Biggus vs. Bradley*,[32] because of the views on the civil law rule expressed therein by Huger, J. He says that our courts have adandoned the "known and safe rules of the common law for the more dangerous, if more inviting maxim of the civil law, that "a sound price warrants a sound commodity." Evans, J., in *Evans vs. Dendy*,[33] says: "The introduction of the doctrine of implied warranty, from a sound price, in sales of personal property, has been the subject of frequent regret by those who have been called upon to apply it, as the source of much unprofitable litigation. I for one am not disposed to extend the principle to sales of land."

Where one sells goods at a reduced price on account of a known defect, and nothing further is said regarding warranties, then there is an implied warranty as to any other defects which were inherent in the property at the time of the sale. In *Ashley vs. Reeves*,[43] the plaintiff sold to the defendant a negro at a reduced price on account of a lameness in one leg. The plaintiff remained silent to the defendant's proposal that he warrant the negro sound in all respects. Subsequently, it turned out that the negro was unsound in other respects at the time of the sale, and this was set up as a defense to an action for the purchase price. It was held that by his silence the plaintiff had assented to warrant the negro sound in all respects except the lame leg, and that if the negro had inherent defects at the time of the sale, the seller would be liable. It was also said that if the action was for money had and received, there would have to be a tender of the property back to the seller within a reasonable time after discovery of the defect, for the obvious reason that the buyer could not have the purchase money and the property also. But a declaration might be laid on the warranty express or implied, without any tender or return of the property.

A rescission of the contract of sale is not necessary to a recovery for breach of an implied warranty.[35] Before the adoption of the Code of Procedure in 1870, if the action was brought for money had and received, as noted in the case above, there had to be a rescission of the contract and a tender of the property back to the seller, if such could be made. Now, however, one need only allege the facts constituting his cause of action, and the court refers the fact to their appropriate form of action. That is, one does not have to sue under any particular form of action now, but it is still true that if the suit is for a return of the purchase money and rescission of the contract, there must be a return, or offer of the property, while if the suit is on the warranty, the contract is treated as existing, and no return of the property has to be made. Whether the suit is based on a rescission of the contract of sale, or on breach of the warranty, the

31. See also, Lowry vs. M'Burney, 1 Mill Const. 237. (1817).
32. 1 McCord 500. (1821)
33. 2 Speer Law 9. (1843).
34. 2 McCord 432. (1823).
35. Greenwood Cotton Mill vs. Tolbert, supra. 23.

buyer should within a reasonable time notify the seller of the unsoundness of the thing sold, and his failure to do so may be considered by the jury in determining whether he has waived the right to rely upon the breach of warranty.[36]

Where a sale is made by sample, the seller impliedly warrants that the whole of the product corresponds with the sample exhibited. In *Carnochan vs. Gould,*[37] it was held that a seller of cotton was not liable, under an implied warranty, for a defect in the quality of the cotton sold, which rendered it unfit for the purpose for which it was purchased, but which extended equally throughout the bulk, and was fully exhibited in samples taken from every part of it.

In *Greenwood Cotton Mill vs. Tolbert,*[38] the defendant sold several hundred bales of cotton to the plaintiff, some of which had been water-packed, and which, consequently, was practically worthless. The agent of the plaintiff cut and sampled the cotton before the purchase, and it appeared to be of good quality. The water had been put into the middle of the bales, and it was impossible to tell it by outward examination. In sustaining a judgment for the plaintiff, it was stated that where goods are bought by sample, the buyer is considered as having purchased on his own judgment, but the article must correspond throughout with the sample exhibited. A sale of packed cotton must be regarded in the nature of a sale by sample which amounts to a warranty that the whole of the cotton sold shall correspond in quality with the sample examined by the buyer. In the instant case, it could not have been discovered by an external examination, nor by a sample taken from the outer part of the bale, that the interior was waterpacked. Therefore, the seller was held to have impliedly warranted that the cotton throughout corresponded with the sample.

The doctrine of implied warranty of quality arises as well upon a contract of hire as upon a sale of personal property.[39] In the same case wherein that principle was laid down, it was also said that if a person sell a flock of sheep, or a drove of horses, the law will not imply a warranty that every member of the flock or drove is sound, but that taken in the aggregate they were so.

Sometimes the question comes up whether the buyer was justified in relying upon the representations of the seller, or should have looked out for himself. In *Southern Iron & Equip. Co. vs. Rwy. Co.,*[40] the action was brought on promissory notes given for the purchase price of a locomotive. As a defense, the buyer set up a breach of warranty of soundness, in that there was a crack in the boiler. The evidence showed that the seller knew of the defect at the time of the sale, but the buyer was not aware of it. The buyer had made a partial inspection of the locomotive, and relied upon the representations of the seller for the remainder. The contract of sale recited that the buyer took the locomotive "in its present condition, without recourse on said vendor for any claim for

36. Greenwood Cotton Mill vs. Tolbert, supra, 23.
37. 1 Bailey 179. (1828).
38. Supra, 23.
39. Colcock vs. Goode, 3 McCord 513. (1826).
40. 151 S. C. 506, 149 S. E. 271. (1929).

repairs or otherwise." It was held that the buyer was entitled to a rescission of the contract; that selling for a sound price raises an implied warranty that the thing sold is free from defects, both known and unknown, and that this implied warranty is not excluded by a written contract.[41] In disposing of the point of whether the buyer had the right to rely upon the representations of the seller, the court quoted the following from *Walker, etc. vs. Ayer*[42] "If a party's situation, with reference to property contracted for, is such that he cannot fairly and reasonably exercise his own judgment thereto, he is not a dealer on equal terms, and has a right to rely upon the representations of value by the seller made to induce the purchase." The court concluded that the parties here had not dealt on equal terms in the sense referred to, for the seller had been using the locomotive for over a year, knew of the crack in the boiler, and had even attempted to have it patched. In view of the buyer's agreement to take the engine "in its present condition," the examination he made, and the other facts of the case, it does not seem that under the doctrine of caveat emptor the seller would have been held liable.

It has been held that a provision in a contract of sale that the seller shall be liable only for such defects as arise within a specified time after the date of the sale, the seller being notified thereof, is valid. In defense to an action brought to recover remainder of purchase price of some electric motors,[43] the buyer set up that the motors were defective. The contract of sale contained a stipulation that the seller would correct at its own expense all defects arising within thirty days after the motors had been put into ordinary use, provided immediate written notice be given upon discovery of the defect or defects. The court in upholding the stipulation stated that "the plaintiff had the right to refuse to warrant the motors at all, and therefore, the right to limit the warranty given in any manner it saw fit, provided it was acceptable to the defendant." The provision was held to apply to both patent and latent defects.[44] But where such a provision is plainly unreasonable, it will not be upheld. Where a dealer sold fertilizer, stipulating that any complaint as to the quality of the fertilizer had to be made within ten days after the sale thereof, the court held such a stipulation unreasonable, for from the very nature of the use to which the fertilizer was put, a longer time was necessary to tell whether it had any injurious ingredients, or other defect.[45]

It has been pointed out above that where there is an express refusal to warrant, the law will imply no warranty.[46] If the contract contains a non-warranty clause, it has been held that such is ineffective unless brought to the attention of the buyer.[47] Now, what is the effect of an

41. Wood vs. Ashe, 3 Strob. 64. (1848).
42. 80 S. C. 292, 61 S. E. 557. (1908).
43. W. E. & M. Co. vs. Glencoe Cotton Mills, 106 S. C. 133, 90 S. E. 526. (1916).
44. Followed in Murray vs. Peacock, 117 S. C. 384, 109 S. E. 121 (1921)
45. Patterson vs. Orangeburg, etc., 117 S. C. 140, 108 S. E. 401. (1921), wherein it was said that ". . the law recognizes the validly of a stipulation limiting the time within which a claim for damages for the breach of a contract shall be presented only when such stipulation is reasonable in its nature as giving the party damaged a reasonable time for the presentation of a claim. . . "
46. Supra, 24, 25.
47. Black vs. Kirkland Seed Co., 158 S. C. 112, 155 S. E. 268. (1930).

express warranty as to the exclusion of implied warranties? In *Houston vs. Gilbert,*[48] the court said that an express warranty of property cannot be fairly construed to intend an exclusion of the natural implied warranty of soundness. But an express warranty will not preclude an implied warranty unless both relate to the same, or closely allied subject.[49] That is, an express warranty of title will not exclude an implied warranty of soundness or quality.[50]

If the buyer, upon discovery of the defect in the thing sold, notifies the seller thereof, he does not waive his right of action on the breach of warranty by continuing to make payments upon the purchase price. In *Stewart vs. Smith,*[51] action was brought on breach of implied warranty in the sale of an electric piano. After discovering the latent defect, and notifying the seller, making an offer to rescind the contract, the plaintiff was held not to have waived her right of action on the breach by making subsequent payments on the piano. It was said that the buyer might sue for the breach though complete payment had not been made.

If the buyer choose to plead an express warranty, he cannot also maintain an action on the implied warranty, covering the same subject. In *Mull vs. Touchberry,*[52] action was brought upon a check for the remainder of the purchase price of an automobile. By the contract of sale, the seller warranted the car to be first class in all respects, and fully worth the value paid. It was held that such an express warranty or undertaking excluded any implied warranty of quality.[53]

48. 3 Brev. 63, 5 Am. Dec. 542. (1812).
49. Supra, 47. Also, Smith vs Russ Mfg. Co., 167 S. C. 464, 166 S. E.
50. Wells vs. Spears, 1 McCord 421, (1821). Also, 10 S. C. 164.
51. 138 S. C. 124, 135 S. E. 801. (1926).
52. 112 S. C. 422, 100 S. E. 152. (1919).
53. Followed in Roanoke City Mills vs. Simmons, 116 S. C. 432, 107 S. E. 903. (1921). In Rainey vs. Simon, 139 S. C. 337, 137 S. E. 41, (1927) it was held erroneous to hold one liable under both an express and an implied warranty of soundness.

Note: This paper represents an attempt to deal with the doctrine of implied warranty of quality generally, and therefore nothing has been said of implied warranty of food and drugs, and where the seller was grower or manufacturer, etc., which topics are each of themselves alone worthy of a paper.

The Constitutionality of the Proposed "Anti-Lynching" Bill

BY ROBERT W. HEMPHILL, '38, AND J. HENRY WOODWARD, JR., '38

House Report 1507, commonly known as the "Anti-Lynching Bill," has been altered many times since its original inception, and the wide publicity which the newspapers have seen fit to give to this proposed legislation has done much to befuddle the minds of the reading masses of American citizens who attempt to keep abreast of the issues pending before Congress. This discussion relates only to the act as finally amended, known then as the Wagner-Van Nuys Anti-Lynching Act.

The bill is entitled "An Act to assure to persons within the jurisdiction of every State the equal protection of laws, and to punish the crime of lynching," and provides certain civil liabilities on governmental subdivisions in which lynching occurs or in which the victim is seized, and certain criminal and civil responsibilities on the officers of these governmental subdivisions.

Every governmental subdivision of a state to which the State has delegated police functions shall be responsible for any lynching occurring within its territorial jurisdiction, and any such subdivision which shall fail, by or through its officers or agents, to prevent any such lynching, or seizure and abduction followed by lynching, is made liable to each victim injured, or to his next of kin if death results, for a sum of not less than $2,000.00 or more than $10,000.00 as monetary compensation for such injury or death. The burden of proof, in such civil actions, is on the governmental subdivision, to prove that the officers or agents charged with the failure, performed their duty in a satisfactory manner, and to the best of their ability. The civil action is to be brought in the U. S. District Court for the judicial district of which the defendant governmental subdivision is a part; may be prosecuted by the Attorney General or his representatives, in the name of the United States for the benefit of the real party in interest, or by counsel employed by the claimants.

Any officer or agent of a State governmental subdivision who shall wilfully neglect, fail or refuse to protect persons from lynching, or shall refuse to protect persons in their custody from lynching, or who shall fail to make diligent effort to apprehend, keep in custody, or prosecute members of a lynching mob shall, upon conviction of such failure or neglect be punished by fine of not more than $5,000.00 or imprisonment not exceeding five years, or both. The liability is imposed on the county in which the victim was seized rather than that in which he came to his death, anticipating that the victim might be easily transported to avoid liability. Satisfaction of judgment against one subdivision for the lynching shall bar further proceedings against any other subdivision partially responsible.

The U. S. Senate Judiciary Committee justified Congressional power to enact such legislation as follows: "The legislation here proposed rests for its authority on the due process and equal-protection provisions of the 14th

amendment,"[1] quoting the well known 'Due Process' and 'Privileges and Immunities Clause' of that amendment. By this assumption they take the position that the 14th amendment is more than a prohibition upon State action; they thus claim it to be a grant of power to the Federal Government to take affirmative action in case of State inaction. It is the contention of the proponents of this argument that this is a false premise.

After the War Between the States, the 14th Amendment was adopted to protect the lately enfranchised colored race; it was directed at State action, State Statutes and State policies in regard to the colored race, because of the supposed unjust legislative discrimination of Southern States. This is clearly proven by the remarks of Mr. Thaddeus Stevens of Pennsylvania, author and sponsor of the 14th Amendment, before the U. S. Senate;[2] Stevens declaring, "The Constitution limits only the action of Congress and is not a limitation on the States. This (14th) amendment supplies that defect and allows Congress to correct unjust legislation of the States so far that the law which operates upon one man shall operate upon all"; thus he pointed out that this afforded Congress power of negativing State Laws which would undertake to discriminate between races or any other classes of American Citizens. Blaine, noted statesman from Maine, one of the midwives who delivered the 14th Amendment, speaking of that and the 13th Amendment, stated: "Both of those amendments operate as inhibitions upon the power of the State, and do not have reference to those irregular acts of the people which find no authorization in the public statutes."[3] If these two men did not know and understand the purpose of the Amendment in question, who is competent to interpret it?

The U. S. Supreme Court has so interpreted this amendment. During Reconstruction times there was a Federal statute known as the Civil Rights Bill providing penalty for denying hotel and other privileges to any American citizen because of race or color. The Court in declaring the Act unconstitutional, and not authorized by the 14th Amendment, stated, through Mr. Justice Bradley:[4]

> "It is the State action of a particular character that is prohibited (by 14th amend.). Individual invasion of individual rights is not the subject matter of the amendment."

This case followed the principle set fourth in the Slaughter House Cases,[5] in which the Court upheld a State Statute of Louisana regulating slaughter houses, and held such acts not in violation of the 14th Amendment.

The Anti-Lynching Bill deals only with individual invasion of individual rights. It does not say anything about State action; it lays no prohibition on State action. Then it can find no foothold in the 14th Amendment. The authors and sponsors of the amendment and the Supreme Court agree as to this. If such a bill were to be enacted and held Constitutional what

1. Page 5 of Senate Judiciary Committee Report.
2. Congressional Record, August 12, 1937, p. 1121.
3. Ibid (2).
4. Civil Rights Cases (1883) 109 U. S. 3; 27 L. Edit. 835.
5. 1873 . . . 21 L. Edit. 394.

might happen is ably set forth in the Civil Rights Cases, supra, quote:

> "If the legislation is appropriate for enforcing the prohibitions of the Amendment it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?"

The American people never intended Congress to have such power!

Much has been written about the Due Process Clause of the 14th Amendment. It is not contested that the taking of a person's life by lynching is to deny to that person due process as to life and liberty, but does not murder do the same thing? Who will contend that the Federal Government can regulate the procedure of a criminal prosecution occurring when a murder is committed within the borders of a state? By analogy, lynching is likewise a crime against the peace and dignity of the State.

The cases construing the Due Process clause substantiate this view. In *Coppage vs. State of Kansas*,[6] the Supreme Court of U. S. upheld the right of the State to make it unlawful for any individual or firm to restrain an employee from affiliating with a labor union. In *Adams vs. Tanner*[7] the Court upheld a Washington State statute destroying employment agencies. Each and every of these cases deal with acts of State legislatures which individuals have contended violated the 14th amendment. But there are yet other grounds of unconstitutionality of the Anti-Lynching Bill.

Does the Bill encroach on "States' Rights," or divest the states of Powers expressly or impliedly reserved to them by the Constitution?

One of the cardinal principles of the American System of Government is that there shall be a "balance of power" between the State and Federal Governments. This principle was ever prevalent in the minds of the "framers" of the Constitution, and was contemplated as understood when the Constitution in its original form of six articles was ratified. The passage of the 10th Amendment providing, "The powers not *delegated* to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," assured the Southern statesmen and strict-constructionists that the sovereignty of the States would not be usurped by the National Government. The second article of the "Articles of Confederation," which preceded our Constitution, declared that each State retained its sovereignty, freedom and independence, and every power, jurisdiction, and right which was not by this confederation "expressly" delegated to the United States in Congress assembled. So, it is contended, States' Rights is most important in the consideration of this Bill.

The first contention of the proponents of this discussion resolves itself into an argument that, were the Anti-Lynching Bill to become law, it would operate as an encroachment on the "police power" allegedly reserved to the States under the 10th Amendment. This power has been ably defined in the case of *Barbier vs. Connolly*,[8] as "the power of the State to prescribe

6. 1915 . . . 236 U. S. 1; 59 L. Edit. 441.
7. 1917 . . . 244 U. S. 590; 61 L. Edit. 1336.
8. 28 L. Edit. 923.

regulations to promote the health, peace, morals, education, and good order of the people."

Thus, it is apparent under the doctrine set forth in the above case that it is the duty of the State to exercise, by its own legislation, this right or obligation to protect certain guaranteed privileges of American citizens. As is pointed out in the case of *Panhandle Eastern Pipe Line Co. vs. State Highway Comm. of Kansas*:[9]

> " 'Police Power' springs from the state's obligation to protect citizens and provide for safety and good order of society, and is a governmental power of self protection, permitting reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."

Section 6 of the Bill declares: "The essential purpose of this act being the furtherance of protection of lives and persons of citizens and other persons against unlawful and violent interference with or prevention of the orderly process of justice . . ." But to the State is reserved the power to legislate for the "further protection of lives and persons of citizens," etc. Looking to the substance rather than the form of this bill, this seems an attempt to allow national legislation to stimulate the punishment of the State-acknowledged[9] crime of lynching. Again referring to the *Slaughter House Cases,* the nature of the "police power" is discussed as follows:

> "On it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property".

Does not the prevention of lynching, a crime admitted to be no virtue, seek as one of its objectives the securing of social order; on what other grounds can any effort to prevent such atrocities be meritorious or of any reasonable consequence?

Where, in the Constitution is there a delegation of the powers sought to be exercised by the authority this Bill would vest? Certainly not in the 14th Amendment, for in the case of *Barbier vs. Connolly*[10] the Supreme Court said:

> "But neither the amendment (14th), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power. . . ."

Does not this case clearly show the limitations on the 14th Amendment as regards encroachment on the powers of the State, or is it necessary to seek further? Other cases[11] provide:

> "It (14th amendment) does not deprive the States of their police power, however; and, subject to the limitations expressed therein, the States may continue to exercise their police power as fully as before the adoption of the Constitution."

9. All States recognize Lynching as a Crime.
10. 1885 . . . 113 U. S. 27.
11. 24 L. Edit. 115.

If the National Government may go into the States and regulate as to the crime of lynching, may it not also go into those same states and regulate theft, burglary, and every other matter which affects either life, liberty, of property of citizens? Can the National Government thus sit in judgement on the matter in which the States exercise their police power? Would legislation on the part of the states providing for punishment of so-called lynchers, etc., be constitutional?

The United States Supreme Court, in the case of *Patterson vs. Kentucky,*[11] declared that the preservation of the rights of persons and property from unlawful violence is within the power of the State or municipal government, holding:

> "Under the authority of the police power legislatures and municipal corporations may enact all laws and ordinances necessary for the preservation of the rights of persons and property from unlawful violence and disorder, and the maintenance of good order throughout the State or municipality."

The purpose of the Bill as stated, shows that the subject matter thereof is of State concern only. In the case of *City of Chicago vs. Sturges,* [12] the Court upheld an Illinois Statute providing indemnity to property owners of 75 per cent for damages by mobs and riots, declaring:

> "The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and it is but a recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob."

Thus it is held to be the *duty* of the *State,* and not of the National Government, to render this protection. Thus, State legislation on this matter would be Constitutional.

Can the police power of the states be surrendered, abridged, or divested by national regulations?

The police power is vested in the States by the broad terms of the 10th Amendment. The cases all hold that this power cannot be taken away from the States. In *Ford vs. A. C. L. Ry. Co.,*[12] the Supreme Court of the United States held:

> "Police power of the states is incapable of exact definition and cannot be alienated or abridged by contract or otherwise."

Powell vs. Pa. R. R.[13] holds that the State Legislature cannot surrender this power. *Stone vs. Mississippi,*[14] and *Boston Beer Co. vs. Massachusetts,*[15] support this view. There has been no attempt on the part of the Legislatures to surrender this power in this particular question. Then the Anti-Lynching Bill, since it seeks to abridge or divest the States of this power in some measure, is unconstitutional in its inception.

Can the bill be supported on the grounds that it tends to the promotion of general welfare?

12. 169 S. Ct. 41; 287 U. S. 502; 77 L. Edit. 457.
13. 22 L. Edit. 253.
14. 25 L. Edit. 1079.
15 25 L. Edit. 989.

The confines or limitations on the power of Congress to legislate for the "general welfare" are set forth by Mr. Justice Roberts in the AAA cases:[16]

> "The 'General Welfare' clause of the Constitution does not empower Congress to legislate generally for the general welfare, but merely to tax, and appropriate the revenues so raised...."

This principal is substantiated in the case of *Carter vs. Carter Coal Co.*,[17] closely following the AAA case, the Court holding:

> "Congress has no power to legislate substantively for general welfare except as general welfare may be promoted by the exercise of powers which are granted."

It is the contention of the proponents of this discussion that the police power includes power to regulate for the general welfare, and this is set forth in substance in the recent case of *Nashville, C. & St. L. Ry. Co. vs. Walters*,[18] in which the court expounds:

> "Police power embraces regulations designed to promote public confidence or general welfare, and not merely those in interest of public health, safety, and morals."

This case has not been overruled, and if this bill is sought to be justified as a means of promotion of the general welfare, its constitutionality cannot be supported on that ground, for it is a State problem to be rectified by State legislation.

Can the bill be justified as a constitutional exercise of the power of Congress over interstate commerce?

It is admitted that Article I, section 8, clause 3 of the Constitution gives Congress power over Interstate Commerce, but is interstate commerce involved here? For interpretation of the "Commerce Clause", we look to the cases known as the Minnesota Rate Cases[19] holding:

> "The words, 'among the several states', distinguishes between commerce which concerns more states than one, and that commerce which is confined within the limits of one state and does not affect other states".

If the malpractices that this bill seeks to curb concern more than one state and are such that the practice of them will necessarily transgress state lines or boundaries, then it is admittedly a problem for Congress. But if mere intrastate activities are involved, the problem is for the individual State under the 10th Amendment. The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. But this bill does not provide "when states etc." but, "whenever that State . . . shall have failed, etc." As to individuals it provides that "any officer or employee of a State," shall have failed, etc. The penalties sought to be imposed are not against two or more states, but against an individual state or governmental subdivision thereof.

16. U. S. v. Butler, 80 L. Edit. 477; 102 A. L. R. 914.
17. 298 U. S. 238; 80 L. Edit. 1160.
18. 79 L. Edit. 749; 294 U. S. 405; 54 S. Ct. 486.
19. 76 L. Edit. 804; 230 U. S. 352.

The action or inaction of a state, governmental subdivision thereof, or municipality, by or through its officers or law enforcement instrumentalities, is considered a crime against the "Supreme Law of the Land" by the adolescent contemplation of this proposed bill. The activity is obviously intrastate.

Further, this is not commerce. It does not partake of the nature of business, of a public utility; no interstate franchise is involved, no interstate communication, no business transactions. The Lindbergh Kidnaping Act is not analogous, for there the culprits cross state lines. The case of *Gloucester Ferry Co. vs. State of Penn.*[20] further enlightens us:

> "It was not intended by this clause (commerce clause) to supersede or interfere with the power of the states to establish police regulations for the better protection and enjoyment of property".

This includes by inference the right to legislate for the better protection of the public, their safety, only on the part of the states. In the "Sick Chicken Case," Mr. Chief Justice Hughes held:

> "In determining how far the Federal Government may go into controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well established distinction between direct and indirect effects . . . Direct effects are illustrated by the railroad cases we have cited . . . But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."

If lynching has any bearing on interstate commerce, and we earnestly contend it has none, certainly that bearing or effect is indirect, and within the domain of the state. Mr. Justice Cardozo, concurring in the above case, observes:

> "Activities local in their immediacy do not become interstate and national because of distant repercussions".

Then the repercussions of lynching, no matter how far they may reach, do not give cause for national interference. This also precludes any argument that the effect on nationwide thought, action, or otherwise, is sufficient grounds for an interference.

As to the crime of lynching, or violence to a party accused or suspected of crimes which invoke them, to give the Federal Government any cause or jurisdiction respecting them, "there must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial relations." [22] The Bill provides no point of time and has not to do with commerce, so cannot be upheld on this ground.

The case of *Henneylin vs. State of Georgia*[23] determines for us the limits to which a state may go in the exercise of its police power:

> "The legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace,

20. 29 L. Edit. 158; 114 U. S. 215.
21. N. R. A. Decision . . . 79 L. Edit. 1570; 55 S. Ct. 583.
22. Coe vs. Errol, 116 U. S. 517.
23. 41 L. Edit. 166; 16 S. Ct. 1086.

order, health, and safety of their people, but which by their necessary operation affect to some extent, or for a limited time, the conduct of commerce among the states, are not yet invalid by force alone of the grant of power to Congress to regulate such commerce; and if not obstructive of some right secured by fundamental law, they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution".

Admitting, for the purpose of argument, that this inaction or action should be remedied, that it has some effect on interstate commerce, yet, unless something is done within the scope of Constitutional powers already enacted or delegated, there are no grounds for national interference. We conclude that this bill cannot be upheld as within the Congressional power over interstate commerce.

Is there implied power under the Constitution for Congress to enact such legislation?

The power sought to be conferred or delegated by this Bill, and the enactment of legislation to so delegate or confer, is not an "implied power" of the Federal Governmnt under the Constitution. Mr. Chief Justice Fuller, in *U. S. vs. Williams*,[24] wrote:

"The powers the people have given to the general government are named in the Constitution, and all not named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

The ruling implies the necessity of Constitutional Amendments to increase the powers of the U. S. Government, certainly to grant the power included in the bill to that government.

Even the celebrated case of *Marbury vs. Madison*,[25] setting forth the doctrine of implied powers, limits the supremacy of the Constitution to the sphere of its own action, and says that the means employed to an end must be within the scope of the Constitution:

"If the end be legitimate, and *within the scope of the Constitution*, all the means which are appropriated, which are not prohibited, may constitutionally be employed to carry it into effect."

But not only is the end sought to be reached by this Bill outside the pale of Federal Jurisdiction and rights, but the means sought to enforce them are also sought to be enforced in an unconstitutional manner.

Are there such extraordinary conditions or conditions of emergency existent in the United States today as to justify such legislation as this proposed anti-lynching Bill?

The proponents of this discussion contend that there is no emergency, nor are there such extraordinary conditions of crime, immorality, or public disorder as to warrant such radical and ultra sectional legislation as this appears to be. But granting that there is, would this legislation be justified? In the "Sick Chicken Case," supra, the Court held:

"Extraordinary conditions may call for extraordinary remedies.

24. 48 L. Edit. 979; 194 U. S. 295.

25. 4 L. Edit. 579.

> But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power . . . assertations of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment . . ."

This substantiates our contention. Mr. Justice Cardozo, concurring in the above case, wrote:

> "Here in effect is a roving commission to inquire into evils and upon discovery to correct them."

Such seems to be the authority sought to be conferred by this Bill, and as such, is unconstitutional.

Lynching is no crime in the United States nor is it an increasing offense. Let us glance at statistics.

Period:	No. Lynchings per yr. av:
1889-1899	187.5
1900-1909	92.5
1910-1919	61.9
1920-1924	46.2
1925-1929	16.8
1931	13.0
1932	9.0
1933	29.0
1934	17.0
1935	23.0
1936	10.0
1937	8.0

In 1933 the United States was in the depths of the depression, and extremes were common, thus accounting for the rise in that year. But, since 1889 there has been a 97 per cent decrease in the number of lynchings. Does this show conditions of emergency? The inevitable and undisputed answer is NO.

Does the bill guarantee to every American citizen an equal protection under the laws?

Let us glance for a moment at the title of this proposed act. It reads: "An act to assure to persons within the jurisdiction of every State the equal protection of the laws and to punish the crime of lynching." Section 2 of the amended Bill defines a mob as "any assemblage of three or more persons which shall exercise or attempt to exercise by physical violence and without authority of law and power of correction or punishment over any citizen" . . . Does it stop here? Does it attempt to guarantee to all persons in the U. S. equal protection from mobs or does it seek to pick out one small group of individuals in one section of the country and deal solely with them? We read further in the same section: "Provided however, that lynching shall not be deemed to include violence occuring between members or groups of lawbreakers such as are commonly known as gangsters or racketeers, nor violence occuring during the course of picketing or boy-

cotting or any incident in connection with any labor disputes as that term is defined or used in the Act of March 23, 1932."[26] The Bill defines a mob in one sentence as any assemblage of three or more persons seeking to do violence, etc., and in the next sentence says this is not applicable to any group operating as a mob above the Mason and Dixon line. Is this the fair and equal protection of the laws that all just people desire? A storekeeper in N. Y. who is brutally shot and killed by a mob for not contributing to a protection association is not protected. But the family of a negro who has raped innocent white girls and has been lynched is allowed to recover much from the county or the officer. In the single city of Chicago during 1926 and 1927 there were 130 slayings by gangsters.[27] There were not as many lynchings in that period in the whole United States. The title of the bill belies its substance. The bill does not guarantee equal protection under the law.

We reiterate, The Anti-Lynchinging Bill, if enacted, is UNCONSTITUTIONAL.

26. 47 Statute 40.
27. Illinois Crime Survey

* Note that this paper is greatly condensed because of space.

The Applicability of Common Law Rules of Evidence Regarding Admissibility in Proceedings Under the Workmen's Compensation Act

BY HOWARD LAMAR BURNS, '38, AND WILLIAM HUMMEL HARLEY, '38

I. SCOPE

The enormous growth of administrative bodies within the last few years has not been without its attendant problems. The very nature of such bureau suggests that there must, of necessity, be some decided variations from those usual rules of practice and procedure which are in use in our courts today. Fully cognizant of the fact that the practice of law is a most practical one and that even its most erudite members have probably had little opportunity to explore the refinements of any particular phase of this comparatively recent Act, unless their practice has led them into it, it is in this light that we have determined to blend our feeble efforts toward clarifying, in some measure, the applicability of common law rules of evidence regarding admissibility in proceedings under the Workmen's Compensation Act.

The treatment of such a topic is rather difficult in that the Industrial Commission has been empowered by Sec. 54 (a) of the Act to "make rules, not inconsistent with this Act, for carrying out the provisions of this Act. Processes and procedure under this Act shall be *as summary and simple as reasonably may be.*" Of course The Industrial Commission has not attempted to formulate a set of rules for the reception of evidence, but it is building up such precedents by the process of exclusion and inclusion. A further problem is presented to the South Carolina Bar by the fact that the Commission has not yet been able to publish its decisions in permanent form. However, the evidence problems confronting the lawyer are not nearly so nebulous as it might seem. South Carolina was one of the last states to adopt such legislation, and, naturally enough, was largely modeled on the statutes of other states. Our Act is most nearly similar to the North Carolina statute; in fact, it is practically the same. The North Carolina Act followed the Virginia Statute in form and content, the latter being drafted from the Indiana Act. Thus we have available numerous decisions from these states interpreting exactly similar clauses, and it is but natural that the commission should and does rely heavily on these decisions.

Practically all the Acts of this type in the United States give the Commission a carte blanche rule making power for practice and procedure so that, in reality, we have innumerable adjudications of evidentiary problems arising under similar powers granted to Industrial Commissions. It might be of some value to the profession to know that our Industrial Commission considers Schneider on WORKMEN'S COMPENSATION LAW as the most reliable commentary and collation of cases. As a result we have resorted to this work freely and have adopted the general outline contained therein in our treatment of the admissibility of evidence.

II. VARIATIONS OF COMMON LAW RULES OF EVIDENCE BEFORE THE COMMISSION

It is intended in this act that the technical rules of pleading and introduction of evidence should not be controlling, but rather that summary justice should be dispensed with informality. However, this does not mean that all legal principles of evidence are to be scrapped. Justice Cuddeback, in *Carroll vs. Knickerbocker Ice Co.*, 113 N. E. 509, has caught the true attitude of the act in the following excerpt: "The act may be taken to mean that while the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made. As was said by Justice Woodward in his able dissenting opinion at the Appellate Division: 'There must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings.'" Perhaps the justice has gone a bit far in his statement that any evidence may be received, but on the whole he expresses the purpose of the act.

It appears from a reading of some of the leading cases that evidence, which is not legally admissible, can be admitted and the award of the commission will not be reversed if it can be shown that the award was not based on that evidence, but that other evidence submitted was sufficient to sustain the award. *Ranney vs. Givens*, 285 Pac. 25, says, "We think the evidence, although incompetent under the record here presented, was not sufficient to set aside the award, as it does not appear that the Industrial Commission's order was based thereon, and there is sufficient other evidence to support the award."

In regard to the hearsay rule, the cases are uniform in holding that the Commission is free to disregard it insofar as admissibility is concerned, but it is equally uniformly held that an award must be based upon more than mere hearsay. In *Garfield Smelting Co. vs. Industrial Comm. of Utah*, 178 Pac. 57, the Supreme Court of Utah said, "We are of the opinion that for the purposes of determining questions of fact arising under the industrial act the commission, in order to arrive at the truth, may pursue any course or method which to it seems best calculated to arrive at the truth, so long as it does not depart from the provisions of the act. The commission may thus have recourse to hearsay evidence if such evidence may lead to some tangible fact which sheds light upon the ultimate question to be determined and found. In that respect it is the duty of the commission to observe and follow the provisions of the act, and if that is done neither this nor any other court has the right to interfere with the commission in the method pursued by it in arriving at its conclusions. We, however, agree with the New York Court of Appeals, as expressed in 218 N. Y. 439, that although the commission in its investigations may have recourse to hearsay evidence to assist it in arriving at the real facts, yet when it makes its findings, every finding of fact must be based upon some substantial legal and competent evidence. In other words, every material finding that is entirely based on hearsay or other incompetent evidence is not supported by substantial evidence, and cannot be permitted

to stand if seasonably and properly assailed. This, it seems to us, is the only reasonable and practical construction that should be placed on the industrial act when considered as a whole, as it must be." Needless to say, numerous awards of commissions which were made on uncorroborated hearsay have been overruled on appeal. Thus in proceedings for compensation under the Missouri Act a medical expert, in giving the history of the case, testified that the deceased employee told him of having been under the care of a doctor off and on since the time of the injury. This statement was objected to in timely fashion. Such statement was held to be hearsay and inadmissible as exceeding the recital of a present existing condition. *Freese vs. St. Louis Public Service Co.,* 58, S. W. (2nd) 758. The Court of Appeals of Ohio has stated: "There is a sound discretion vested in the board by virtue of the General Code to ascertain the truth of a claim by what it considers reliable evidence, whether it be hearsay or otherwise. This discretion cannot be exercised in an arbitrary manner; for it then ceases to be discretion." *Baker vs. Ind. Comm.* 186 N. E. 10. It seems to be within the power of the commission, however, to exclude any hearsay it might wish to exclude and of course will not be reversible error although it may receive all the hearsay of the opposing party. In *Ohlson vs. Industrial Commission,* 192 N. E. 197, the court says: "It is next urged that the Industrial Commission erred in excluding competent evidence offered by the plaintiff in error. This is with reference to the offer to prove a statement made by the arbitrator at the time of examining the doors and windows which were said to have been painted at the time of the employment during which the accident occurred. Such statement was properly excluded, as it was hearsay and clearly incompetent." However, it is necessary that objection to admissibility of hearsay be made seasonably in order that it may be taken advantage of on appeal. *Hege & Co. vs. Tompkins* (Ind.), 121 N. E. 679, in treating the exactly same evidence provision as is contained in our act said: " 'The party against whom such evidence is introduced may not take his chance of obtaining a favorable verdict at the hands of the jury on the evidence, and then, after an adverse verdict, obtain a new trial on the ground that the verdict does not rest on any competent evidence.' The above case has been cited with approval (citing cases). The reason for adopting the above rule in ordinary civil actions apply with even greater force in hearings before the industrial board. It is evidently the intent of the Workmen's Compensation Act that by concise and plain summary proceedings, controversies arising under the same should be promptly adjusted by a simplified procedure, unhampered by the more technical forms and intervening steps which sometimes incumber and delay ordinary civil action. We see nothing unreasonable or harmful in applying the rule announced to proceedings before the Industrial Commission, as it would only require that a party object to hearsay evidence when offered, in order to overcome the presumption which would otherwise arise that he consented to its admission and consideration by the board. In this case the hearsay evidence was admitted without objection, and the board, therefore, had a right to consider the same, and give it such probative force as it might believe it merited, under all the attendant facts and circumstances." Furthermore, this same case stands for the view that the written report of the employer

to the Commission of the injury may be admitted and the whole report, including the printed part of the report is his statement unless qualified. This is true even though the report be filled out from hearsay reports, which is usually the case.

The admission of evidence on the grounds of res gestae is quite similar to the civil law rule and must have the same requisites in general before the commission as in a court of law, but the cases reveal more liberality in the application of the rule. Schneider states the following with approval, "Matters incidental to a main fact and explanatory of it, including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which the main fact might not be properly understood; events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events; the circumstances, facts and declarations which grow out of the main fact are contemporaneous with it, and serve to illustrate its character, including everything which may fairly be construed an incident of the event under consideration." However, the courts necessarily vary widely in the application since each case is peculiar on its facts. Thus in *State vs. Powers,* 92 Kan. 225, the court said: "The rule is that for statements of an injured person to be admissible in evidence, they must be shown to have been made at a point of time so close to the alleged injury as to be ENTIRELY SPONTANEOUS." Yet in *Wickham vs. Monmouth Memorial Hospital,* 162 Atl. 891, in a proceeding for compensation under the New Jersey Compensation Act, a letter written by an injured employee to his wife residing in England, telling of his injury THE SAME WEEK HE WAS INJURED, was held admissible in evidence as part of the res gestae. From these two examples, it is obvious that no set interpretations of the meaning of res gestae can be formulated, but only that the general requirements of res gestae must be argued and the latitude of the court will determine.

In regard to facts learned by a physician in examination, Sec. 27 of the Act expressly provides that " . . . No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Act or any Action at law brought to recover damages against any employer who may have accepted the compensation provisions of the Act." This makes it very clear that such statements are not privileged but above and beyond this provision, the statement must, of course, be competent within themselves. *Wells Bros. vs. Ind. Comm.* 137 N. E. 791, stands for the proposition that the testimony of a physician is incompetent where it is based upon his observation of outward manifestations, wholly within the applicant's control; likewise the testimony is incompetent where the physician's statement is based partly upon his own observation and partly upon a statement of the case made by the injured person. In *Mesmer & Rice vs. Indus. Comm.,* 173 Pac. 1099, all the parties agreed that the Commission's physician make an examination to ascertain whether the disability was due to disease or injury and the court held his report as an entirety was admissible as evidence regardless of the fact that he based his findings partly upon reports

of assisting physicians, the court saying: "There can be no doubt that his (physician's) report was, in view of the understanding of the parties, competent evidence to be considered by the commission . . ."

The cases are rather conflicting as to the admissibility of the verdict of a coroner's inquest, but the prevailing view seems to be that such evidence is inadmissible. After a line of cases in Illinois held it to be admissible, an act was passed making it inadmissible. It has been held in Illinois, Indiana and Oregon that a verdict that death was met "while in the discharge of his duties" was inadmissible since such a finding is beyond the providence of the coroner's jury. At least, the tendency of the courts is to declare it inadmissible upon the slightest irregularity.

Of course, evidence of negligence is irrelevant against an assenting employer under the Workmen's Compensation Act and the question of its admission, of necessity, would not arise.

In establishing proof of the relation of employer and employee, the courts apply generally the various methods discussed above, but in several instances unusual results have been accomplished. It has been held in California that hearsay evidence will not be considered in proving the status of a person as an employee or an independent contractor (173 Cal. 405), but it is to be remembered that in 1917 California, by express enactment, made hearsay admissible in such a hearing. But the case of *Standard Oil Co. vs. Mealey*, (Md.) 127 Atl. 850, sustained the award of the Commission upon hearsay alone to prove the relation of employer and employee. This court held it proper to admit statements of a deceased workman said to have been made to his wife, and to his physician that he had fallen and struck his side at a spot where the malignant growth later developed, and sustained the award when this was the only evidence that the injury resulted from the relation. It is submitted, that upon due regard for the necessity of informality in a Commission's hearing, such an award based upon this testimony, and this alone, is going rather far in the interpretation of the spirit of the act. To say the least, this case is not in accord with a majority of the courts. *Harbrich vs. Ind. Com. of Wis.*, 200 Wis. 248, is authority for the principle that the test of the status of the parties is to be determined by the power of control which the employer has over the employee, whether or not he exercises it. It is interesting to note here that the U. S. Supreme Court has, in *Crowell, Dep. Com. vs. Benson*, 285 U. S. 22, held that the question of the relation of employer and employee is a jurisdictional one under the U. S. Employee's Compensation Act and subject to review de novo on appeal. It is submitted that this holding seems to operate contrary to the purpose of the act.

It is interesting to note that where a part of testimony, such as a document, is admissible and part of it should be excluded, a general objection to the document as inadmissible will not be a sufficient objection, but rather the objector must assail that particular portion which he feels incompetent. Otherwise there is no error in overruling the objection. This practicality might seem insignificant but may often prove quite valuable. *Railway Co. vs. Gormley*, 43 S. W. 877; *Railway Comm. vs. Railway Co.*, 212 S. W. 535.

Section 66 of our Act provides for reports to be filled out by the employer concerning certain accidents. These records are not public records, "but open only to those parties satisfying the Commission of their interest in such records and for the right to inspect them". This account of the accident is admissible at the hearing under practically every court's holding. But the difficulty arises when an effort is made to define precisely what the effect of such report is. Honnold on Workmen's Compensation says: "The report of the accident made by the employer, as required by statute, is competent prima facie evidence of the facts stated therein, subject to be explained or contradicted". The cases are legion to the point that such reports establish a prima facie case. A very good summary of this point is given in the court's syllabus in *Orchard vs. Peterson* (Neb.) 256 N. W. 37, "In action under compensation law, report of an injury to employee made by employer to the compensation commisioner may be introduced in evidence as an admission against interest of the employer, as to how, when and where the injury occurred, and in the absence of other evidence, may be sufficient to make a prima facie case for claimant." But it is obvious that such reports are not conclusive upon the employer but only prima facie. If, as in *Little Fay Oil Co. vs. Stanley,* et al., 217 Pac-377, the report was made under a mistake of fact, it then becomes a question of fact for the Commissioner to determine by giving all the evidence admitted such weight as it deserves.

Litigation has developed in many states as to the admission of depositions and affidavits, but our Act has obviated any such exigency by setting out in specific and clear terms the method of taking depositions, and it is inferable from this that any such papers sought to be admitted must follow this procedure or fail admission. Section 54 of the Act provides,".... Any party to a proceeding pending under this Act, or its or their attorney may cause to be taken the disposition of witnesses to be taken either within or without the State, to be taken either by commission or de bene esse. Such depositions shall be taken in accordance with and subject to the same provisions, conditions and restrictions as apply to the taking of like depositions in civil actions at law in the Courts of Common Pleas and the same rules with respect to the giving of Notice to the opposite party, the taking and transcribing of testimony and the transmission of certification thereof, and matters of practice relating thereto shall apply, PROVIDED, that in any case where the testimony shall be taken by commissions the commission shall be issued, upon request of the party or attorney, by some member of the Commission; PROVIDED, FURTHER, that the provisions herein shall not be so construed as to prevent the Commission or Deputy Commissioner from issuing commissions for the taking of testimony, even in the absence of any application therefor, when in their judgment it is deemed necessary or appropriate." It is apparent that this is one type of evidence where the rules of civil practice are not relaxed. The Act must be followed in its application, or rather in its method of taking the testimony and its commission will doubtless be very strict in its adherence to the letter of this particular provision. However, it is clear that the type of evidence taken at the securing of the deposition is of course governed by the same lenient rules of procedure that the Com-

mission follows in its administration of summary justice. But if unauthorized depositions be offered and no objection made by the oposing party, the case of *Webb vs. Ia.-Neb. Coal Co.*, 198 Ia. 776, holds that such depositions will be received by the commission. The precise language of our Act would seem to throw out, upon proper objection, all unsworn affidavits and statements which did not allow cross-examination.

As to the reception of evidence in general, there are a few adjudications which, though they might seem isolated, are really quite practical. It has been held that a compensation commissioner may take cognizance of scientific authority and data in arriving at a conclusion. 107 Atl. 611. Schneider cites with approval Feldman's Case, 240 Mass. 555, to the effect that in order to set aside an award because of the admission of improper evidence, it must be shown that such error was prejudical. But after the Commission has been reversed for basing its award upon erroneous legal principles, the party is entitled to introduce further evidence at a new hearing, and if this privilege is taken, the insurer is entitled to the same privilege, and the case is considered anew, on the point erroneously decided. 229 Mass. 435. However, a reopening will not be granted because of an erroneously admitted deposition, where there is no offer to contradict the matter contained in the deposition. 142 Okla. 193.

Dying declarations, though admissible in only one jurisdiction (Kan.) in civil actions, seem to lose their objection when considered in connection with the purpose of the Workmen's Compensation Act. The reason such statements are excluded in civil trials is based directly upon the hearsay rule which has not been relaxed in such civil trials. But from our discussion of the hearsay rule, it seems to follow naturally that the objection to dying declarations would disappear as soon as hearsay evidence is allowed. The purpose of the Act "permits liberal investigations, by hearing and otherwise; but after all the data have been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law, must be excluded from consideration that is to say, when all the irrelevant and incompetent testimony has been put aside, the finding must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct." 104 Atl. 617. It is obvious that a dying declaration might lead the commission to find some evidence that otherwise would go unnoticed. Then too, the admission of such evidence could easily give the Commission a more perfect perspective of the truly probative evidence before them. Certainly, such statements are admissible for this purpose and it is submitted that with the aid of slight corroborative testimony, the commission would be justified in placing much weight upon it.

SUMMARY

This cursory examination of the varying constructions placed upon the common law rules of evidence is illustrative of the marked confusion existing today in regard to the administrative procedure of such bodies. However, the only true perspective of the rules of evidence is to be had by a close insight of the purpose and desired effect of the Act. The Statue

breathes of summary justice in its most informal attire, but this cannot mean that rules of evidence must be disregarded. On the contrary, emphasis is to be placed upon a relaxation of the strict and technical bounds of the civil law rather than utter disregard. It would be nothing short of a misnomer to relegate such abandonment within the nomenclature of summary justice. The test of admissibility in its skeletonized form would appear to lie in its "reasonableness of probative value." This is, of course, extremely general and, at most, can only be a guiding star to be followed with keen discretion.

It is at once apparent that the interpretation by the court of the latitude of admissibility can completely effectuate the objective of the Act, or, by a narrow construction, can strip the Commission of its admirable potentialities. That the judicial interpretation must consider foremost the spirit and objectives which prompted its enactment is obvious.

The suggestion has been made that the only completely satisfactory method of preserving the value of the Act is to embody a set of rules of evidence within the Act. 36 Harv. L. R. 297. We submit that such a plan is not only impractical but well nigh impossible. Regardless of definitive codification, judicial construction is necessary. Such rigid confines are utterly foreign to the nature of such administrative bodies. It has been exhibited in the slow but careful growth of the common law rules that inclusion and exclusion is probably the most satisfactory method. Rules of evidence evolve with peculiar needs and pass away when necessity ceases.

The application of the hearsay rule has furnished by far the most contentious problem for the bench and bar, as has been indicated and treated above. Likewise, this particular rule affords the most interesting and revealing phase of the problems in evidence. The preponderant rule is to the effect that such testimony is admissible and can be accorded such weight as the Commission sees just, but in order to base an award upon such testimony there must be at least a residuum of legal evidence. As the writer in 24 Mich. L. R. 834 has aptly put it, ". . . the proceedings before administrative tribunals are comparatively unrestricted by common law rules of evidence. Obviously, the mere creation of an administrative commission evidences an intent to provide a summary procedure. But at the same time, this procedure must not be arbitrary. Even in case of boards exercising purely administrative functions a fair trial must be afforded, measured not by the rules of evidence applicable to proceedings in courts of law but by an 'honest effort to establish the truth by fair and reasonable means.' At the other extreme, where quasi-judicial functions are exercised, as by the Workmen's Compensation Commissions, the proceedings must be more judicial in nature and rules of evidence, though liberalized, apply."

Thus the delicate task of the practitioner, the Commission, and the courts in properly arriving at such rules as will deal summary justice becomes readily apparent. It is only through the conscientious co-operation of the these three that our State can profit by the invaluable experience of other states.

The Privileges and Immunities Clause of the Fourteenth Amendment

BY THOMAS H. POPE, JR., '38, AND RICHARD A. PALMER, '38

Since the recent decision in the case of *Colgate vs. Harvey*[1], much has been written about the privileges and immunities clause of the 14th Amendment. For many years the clause was regarded as well-settled law and consequently, the decision in the Colgate Case has thrown the legal pundits into a state of confusion. No one can predict with certainty what course the Supreme Court will pursue in the future. However, it may prove profitable to examine the leading cases decided by the Court on this subject.

In the period immediately after the war between the states, the Radical Congress passed much legislation designed to concentrate our governmental forces in the Central Government. Nationalism was the dominant note of all that took place in that Tragic Era. And among the nationalistic legislation were three constitutional amendments. It is important that we keep this intent in mind as we attempt to determine what the privileges and immunities clause was intended to embrace.

As one writer puts it,

> "They desired to nationalize all civil rights; to make the Federal power supreme; and to bring the private life of every citizen directly under the eye of Congress. This intention of the Radicals, though too much involved for the people in general to comprehend, was quite generally understood by the leading editors in the North and in the South and by the party leaders on both sides."[2]

It was not long before the Supreme Court of the United States was called upon to determine what was meant by the clause in question. Although the decision was the occasion for very little comment at the time, the Slaughter-House cases,[3] have since become known as a familiar landmark of American Constitutional history. Let us review the facts in that case and study carefully the logic of the Court in arriving at its decision.

The "carpet-bag" legislature of Louisiana, undoubtedly under the influence of corruption and bribery, passed a statute granting a monopoly of the slaughter-house business within certain parishes of New Orleans in favor of one corporation. The act deprived several hundred butchers of the right to engage in that business. Following the general wave of outrages throughout the state, eminent counsel (John A. Campbell) was retained to protest the right of the state to establish such a monopoly. The plaintiffs contended, among other things, that the monopolistic statute abridged the privileges and immunities of citizens of the United States. Mr. Justice Miller, speaking for the Court, was careful to point out in the

1. 80 L. Ed. 299.
2. Charles Wallace Collins, "The Fourteenth Amendment and the States," page 45.
3. 2 L. Ed. 394.

beginning of his opinion that the act in question, while admittedly granting exclusive privileges, did not curtail the butchers' right to exercise their trade. In doing so, he said that while the wisdom of the legislation might be open to conjecture, it was difficult to see how the act destroyed the business of the plaintiffs. He concluded that the regulations of the slaughtering of animals was a valid exercise of the police power and consequently, the proper subject of state legislation only.

Concisely stated, Justice Miller then reasoned that the amendment defined citizenship, that it distinguished between national citizenship and state citizenship, and that the amendment specifically negatived the right of any state to make or enforce a law abridging the privileges of national citizenship. He then determined that the rights and privileges of state citizenship were in no way affected by the amendment but that on the contrary were fit subjects of state control.

Having arrived at this conclusion, it became necessary to decide what the privileges of national citizenship are. Judge Miller referred to the well-known decision rendered by Mr. Justice Washington in the case of *Corfield vs. Coryett,*[4] and quoted therefrom as follows:

> "The inquiry is what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate."
>
> "They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

The Court adopted this definition of the privileges of state citizenship and concluded that it was not the purpose of the 14th Amendment to transfer the protection of all civil rights from the states to the Federal government.

On the other hand, Judge Miller said that there were certain privileges of national citizenship, some of which were the right to go to the seat of government to assert any claim, to transact any business, to share its offices and to engage in administering its functions; the right to demand the care and protection of the Federal Government over life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; the right to peaceably assemble and petition for redress of grievances; the right to use the navigable waters of the Unitel States; and all rights secured to our citizens by treaties with foreign nations.

It is significant that Mr. Justice Field, dissenting, cited with approval the case of *Corfield vs. Coryell,*[5] and concluded:

4. Wash. C. C. 371.
5. Ibid.

> "A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State."

And Mr. Justice Bradley, dissenting, concurred with Mr. Justice Field and said:

> "In my judgment, it was the intention of the people of this country in adopting that amendment to provide national security against violation by the States of the fundamental rights of the citizens."

It would be difficult to exaggerate the importance of this decision. As Charles Warren points out,

> "Had the case been decided otherwise, the States would have largely lost their autonomy and become, as political entities, only of historical interest. If every civil right possessed by a citizen of a State was to receive the protection of the National Judiciary, and if every case involving such a right was to be subject to its reviews, the States would be placed in a hopelessly subordinate position . . . "[6]

Thus the court decided that the amendment in so far as it relates to privileges and immunities is confined in its operation to the privileges of National citizenship. In this regard the clause is simply declaratory of the pre-existing law. As one distinguished writer shows very clearly,

> "The clause is only declaratory of antecedent law. We may say that the provision emphasizes the pre-existing law, imbedding it in the Constitution forever, not leaving it to mere implication and court decision."[7]

This conclusion appears sound. Certainly before the amendment was adopted the Federal Government, by implication, possessed the power to protect its citizens in the free exercise of the privileges of their national citizenship. Such power is an essential attribute of sovereignty and indeed was exercised by the court in the early case of *Crandall vs. Nevada.*[8]

In analyzing the slaughter-house decision, it is apparent that three rules were followed by the court. First, the 14th Amendment defends national citizenship against abridgment by the states, but it does not assume the defense of those privileges incident to state citizenship. Secondly, the 14th Amendment does not protect the privileges and immunities of citizens of the United States against the assault of the national government. Thirdly, and of more importance to us because of the subject of this paper, the court will treat each case as it arises in order to determine whether any privilege of national citizenship has been abridged rather than declare and enumerate the privileges and immunities.

The court was wise in refusing to set out all the privileges incident to national citizenship in the Slaughter-House Cases. And it has been wise in consistently persisting in its refusal in all the subsequent cases. Since new privileges of national citizenship may arise from new legislation, provided of course that such legislation be within the scope of congressional

6. Charles Warren, "The Supreme Court in United States History."
7. Henry Brannon, "The Fourteenth Amendment," page 62.
8. 6 Wall. 35.

authority, it would be futile, as well as extremely dangerous, to give an inflexible definition of privileges and immunities. And such has been the view taken by the Supreme Court from 1873 to the present time.

In the years which intervened between the *Slaughter-House Cases*[9] and the *Colgate vs. Harvey Case*,[10] forty-four cases were carried to the Supreme Court in which state statutues were assailed as infringements of the privileges and immunities clause. In no one of these was the contention sustained. But in these numerous cases the court expressed its views as to what some of the privileges are.

The privileges of citizenship include the right with others to assemble peaceably and petition the government for a redress of grievances; to share its offices, to engage in administering its functions;[11] to use the navigable waters of the United States;[12] to enter the public lands of the United States;[13] to demand the protection of the federal government on the high seas;[14] or while subject to some federal agency at home;[15] the right to pass into another state;[16] the right to acquire and hold property of every kind;[17] to protect and defend the same in law;[18] the right to follow any of the ordinary callings of life.[19]

On the other hand, the court decided in the case of *Maxwell vs. Dow*,[20] that the adoption of the 14th Amendment has not had the effect of making all the provisions contained in the first ten amendments operative in state courts, on the ground that the fundamental rights protected by those amendments are, by virtue of the 14th Amendment, to be regarded as privileges or immunities of citizens of the United States.

And in the case of *Bradwell vs. Illinois*,[21] the court held that the right to practice law is not an incident of national citizenship; in *Minor vs. Happersett*,[22] the right of suffrage was held not to be a privilege of national citizenship.

As stated at the outset, there was little doubt as to what came within the purview of the clause in question until 1935. In December of that

9. Supra note 3.
10. Supra note 1
11. Supra note 8.
12. Supra note 3.
13. United States vs. Waddell, 28 L. Ed. 394.
    Twining vs. New Jersey, 53 L. Ed. 97.
14. Supra note 3.
    Blake vs. McClung, 43 L. Ed. 432.
15. Supra note 13.
    Logan vs. United States, 36 L. Ed. 429.
16. Supra note 14.
    Ward vs. Maryland, 20 L. Ed. 449.
17. Ibid.
18. Bussell vs. Gill, 58 Wash. 468, 108 Pac. 1080.
19. Butchers' Union Slaughter-House Co. vs. Crescent City Live Stock Landing Co., 28 L. Ed. 585.
20. 44 L. Ed. 597.
21. 21 L. Ed. 442.
22. L. Ed. 627.

year a divided court put an end to this feeling of security when it handed down the decision in the case of *Colgate vs. Harvey*.[23]

The case was carried up on appeal from the Supreme Court of Vermont in order to test the constitutionality of the Vermont Income Tax Law, which provided, *inter alia*, for the exemption from taxation of the interest received on account of money loaned *within the state* at a rate of interest not exceeding five (5%) per cent per auunm, evidenced by a promissory note, mortgage, or bond for a deed bearing a like rate of interest. Certain other provisions of the law were also contested but do not bear on the question here.

The court, speaking through Mr. Justice Sutherland, said:

> "But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and quite apart from the equal protection of the law clause, the suggestion is effectively met and evercome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. . .
>
> "No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. This fact is obvious and vital and no elaboration is required to establish it . . .
>
> "The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, *albeit he is at the same time a resident of the state which undertakes to do so*. . .
>
> "Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it."

Mr. Justice Southerland continues:

> "The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship . . .
>
> "The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that Article so as to also safeguard citizens of the United States *against any legislation of their own states having the effect of denying equality of treatment in re-*

23. Supra note 1.

spect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizens and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost-forgotten clause of the Constitution."

Mr. Justice Sutherland concludes by saying:

"It reasonably is not open to doubt that the discriminatory tax here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with reference thereto in any part of the United States."

The minority, speaking through Mr. Justice Stone, scathingly denounced the reasoning of the majority and deprecated the basis upon which the latter rested their decision. The minority relied on the *Slaughter-House Cases*[24] and were content to maintain the settled policy regarding this impotent clause of the 14th Amendment until now.

In view of the unprecedented departure from the long line of harmonious cases on the subject, it is well to note the varied reactions in the leading legal periodicals. Needless to say, they are in hopeless conflict as to what they think the court will do in the future.

The writer of the notes on *Colgate vs. Harvey*[25] for the *Yale Law Journal* (45 Yale Law Journal 926) has this to say of the decision:

"In the principal case there is an implication that no state may make any discriminations whatsoever against loan contracts formed in other states by its residents, because the making of such loans is a privilege somehow accorded to each citizen by the Constitution . . . However, the court in the principal case might have meant simply that the attempted classification unlawfully denied plaintiff the equal protection of the laws and only as a result abridged his privileges and immunities. . . It might be said, therefore, that the principal case turned solely upon the lawfulness of the classification and that the discussion of privileges and immunities, consequently, was merely surplusage. It is to be hoped that the court will either adopt this restrictive interpretation of the principal case or introduce into its novel doctrine of a separate protection for privileges and immunities of federal citizenship a qualification of 'reasonableness,' to mitigate its present apparent absolution, thereby leaving the states in possession of at least their present power reasonably to subject individual rights to legislation having for its end the promotion of the public interest."

The Harvard Law Review, Vol. 49, p. 935, says:

"By a broad interpretation of the due process and equal protection clauses, the court has secured against arbitrary state action many of the 'fundamental rights' which were intended to be protected, but which were in fact denied protection, as privi-

24. Supra note 3.

25. Supra note 1.

leges or immunities. Consequently, if *Colgate vs. Harvey* presages any expansive development of the forgotten clause, it would be along lines analogous to those of the commerce clause and tending towards the further removal of barriers to interstate activity."

The *Illinois Law Review,* Vol. 30, p. 953, takes the view that,

"It would seem that the discussion of the privileges and immunities clause did not, as the dissent suggests, merely develop a support for the equal protection argument. It seems probable that the court has here adopted a theory which it previously rejected, viz, that the privileges and immunities clause of the 14th Amendment imposes a substantial limitation on state powers separate and distinct from the equal protection and other clauses of the Constitution."

And S. J. Stern, Jr., writing in the *North Carolina Law Review,* 14 N. C. Law Review 282, concludes a very able article on the *Colgate Case*[26] as follows:

"The rule of the instant case, no abridged statute having been set forth, seems extremely undesirable, for as pointed out by Mr. Justice Stone in his able minority opinion, ' . . . the clause becomes an inexhaustible source of immunities, incalculable in their benefit to taxpayers and in their harm to local government, by imposing on the states the heavy burden of an exact equality of taxation wherever transactions across state lines may be involved.' "

And the *Columbia Law Review,* Vol. 36, p. 669, says:

"Now the court has builded this freedom of physical transit which envelops *interstate commerce transactions* into a freedom to disregard state lines in carrying on business, which may invelop all interstate transactions . . . Though the clause will probably be used only against discriminatory legislation, the protection afforded citizens of the legislating state seems more substantial than that of equal protection clause . . . The logical implication, that no such discrimination can be valid, seems an unlikely rule of rigorous equality . . . . But where the line of permissible discrimination would be drawn is in no way suggested by the instant opinion. The decision is an unfortunate introduction to a new area of constitutional uncertainty, in which the judiciary may romp between the lines of inclusion and exclusion."

As to what course the Supreme Court will follow no one can predict safely. The conduct of the court in the past does not encourage one to make dogmatic predictions. It is significant, however, that the 14th Amendment was drafted during the flood-tide of nationalistic fervor, that it was first interpreted in the ebb tide of that feeling, and that the nationalistic tendencies of the present day are making their impressions on the Supreme Court. The true answer probably lies in the state of public opinion existing at the time when the court is again called upon to interpret the once forgotten clause of the 14th Amendment.

26. Supra note 1.

Simmel Vs. Wilson (121 S. C. 358; 113 S. E. 487)

A DISCUSSION

BY N. L. BARNWELL, '38

In October, 1918, plaintiff, a California shipper, who had had neither prior knowledge of nor prior dealings with denfendant, sold to defendant "Wilson & Wilson, H. G. Wilson" of Charleston, S. C., a shipment of tomatoes, draft attached. H. G. Wilson was unable to meet the draft, and the shipment was sold at a loss. To recover, plaintiff brought action against H. G. Wilson, joining H. W. Wilson as a partner and alleging that he was a member of the firm of Wilson & Wilson. H. W. Wilson had in fact withdrawn from the firm more than a year previously. The only notice given of his withdrawal, however, was given to Mercantile Agencies and to the Bank of Charleston. Plaintiff knew nothing of this.

In the lower court the judge directed a verdict in plaintiff's favor, holding H. W. Wilson liable on the ground that where a partnership had admittedly been in existence a retiring partner must give public notice of his withdrawal in order to escape liability for debts subsequently contracted. On appeal, the decision was reversed, the Supreme Court of the State holding that plaintiff was not entitled to notice, since he had not relied on H. W. Wilson being a member of the firm when he shipped goods to defendant. *Simmel vs. Wilson,* 121 S. C. 358.

Three rules are given by the Supreme Court as to who has the right "to invoke the benefit of the doctrine of notice of dissolution." These rules are:

I. "Prior dealers" that is, those who have extended credit to the firm, are entitled to *actual* notice.

II. Those who have not extended credit to the firm, but who have had prior knowledge of the firm's existence, are entitled to know as much about the firm's dissolution as they knew of its existence. To this class publication in the newspaper is considered adequate notice, although "it is not an absolute infexible rule that there must be publication in a newspaper to protect a retiring partner. Notice of the dissolution in any other public or notorious manner is proper to be considered on the question of notice." (23 L. Ed. 851, Syllabus).

III. Those who have had no prior dealings with nor prior knowldege of the firm are entitled to no notice of its dissolution.

Rule I is based on estoppel. To illustrate: If A withdraws from the firm of A & B, and prior dealers with the firm do not receive actual notice of his withdrawal, but continues to credit the firm, still believing the firm consists of A & B, then A is estopped to deny his liability as a partner. For the prior dealers or creditors have acted to their detriment relying on a state of facts which A, through previous continued dealings, had led them to believe was true. *Price vs. Middleton,* 73 S. C. 110. Prior dealers are entitled to actual notice, for since they extended credit to the firm, they are presumed to know who are the members of the firm and therefore "they are entitled to act upon that knowledge until they have

been informed that the partnership no longer exists." It follows, therefore, that to prior dealers newspaper advertisements of dissolution are not in themselves notices. *White vs. Murphy* (3 Rich. 369) and this is true even though the prior dealer was a subscriber to the paper where he had no actual notice. *Tollar vs. Jarvin*, 47 N. H. 324.

Rule II is also based on estoppel. But persons who have merely had prior knowledge of a firm are presumed to rely to a lesser degree on the membership of the firm than are those who have been actual creditors of the firm. Besides it would be manifestly impossible to give actual notice of dissolution to everyone who had prior knowledge of the firm.

No estoppel exists in regard to Rule III. For "a person who did not know of the existence of a partnership cannot, after it has been dissolved, say that he relied on its continuing to exist, or that he was induced by that unknown existence to give credit." Judge Freeman in note to *Prentiss vs. Sinclair*, 5 Vt. 149, in 26 Am. Dec. at page 291.

Other jurisdictions have generally followed these rules.

In Utah, where a partnership incorporated, and the original partners sought to escape liability as partners, it was held that the burden was upon them to show that they gave actual notice of this incorporation to persons who had dealt with them. *Ogden Packing & Provision Co., vs. Wyatt*, 59 Utah 481; 204 P. 978.

Likewise, in Virginia, actual notice of a partner's withdrawal must be brought home to a prior creditor, who continues his dealing with the firm, in order to relieve the retiring partner from continued liability for firm debts. *Wood vs. Jefferies*, 117 Va. 193.

So in Illinois, where partners withdraw from a firm which continued in business, it was held that in order to escape liability for future debts of the firm, actual notice of their withdrawal must have been given to prior dealers with the old firm. Mailing a notice of withdrawal, though strongly evidential did not in itself constitute actual notice. *Meyer et al. vs. Krahn et al.*, 2 N. E. 495.

Where notice of a firm's dissolution had been given to a traveling salesman of a creditor company, and it was the salesman's duty to report such information to his principal, it was held that notice was imputed to the company and the retiring partner was relieved from further firm liability. *Jenkins Bros. Shoe Co. vs. Renfrow*, 131 N. C. 323; *Hurst Bollin Co. vs. Jones* 152 Tenn. 535.

In *Askew vs. Silman*, 95 Ga. 678, was held that one who had not extended credit to the firm, but had merely bought goods from the firm, was not entitled to actual, personal notice of the firm's dissolution. A customer of this kind was due only general notice. In the language of the court. "In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known to creditors and to the world" (Codes 1895); but it is not necessary that the notice should be actual or personal except to creditors."

In Massachusetts, as in the principal case where the creditor never knew of the firm's existence, nor had ever had prior dealings with it, a former partner was not required to avoid liability, to give notice, of any sort of the firm's dissolution. *Purtin Trust Co. vs. Coffey*, 62 N. E. 970.

Power of State to Tax Intangibles

BY BILLY COLEMAN, '38, AND ELDRIDGE BASKIN, '38

The doctrine, that the due process clause of the Fourteenth Amendment imposes important limitations on the states in the problem of the states to tax, is now too firmly established to encourage any hope of its abandonment within any reasonable future period. Recent decisions of the Supreme Court of the United States have raised the question of how far the earlier decisions may still be accepted by the states as safe guides by which to steer their tax courses in dealing with intangible property. The difficulty confronting the states has arisen from the frank repudiation by some of those decisions of principles that for years passed as law. The scope of the changes wrought in the law as to a state's power to subject intangibles to various kinds of taxes by the series of recent decisions depends on their implications which in turn are closely tied up with their reasoning. They all involved inheritance taxes, imposed by states other than that of the decedent's domicile.

The sole basis for the tax in the *Farmers Loan and Trust Company vs. Minnesota* case, 74 Law Ed. 371, and the *Beidler vs. South Carolina Tax Commission* case, 282 U. S. 1, (both 1930 decisions) was the domicile of the debtor in the taxing state; while in *Baldwin vs. Missouri*, 74 Law Ed. 1056, the claim was based on the presence for safe keeping, within the state, of the securities. The *Farmers Loan* case was the first to definitely and explicitly break with the law as theretofore established in *Blackstone vs. Miller*, 47 Law Ed. 439, decided in 1903.

Blackstone vs. Miller was authority for the doctrine that a state did not violate the due process clause of the Constitution in imposing a tax on the transfer of intangible property owned by a non-resident. In that case the testator died domiciled in Illinois but leaving a deposit in a New York bank. Illinois taxed the transfer of the deposit along with other personal property. The attempt of New York to collect the transfer tax was objected to as violating the fourteenth amendment. Judge Holmes, however, based his decision in favor of New York's right to tax upon the theory of the debt. For the owner of debt to collect he must resort to New York law. Holmes stated that no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that by the law of the domicile, the chattel is taken into account again in the succession tax there. In other words, the tangible property might be taxed by two states. These inconsistencies infringe no rule of Constitutional law. Judge Holmes said practicable similarity had more or less obliterated the legal difference, for taxing purposes, on money in a bank and coin in the pocket.

Holmes insisted that power over the person of the debtor confers jurisdiction. He perceived no better reason for denying the right of New York to impose a succession tax on debts owned by its citizens than upon tangible chattels from within the state at the time of the death. Holmes distinguished the case of *State Tax on Foreign Held Bonds*, 15 Wall. 300, on

grounds that negotiable paper was involved there, the theory being, that such paper is more than mere evidence of the debt—it is inseparable from the debt itself.

In 1914 *Wheeler vs. Sohmer*, 58 Law Ed. 1030, construed due process to permit a state to levy an inheritance tax on the transfer of notes owned by a non-resident but kept within the state for safe keeping, even when the debtors were non-residents, and no property within the state was mortgaged to secure the notes. The principal reason urged in support of this conclusion was that the convenience and understanding of business men, which had made of bonds the debt itself, extended to bills and notes, and that, therefore, the credits could be deemed to have a situs where their tangible evidences were kept. There was no doubt but that the state in which credits had a business situs could impose an inheritance tax on their transfer on that basis alone as decided in *New Orleans vs. Stempel*, 44 Law Edition 174, an 1899 case.

There were therefore four distinct jurisdictions that had a constitutional power to subject the transfer of credits and bonds to inheritance taxes at the time the court decided the *Farmers Loan* case. These jurisdictions were (1) the domicile of the owner; (2) the debtor's domicile; (3) place where the instruments were physically present; and (4) the jurisdiction where the owner had caused them to become integral parts of a localized business. If each state could adopt any one of these and tax accordingly, obviously the same bonds might be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggested a wrong premise.

In the *Farmers Loan* case Minnesota attempted to assess an inheritance tax upon the transfer of the state bonds kept in New York and owned by a domiciled resident of New York. When this case first came before the state Supreme court of Minnesota, it held negotiable public obligations were something more than mere evidence of debt and, like intangibles, taxable only at the place where found, regardless of the owner's domicile. The court accordingly denied the right of the state to tax the testamentary transfer thereof. However, upon rehearing, considering the cause along with *Blackstone vs. Miller*, it felt obliged to treat the bonds like ordinary choses in action and to uphold the assessment, because the obligations were debts of Minnesota, subject to her control, because her laws gave them validity, protected them and provided means for enforcement of payment. Accordingly the Supreme Court of Minnesota decided that the bonds had situs for taxation purposes in that state.

The United States Supreme Court reversed the Minnesota court and "to prevent misunderstanding" it definitely overruled *Blackstone vs. Miller* and the doctrine that ordinary choses in actions are subject to taxation both at the debtor's domicile and also at the creditor's domicile. In the court's opinion the inevitable tendency of the doctrine of *Blackstone vs. Miller* would be to disturb the good relations between states and to produce the kind of discontent expected to subside after establishment of the Union. In Justice McReynold's words, "the practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. Having reconsidered the

supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. In this court the present approved doctrine is that no state may tax anything not within her jurisdiction without violating the fourteenth amendment. No state can tax the testamentary transfer of property over and beyond her power. Nor is it permissible broadly to say that notwithstanding the fourteenth amendment two states have power to tax the same personalty on different and inconsistent principles, or that a state always may tax accordingly to the fiction that, in successions after deaths moveables follow the person."

Southern Pacific Company vs. Kentucky, 56 Law Edition 96, indicates that the right of one state to tax may depend somewhat upon the power of another so to do. *Coe vs. Errol*, 29 Law Edition 715, though frequently cited to support the general affirmation that nothing in the fourteenth amendment prohibits double taxation, does not go so far. It merely affirmed the proposition that the mere fact of taxation of tangibles by one state is not enough to exclude the right of another to tax them.

Tangibles with permanent situs and their testamentary transfer may be taxed only by the state where they are found. And by the *Farmers Loan* case debts, while having no actual territorial situs, may be properly treated as localized at the creditor's domicile for taxation purposes by that state only. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against unjust and oppressive taxation is a matter of the greatest moment. Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding so far as possible, unjust and oppressive consequences.

The *State Tax on Foreign Held Bonds* case, 21 Law Edition, 179, held that the state was without power to tax the owner of bonds of a domestic railroad corporation, the contracts being made and payable outside her limits when issued to and held by citizens and residents of another state. In Justice Field's words in that opinion, "their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no member of authorities, and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement."

Neither the *New Orleans vs. Stempel* case, cited above, nor the *Farmers Loan* case decided whether or not the state of the owner's domicile could tax choses in action which had become integral parts of some local business in another state. However, the Stempel case did decide that in such a situation the state in which the business was located could tax. There was no evidence in the Farmers Loan case that the bonds in question had become integral parts of a local business and, furthermore, they were located at the domicile of the owner. Therefore, that problem of double taxation was not decided.

The emphasis in Justice Holmes' dissent in the *Farmers Loan* case was on the fact that the laws of Minnesota were necessary to the continued existence of the obligation so that its help was necessary to acquire a right,

and that it could demand a quid pro quo therefor. The affirmative argument in his dissent in the *Baldwin* case was predicated on the protection that the assets in question received from Missouri although it repeated the theory that the due process clause does not permit the court to interpose to prevent multi-state taxation. These last considerations would have more force if the doubts as to the relevance of the due process clause originally expressed by Mr. Justice Holmes in the *Union Transit* case, 50 Law Edition 150, (1905) had not been dissolved against his view by a long series of subsequent decisions. Once that had happened, the issue was no longer as to its relevance but became that of the extent of the limitations imposed on the states by its vague provisions.

The position, however, that Minnesota should have been allowed to tax because the obligation owed its continued existence to its laws seems adequately answered by the theory of Mr. Justice Stone, that once it had passed out of that state, the laws of Minnesota did not protect it and the state could not withhold the power of transfer or perscribe its terms.

Efforts to reduce this evil of four jurisdictions to tax by deducing from the due process clause a prohibition against inheritance taxation by the state of the decendent's domicile when the bonds were permanently kept for safekeeping outside of it, based on the theory that such bonds were tangibles and within the protection of *Frick vs. Pennsylvania*, 69 Law Edition 1058 (1925) were defeated not long before the *Farmers Loan* case. The Frick case held that Pennsylvania could not tax the testamentary transfer of *tangibles*, personalty permanently located in New York, known as the famous Frick collection of art treasures valued at $13,000,000. It was this startling possibility that suggested to the Supreme Court that the law on this matter had developed from an incorrect premise. It is this new premise that must be sought in recent decisions.

The broadest deductible premise from the *Farmers Loan* case is that due process prohibits multi-state taxation of intangibles to the same extent that it prevents multi-state taxation of tangible personalty. The narrowest premise derivable from this opinion is that due process prevents the state of the debtor's domicile from subjecting the transfer of bonds to an inheritance tax merely on that basis. That the premise intended was broader than that last suggested is clear from the subsequent decisions which have extended immunity from inheritance taxation predicated on the sole basis of power over the debtor, to ordinary open accounts and to bank accounts and ordinary notes whether or not secured by property in the taxing states, as decided in the *Beidler* and *Baldwin* cases (cited above).

In the *Beidler* case the State Supreme court of South Carolina allowed the tax commission to levy a tax upon the transfer of an open unsecured account owned by the Santee-Cooper Cypress Lumber Company to Francis Beidler, testator, a resident of Illinois. The United States Supreme court reversed the South Carolina court on the ground that it constituted a violation of due process clause of the fourteenth amendment, thereby placing open accounts within the principle of the *Farmers Loan* case. No evidence was shown to support the contention that the debt had acquired a business situs in South Carolina. However, upon that theory no doubt, the executors did voluntarily pay the succession tax to the state of South Carolina with

respect to 8,000 shares of capital stock owned by testator in the lumber company.

In the *Baldwin* case the United States Supreme court brought bank deposits and United States bonds within the protection of *Farmers Loan* case and due process clause of fourteenth amendment and denied the state of Missouri the right to tax the same though they were physically present within that state. The bonds and notes although physically within Missouri were choses in action with situs at domicile of the creditors. At that point they passed from the dead to the living and there the transfer was actually taxed. As they were not within Missouri for taxation purposes the transfers were not subject to her powers.

It has been suggested that should the state of the domicile be unable to enforce collection of the tax laid by upon the transfer, then in practice all taxation thereon might be evaded, the inference being that double taxation—by two states on the same transfer—should be sustained in order to prevent escape from liability in exceptional cases. The Supreme court said, "We cannot assent. Rights guaranteed by the Federal Constitution are not to be so lightly treated. They are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

It is not enough to show that the written or printed evidence of ownership may, by the law of the state in which they are physically present, be permitted to be taken into execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds are often so treated they are nevertheless in their essence only evidences of debt. Whatever incidental qualities may be added by uses of business or by statutory provisions, this characteristic remains and proves itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself.

Ordinarily bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes whether secured by liens or real estate or otherwise. The mortgage is but a security for the debt and as held in *State Tax on Foreign Held Bonds*, the right of the creditors to proceed against the property mortgaged, upon a given contingency and to enforce by its sale the payment of its demand has no locality independent of the party in whom it resides.

Justice Stone in his opinion in the Baldwin case argued that the overruling of one conclusion in *Blackstone vs. Miller* should not be deemed to carry with its cases upholding a tax measured by a non-resident's bonds and notes located within the taxing state, and cases upholding a tax measured by a nonresident's notes, secured by mortgages on lands within the taxing state, and those cases upholding a tax upon intangibles having a business situs within the taxing states, but owned by non-resident. But it is a practical consideration of some moment that taxation becomes exceedingly difficult if the securities of a non-resident may not be taxed where located, and where the courts are not open to the tax gatherers of the domicile.

Justice Holmes in his dissent in the *Baldwin* case states, "Although this decision hardly can be called a surprise after the Farmers Loan case, I

have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the fourteenth amendment in cutting down what I believe to be the Constitutional rights of the states. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the amendment was intended to give us 'carte blanche' to embody our economic or moral belief in its prohibitions. Yet I can think of no narrower reasons that seem to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the states, and should be slow to construe the clause in the fourteenth amendment or committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the states may pass. It seems to me to be exceeding our powers to declare such a tax a denial of due process of law.

"And what are the grounds? Simply, so far as I can see, that it is disagreeable to a bond owner to be taxed in two places. Very probably it might be good policy to restrict taxation to a single place and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among states, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition, and authority have united to declare the right of the state to levy the now prohibited tax."

In connection with the problem of the inheritance tax voluntarily paid on shares of stock in the *Beidler vs. South Carolina Tax Commission* case, the article by Arthur L. Harding published in January, 1937 (25 California Law Review) is interesting. Applying decided cases he laid down the following rules:

(1) The state of incorporation as such may levy neither an ad valorem nor an inheritance tax upon shares of stock owned by a non-resident (citing *First National Bank vs. Maine*, 76 L. E. 321). Such a tax may only be applied as the result of some contractual relation with the state.

(2) Ad valorem or inheritance taxes cannot be levied by a state upon the non-resident owner of shares of stock in a foreign corporation merely because the corporation owns property or has a place of business within the state, or

(3) because the physical evidence of the stockholder's interest is found within the state (citing the *Baldwin* case).

(4) Such shares may acquire a business situs.

(5) The domicile of the owner may tax unless a business situs elsewhere has been acquired.

(6) The state of incorporation as such may levy a simple excise or stamp tax such as the conventional transfer tax upon each change of ownership of such shares.

(7) Stock transfer tax may be levied by a state other than the state of incorporation where the actual act of the transfer of the stock occurs within its territorial limits.

In *First National Bank vs. Maine,* 76 L. Ed. 321 (1932 case) Justice Sutherland considered the attempt of Maine to tax the transfer by death of shares of stock of a Maine corporation owned by decedent, a resident of Massachusetts. Sutherland said ownership of shares by a stockholder and ownership of the capital by the corporation are not identical, the interest of the stockholder being an incorporeal property right which attached to the person of the owner in the state of his domicile, and the fact that the property of the corporation was situated in another state afforded no ground for the imposition by that state of a death tax upon the transfer of the stock.

Justice Sutherland stated: "We are unable to find in the further fact of incorporation under the laws of such state adequate reason for a different conclusion. Undoubtedly the state of incorporation may tax the transfer under the power generally to impose taxes of that character. But plainly such a tax is not a death duty which flows from the power to control the succession; it is a stock transfer tax which flows from the power of the state to control and condition the operations of the corporatins which it creates. Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile. We do not overlook the possibility that shares of stock as well as other intangibles may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property."

The execution of the tax was held not within the power of the state of Maine under the 14th Amendment.

The most recent case was the *First Bank Stock Corporation vs. Minnesota,* 81 L. E. 1061 (a 1937 case). The question involved was whether a Delaware corporation doing business in Minnesota could be required consistently with the due process clause of the Fourteenth Amendment to pay a property tax laid by Minnesota upon its shares of stock in Montana and North Dakota state banking corporations.

The Minnesota Supreme Court held that the Corporation had acquired a commercial domicile within the state, and as the shares were assets of the business carried on in Minnesota, they were rightly taxed there rather than in Montana or North Dakota. The corporation was qualified to do business in Minnesota. It maintained a business office there. Its meetings of stockholders and directors were held within the state. The stock certificates in question were kept in Minnesota, where the corporation received dividends and disbursed dividends upon its own stock.

The appellant corporation maintained a compensated service for the banks it controlled. It offered advice as to their accounting practices,

made recommendations concerning loans, commercial paper and interest rates, and made suggestions regarding their purchase and sale of securities. Thus the appellant corporation maintained within Minnesota an integrated business of protecting its investments in bank shares, and enchancing their value, by the active exercise of its power of control through stock ownership of its subsidiary banks.

The United States Supreme Court held that although the doctrine of business situs had usually been applied to obligations to pay money, it was equally applicable to shares of corporate stock which because of their use in a business of the owner could be treated as localized at the place of the business.

Justice Stone: "We do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax; nor need we inquire whether a non-resident shareholder by acquiring stock in local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere at their business situs. We leave those questions open. It is enough for present purposes that this court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicile of the owner. We cannot say that there is any want of due process in the taxation of the corporation's shares in Minnesota, irrespective of the extent and control over them which the due process clause may save to the states of incorporation.

With all the changes wrought in recent years in the law of taxation by the pivotal decisions of the United States Supreme Court the application of the ancient maxim, "moblia sequumtur personam," so far as intangible personal property is concerned, has not generally speaking been overturned. And in respect to that type of personal property it still may be said that it is subject to taxation at the domicile of the owner, the possible exception to this rule is in cases where such property may be said to have acquired a business situs elsewhere.

Biographical Sketches

Thomas Hardeman Spain

BY OSBORNE H. RHODES, '39

Thomas Hardeman Spain was born in the town of Sumter, S. C., on April 10th, 1857. He was the son of Albertus Chambers Spain and Sarah Hardeman Spain. His father was a leader among the lawyers of the South in his day, his last case being the one arising out of the famous Cash-Shannon duel. To this son there was given a heritage rich in the distinctions that had so characterized the father, a brilliant intellect so coupled with industry and integrity as to command the respect and admiration of all his fellow men.

Although born in Sumter, Thomas Spain moved with his parents a few years later to the town of Darlington, S. C. Here he entered and attended school throughout all the grades that were offered at that time in that locality. After acquiring all the graded and high school education that was available to him, Mr. Spain, a boy of some sixteen or seventeen years of age, accepted a job as a clerk in a local store of general merchandise. In the later years of his life he found great pleasure in telling of his many experiences as a clerk, especially of his dislike for dipping lard and pouring loose molasses into a gallon jug, as was the custom in that day.

During the time that Mr. Spain was clerking, he was also studying law at night in his father's law office. In his studies he was encouraged and greatly assisted by his father, who was an able instructor as well as a man well acquainted with the law.

After having been admitted to the South Carolina Bar in 1880, Mr. Spain continued his unceasing study of the law, a study that was never to end until the twilight days of his life approached.

Some few years later he became Probate Judge and Master of the County of Darlington. In this capacity he served for a period of twenty years and won the love and admiration of the Darlington Bar. As a result of his phenomenal memory, he acquired for himself, among his many friends, the title of the "Darlington Encyclopedia of Law." This ability to remember was to serve him well in his later life both as judge and teacher.

In the year 1906, at the age of fofty-nine, he was married to Miss May Sanders of Hagood, S. C. His marriage afforded him a great deal of pleasure and comfort throughout the duration of his life.

Thomas Spain was highly rewarded in the year 1912 for his many years of incessant study of the law. On January 12th of that year, he was elected Judge of the Fourth Judicial Circuit of South Carolina. His greatest service to his State was rendered during the six years that he presided on the bench.

He was intensely thorough in his search for information as to the

authorities applicable to any pending case before him. While holding court in Columbia, if a trial lasted beyond the noon recess of the Court, he could often be seen, after a hasty lunch, hurrying down to the Supreme Court library to obtain first hand sources from which to apply the proper rules of law to the facts developed during the trial of the case.

It has been said that Judge Spain began with the 33rd volume of the South Carolina Reports and read every case up to the current volume; then started with the 32nd volume and read back through the first.

As a judge the duties of his office were performed with that soundness of judgment and human understanding that he had acquired during his many years of affiliation with the legal profession. His absolute fairness and dignity on the bench were products of his early environments and training under his father. His unusual mind and many years of industrious study rendered him profound in his knowledge of the law. Throughout his six years as a judge, his primary interest was that justice be done and he never lost sight of the man at the bottom; he was intensly sympathetic toward the misfortunes of others.

In 1918 Judge Spain left the bench, a man worn in body and health, but not in mind. Unknown to him his years of service to the legal profession were not at an end. He retired to the City of Darlington and there practiced law at random as best his health would permit. He was affiliated during these few years of practice with Herbert Hennig, a much younger man than he.

The 1921-1922 session of the University of South Carolina Law School opened with the addition of Judge Spain as a member of the faculty. It was extremely fitting that he should climax his long service to the bar imparting to the young men of South Carolina the knowledge and experience he had acquired during his many years of hard labor spent with the law. His remarkable memory was of value to him in this endeavor for it is said that, from reading all the South Carolina Reports, he could cite in the classroom any important case, giving the names of the Judge presiding and the year in which the case was decided.

He was well aware of the many vicissitudes facing a young man in the practice of the law. Great profit was derived by students from his rich knowledge and conception of the profession. His warm friendliness and understanding of students' problems brought them to lay before him their difficulties, and well were they aware that in him they would find a competent instructor and an anxious advisor.

J. Nelson Frierson, Dean of the Law School, said that on one occasion, before Judge Spain came to the Law School, he was trying a case before him at Columbia when Mr. Spain motioned him to the bench and whispered to him, "You have the job I want, teaching those boys over there at the Law School."

It was only natural that he should win the devotion and confidence of the whole student body of the Law School as well as that of the faculty.

The Law School lost a great teacher and a true student when Judge Spain left, after three years' service, at the end of the session in 1924. His health had never been regained since he left the bench and he suffered severely from physical disability during the whole time he was at the Law School.

Although his mind was actively employed up to the very last and his interest in world affairs, as well as those relating to our state and nation, was ever keen and vivid, he retired from active affairs at the age of sixty-seven years. He lived the remainder of his life in modest seclusion in Columbia, S. C., where he died on September 12th, 1935.

In commenting on the death of Judge Spain, The State newspaper said in part, "In Judge Spain's death, South Carolina loses a man of upstanding qualities, an attorney learned in the law, whose services led him to the bench which he graced with poise and understanding, with those high principles and fidelity that have always characterized the South Carolina judiciary. He was a man of many friends."

Mr. J. E. Norment, one of Judge Spain's closest friends, wrote of him a short time after his death, "Of unusual modesty and striking personality, his dominating characteristic was love. His patriotism was born of love for home and country, loyal and true in all things, his fraternal spirit left nothing for his friends to question concerning their place in his affection. His love and faithfulness to truth and honesty, and his cordial principles of upright manliness formed the strong and abiding foundation upon which he stood four-square with no deviation. These outstanding attributes united in forming a rare character which was in all things of incorruptible integrity."

William Thomas Aycock

BY WILLIAM H. BLACKWELL, '39

William Thomas Aycock was born on February 24, 1868, at Rockingham, North Carolina, the son of James Henry and Henrietta Brogdon Aycock. His father was a native of North Carolina, and his mother of Clarendon County, South Carolina. While the early part of his youth was spent at the place of his birth, his family moved to Wedgefield, South Carolina, when he was about eleven years old, where his father had extensive planting interests. There young Aycock attended the primary schools. He was a student at Bingham Military School, graduating in the year 1886 with the rank of Cadet Captain, from whence he went to the South Carolina College, now the University of South Carolina, entering the sophomore class.

While at Carolina, his friends gave him a name which followed him throughout his life—that of "Large" Aycock. His younger brother was in school at the same time, and he being somewhat smaller in stature, was known, naturally enough, by the name of "Small." The late Professor Hodges believed that this appellation, "Large," was not inspired wholly by the bodily stature of Mr. Aycock, but that back of it lay a subconscious appreciation of the man's mind and soul, a recognition of the rare qualities which make one large in intellectual and spiritual stature as well.

At Carolina, he was a thoughtful and popular student, taking part in many of the various campus activities. That he was successful in these activities is shown by the fact that he was one of the commencement speakers, and was valedictorian of the Euphradian Literary Society.

He was awarded an A.B. degree in 1889, but did not immediately enter upon the study of law. He was later to turn to this, after a few years spent in merchandising and planting, in which he was engaged with his father and brothers. Upon deciding to study law, he entered the Law School of Columbia University. For three years, he devoted his attention to his studies there, and was rewarded in 1896 with the degree of LL.B. Thereupon, he returned to Columbia, South Carolina, and entered upon the practice of law. For several years, he practiced alone, but in 1900, he entered into partnership with Francis H. Weston, under the firm name of Weston & Aycock. This partnership continued until 1927, when it was dissolved in order that Mr. Aycock might be able to devote his full time to his duties in the Law School of the University of South Carolina. The firm enjoyed a varied and extensive practice, both in trial and appellate work. Twenty-seven years of successful practice, during which time the firm remained unchanged, speaks for itself.

Mr. Aycock's qualities of thoughtful reflection and thoroughness, his habit of analyzing and studying a problem completely, brought to him success in his chosen profession. He brought to the practice of law a deep and profound sense of the high ideals of the profession, and lived up to a realization of those ideals. He became an able and distinguished lawyer, a safe and wise counsellor.

Though interested, he was not especially active in politics, since the practice of law demanded most of his time and attention. In 1904, he served in the State Legislature as a member of the House. For several years, he was chairman of the Richland County Democratic Committee. As befitted a good citizen, he was keenly interested in the growth and welfare of his city, and served as a director of the Columbia Chamber of Commerce, and a member of the School Board.

In 1920, Mr. Aycock was elected to fill a vacancy on the faculty of the University of South Carolina Law School. There he became at once a popular professor, and came to be regarded as one of the best men on the faculty. Just as his skill and legal prowess in the courtroom gained for him the respect of his adversaries, so in the classroom his personal qualities gained the love and admiration of his students. Among themselves, they knew him affectionately as "Large" or "Big Boy".

He commanded the respect and attention of his students at all times. This was due to the high esteem in which they held him, for he was in no sense a disciplinarian. His classes were probably the most well ordered in the school. Thoroughness characterized his treatment of every subject, and he gave copious citations. Not only did he have a firm grasp of the fundamentals, but he had a clarity of thought and lucidness of expression that made it a pleasure to hear him. He was very tolerant of and patient with those whose capabilities would not measure up to those of himself. Of the several subjects which he taught, his favorite, and the one in which he was most proficient, was that of real estate law. This, of course, is one of the most difficult branches of the law, for it has been said that "upon no other branch of the law has so much patient thought and so much profound learning been expended."

His breadth of legal learning, augmented and rounded by many years of

successful practice, enabled him to impart to those under him an insight into the real meaning of the law as a practical science, rather than as a mere academic study.

The same kindly qualities which endeared him to his students earned for him the affection and esteem of his colleagues. They valued his wise counsel, his friendly encouragement and inspiration, and sought his opinion. He was "a wise counsellor and a trusted friend."

Besides his teaching, he continued to practice, associated with Mr. Weston. He appeared in many appellate causes during this time. Several times he sat as a special trial judge, displaying on these occasions his calm judicial temperament and wide knowledge of the law. In addition to this, and an even greater tribute to, and recognition of, his fitness, he sat by special appointment as acting Associate Justice of the Supreme Court of South Carolina for a time, and participated in several of that august body's decisions. With his well trained mind and his splendid legal equipment, he would have been an ornament to any judicial body.

As a lawyer, as a teacher, and as a judge, Mr. Aycock was characterized by a close and persistent study of the problem at hand, and a complete mastery of it. If any particular attribute might be said to be characteristic of him, it would be thoroughness. To him, if a thing was worth doing, it was worth doing well. Of his work as a teacher, it has been said that it was done "with all the perfection that could be achieved by high intelligence, a calm judicial temperament, relentless application, and that infinite capacity for taking pains which is sometimes called genius."

Although an active life of practicing left little time for literary pursuits, Mr. Aycock indulged his taste for literature on such occasions as were allowed to him. He was especially fond of history, being well read in that field. Always interested in current events, he kept himself well posted, and could always converse intelligently and informatively on current matters. He was a member of the Cosmos Club, and composed several papers of literary merit, which he read before the Club.

Mr. Aycock was married to Miss Mary MacDonald Stewart of Nashville, Tennessee, in 1906, and to them four children were born. The marriage was a happy one, and Mr. Aycock proved a devoted husband and a loving father.

In recognition of his scholarly attainments, he was made an honorary member of Phi Beta Kappa, when a chapter of this society was established at the University of South Carolina in 1926. He was also a member of Phi Delta Phi, legal fraternity, a Mason, and a member of the Knights of Pythias. He was an active and interested member of the Presbyterian Church; also an active member of the South Carolina State Bar Association, serving for several years as chairman of the Committee on Grievances, and also belonged to the American and Richland County Bar Associations.

On July 17, 1928, while making a business trip to a nearby town, the car in which he was riding was struck by a train near Stateburg. His brother-in-law, who was riding with him, was instantly killed, and Mr. Aycock received injuries which proved fatal, as two days later he passed away.

Advocate, legislator, judge, teacher, and citizen, he acquitted himself of each with distinction, and "enriched beyond his time the community that he graced."

A Biographical Sketch of Harry Nicholas Edmunds

BY JAMES D. GOOD, '38

Harry Nicholas Edmunds was born in Ridgeway, South Carolina, on January 25, 1876, the son of Robert Henry Edmunds and Mattie Peay Lamar. In December, 1879, Mr. and Mrs. Edmunds, with their three year old son, moved to Columbia. Harry Edmunds continued his residence in the capital city until September, 1928, when he moved to Athens, Georgia.

After attending the public schools in Columbia, young Edmunds entered the University of South Carolina in September, 1892, at the age of sixteen. In June, 1896, he received the degree of A. B., graduating at the head of his class. He thereafter entered the law school of the same institution and in June, 1898, received the degree of LL.B., *Summa Cum Laude.*

The brilliant young student entered the practice of law in the fall of 1898 in Columbia as a member of the firm of Logan and Edmunds. He was associated in this firm continuously until 1914, and after 1915 he practiced alone. The fledgling attorney was destined to rise rapidly to honor and responsibilities in his chosen profession. Four years after beginning practice, in 1902, he was selected as city attorney for Columbia and continued in this capacity until 1904. He was again chosen in 1911 and served through 1914.

During this period of general practice, Mr. Edmunds also interested himself in politics. From 1910 to 1914 he was chairman of the County Democratic Organization of Richland County. Later, he was Secretary of the South Carolina State Democratic Executive Committee. He occupied this important party position from 1918 until 1928, when his leaving the state necessitated his resignation.

In 1916, a notable honor was conferred on Mr. Edmunds when, by special appointment, he was named as Acting Associate Justice of the Supreme Court of South Carolina. This was only one way in which his associates showed their confidence in his knowledge of the law, and recognized his ability as a lawyer. He served as referee in bankruptcy for the Eastern District of South Carolina from 1918 to 1928.

During the fall of 1920, the Board of Trustees of the University of South Carolina requested the General Assembly to inaugurate a three year course in law with the addition of two professors. This was granted during the 1921 session.

The Honorable Thomas H. Spain of Darlington and Harry N. Edmunds, were elected to these new positions, thus bringing the faculty to a total of five men.

While on the faculty of the Law School, Professor Edmunds was extremely active. Besides continuing as Secretary of the State Democratic Executive Committee, and as referee in bankruptcy, he carried a full schedule of courses as a professor of law during the first term. He taught the first year class thier course in *Property I.* Also in the same term, he instructed the second year men in *International Law,* and conducted the course in *Corporations* and held *Practice Court* for the senior class. During

the second term of the school year, he held classes for the second year men in *Partnership* and *Practice and Procedure.* He instructed the seniors in *Bankruptcy* and *Municipal Corporations,* and again held *Practice Court.* Upon the death of E. Marion Rucker in 1926, Mr. Edmunds took over Professor Rucker's course in *Damages,* for the 1927-28 session.

Although so prominently and actively engaged in the teaching and practicing of law, and in the field of politics, Mr. Edmunds took a keen interest in sports, and especially in football, after his undergraduate days. In 1896, while still in Law School, he arranged the first meeting between the football teams of Carolina and Clemson. Moreover, he was responsible, as much as any other one man, for transforming the Carolina-Clemson football game from just another game to the classic it is now. For many years after the start of this rivalry, he served on the Carolina-Clemson committee in charge of the fair week game.

Mr. Edmunds also was a leader in the formation of the Southern Conference and for several years served as vice-president and chairman of the executive committee. A famous Southern sports writer and columnist, commenting on Mr. Edmunds's death, wrote, "Sportsdom has indeed lost an ardent devotee in Harry Edmunds."

In 1928, Mr. Edmunds was again to be signally honored. In the fall of that year he was called to the University of Georgia as Dean of the Lumpkin School of Law. During that year, however, he retained his connection as professor of law at the University of South Carolina. In the fall of 1929, he took over his duties as full time Dean. Two years later, on June 20, 1931, Mr. Edmunds was married to Miss Elma Pitts Marks of Columbia.

Under his direction, the School of Law at the University of Georgia was completely reorganized. The case system of instruction was introduced, and there were several changes made in the faculty. As a result of his ceaseless efforts, the Law School was placed on the list of approved schools by the Board of Regents of New York, and the work that was done in the school was approved by the Section of Legal Education of the American Bar Association. In December, 1931, the school was admitted to membership in the Association of American Law Schools.

When Dean Edmunds went to the University of Georgia, the quarters of the Law School were inadequate. Under his leadership the alumni of the school subscribed funds and erected a modern law school building at a cost of $150,000. Dean Edmunds was chosen chairman of the building committee.

While serving as Dean of the Georgia school, Mr. Edmunds was responsible for bringing J. Alton Hosch, present Dean of the Georgia Law School, to the University. In a letter concerning Dean Edmunds, Dean Hosch wrote that he could not "close this letter without letting you know the deep affection I had for Mr. Edmunds." He also brought to the Law School, Dr. Harmon W. Caldwell, who is now President of the University.

Dean Edmunds was never strong, and due to his untiring efforts in behalf of the school his health gave way, and he felt it necessary to resign as Dean of the School in December, 1932, whereupon he and Mrs. Edmunds left Athens and returned to Columbia.

When his health apparently improved, he accepted a position as attorney

with Home Owners' Loan Corporation. Although a recurrence of his heart trouble had incapacitated him, he held this position at the time of death, which came on October 2, 1934, after an illness of nearly twelve weeks. He was survived by his widow, Mrs Edmunds, one half-brother, Pierre Edmunds of Columbia, and four aunts, Mrs. J. Wilson Gibbes, Miss Ella Lamar, and Mrs. L. T. Wilds, all of Columbia, and Mrs. W. M. Moore of Spartanburg. Following the funeral services at his residence, he was laid to rest in the First Presbyterian churchyard.

Dean Edmunds held membership in Phi Beta Kappa, scholarship fraternity; Phi Kappa Phi, scholarship fraternity; Sigma Alpha Epsilon, social fraternity; Omicron Delta Kappa, honorary fraternity; Phi Delta Phi, legal fraternity; Blue Key, leadership fraternity; also he was a member of the Gridiron Club and The Sphinx Club of the University of Georgia. He was a member of the American, South Carolina and Georgia Bar Associations. He was a devoted member and deacon of the First Presbyterian Church of Columbia.

Hughes Spalding, presiding at the dedication of Harold Hirsh Hall and Alexander Campbell King Memorial Library, on October 29, 1932, told of the diligent efforts made by Dean Edmunds for the up-building of the Lumpkin Law School. In speaking of Dean Edmunds, Mr. Spalding said, "In his efficient and thorough way he has builded from the ground up and has made all of us proud of him and of our Law School."

Elbert Marion Rucker

BY HARPER WELBORN, '38

Elbert Marion Rucker was born in Anderson, South Carolina, March 15, 1866, of distinguished parentage. He died August 16, 1926, after sixteen years of devoted and outstanding service in the Law School of the University of South Carolina. His father, Elbert M. Rucker, was a Georgian, a lawyer of ability, whose family had long been identified with the bench and bar; one of them, the late Joseph Rucker Lamar, being a Justice of the Supreme Court of the United States.

Mr. Rucker's mother was Sarah Frances Whitner of the famous family of that name. His maternal grandfather, Joseph N. Whitner, was a great equity Judge in South Carolina.

For three generations the Whitners have been students at South Carolina College and the University, and when Professor Rucker was elected a charter member of Phi Beta Kappa, the secretary of the national organization noted that over one hundred years ago a Whitner had joined in the application for the establishment of the order at this University.

As a boy, Mr. Rucker went to school in Anderson and later was graduated from Adger College, located at Walhalla, South Carolina. After finishing Adger College he went on to the University of South Carolina where he received both the academic and law degrees. Leaving the University in 1887, Mr. Rucker practiced law at the Anderson bar for thirteen years with the exception of four years, from 1893 to 1897, during which time he went to Washington as Assistant United States Attorney for the Department of Interior, an experience which was obviously of great value in after years, instilling catholicity of belief and broadened vision.

In 1900 Mr. Rucker was elected to the General Assembly from Anderson County and served as Representative until he came to the University in 1910 as Professor of Law. In the Legislature he was a prominent figure and of commanding influence, as shown by his appointment as chairman of the powerful Ways and Means Committee. During his stay in the Legislaure, among other things, he was largely responsible for the abolition of the state dispensary system.

In 1910 Mr. Rucker accepted the position of Professor of Law at the University and in accepting the professorship gave up entirely his private practice that he might devote his full time to teaching. In the lecture room and on the campus his influence among the students was great and none was superior in furthering their activities. He was for many years an enthusiastic member of the Athletic Advisory Board, and was Chairman of the Debating Council and of the Social Cabinet.

"But perhaps," Dr. Yates Snowden tells us, "it is as the 'friend in need' that he will be longest remembered, and there are doubtless many beneficiaries of his bounty, his judicial council, his tender chiding who will for years to come yearn for "the touch of a vanished hand and the sound of a voice that is still."

"For the momentary failing, the thoughtless lapse, the 'first grace' no

Roman priest could have been more sympathetic or forgiving; but woe to the miscreant who expected Marion Rucker to condone any essentially base or wicked act. The Professor's usual judicial imparitality and mental equipoise disappeared, and the culprit student was excoriated; for the beloved teacher had never cultivated the fine art of oscilliating between moderate commendation and parenthetical damnation."

E. Marion Rucker was a graceful and eloquent speaker. He had perfect command of himself, and, almost invariably, of his audience, and when treating some subject dear to his heart, his passionate eloquence would be greeted with rounds of applause not only in the college chapel, or Clariosophic Society, but in the House of Representatives, in the Redpath Chautauqua tents of the middle West, and more than a hundred times during the World War, when he rendered invaluable service to the Red Cross, Liberty Loan and other great movements of the day.

His rank as a laywer was attested by several calls to sit as Special Associate Justice of the Supreme Court of the State. He was also a noted lecturer and at various times delivered a special series of lectures at the summer schools of the Universities of Georgia, Miami, Kentucky, Cincinnati, North Carolina, and South Carolina.

His family life was a happy one. In 1886, before graduating from Law School, he married Miss Susan Elizabeth Kinard, of Columbia, who died in 1913. Of this marriage were born the following children: Elizabeth (Mrs. George Rainsford), and Frances Louise (Mrs. William Webster Moore). On August 26, 1915, Professor Rucker married Miss Mary Mitchell Martin, of Florence, Alabama, who at the present time is a member of the faculty of the Columbia City Schools.

The August 17, 1926, Edition of "The State" concludes its eulogy on Elbert Marion Rucker's death by saying, "Professor Rucker's friends are legion. Time has not only proven this statement to be true but has shown that his was a life and a character such as to emblazon its statute in the minds and hearts of men and women for an immemorial time to come."

James Braddock Park

BY HOWARD LAMAR BURNS, '38

James Braddock Park was born in Laurens County on November 28, 1873, the son of J. Fowler Park and Jane (Braddock) Park. Descended from a distinguished line of Ulster Scot forebears, Mr. Park was endowed with those substantial and admirable qualities which earned for him that place which is reserved for great men and great lawyers. As a child he attended the neighborhood school, later being a student at a school for boys in the town of Laurens. He received his formal legal training at the Law School of the University of Virginia, which he supplemented with a year of preparation in the office of Johnson and Richey, an outstanding legal firm in Laurens, and was admitted to the bar in December, 1894. He began practice alone in Laurens immediately after his admission. However, upon the formation of the new county of Greenwood, he moved to the city of Greenwood in 1897. When first a resident of Greenwood, Mr. Park was associated with the firm of Ball and Simpkins, the firm name being Ball, Simpkins and Park. Ball and Simpkins, located at Laurens, had long been one of the outstanding law firms of this state, Col. B. W. Ball being at that time Solicitor of the Seventh Circuit. Some years later, Mr. Park entered into a partnership with J. F. J. Caldwell of Greenwood, the firm being Caldwell and Park. In 1906 he formed a connection with F. Barron Grier which was to last until his death. It was as a member of the firm of Grier and Park that his character and ability were so indelibly impressed upon the legal profession and thinking public of South Carolina.

The keenly analytical mind of Mr. Park uniquely fitted him for the practice of law. He was such an exceptionally fundamental thinker that his logical conclusions were irrefutable. He was by all proper standards a great lawyer possessed of a great legal mind. His thorough grounding in legal principles, his knowledge of adjudicated cases, his habits of keeping abreast of the current decisions, combined to make even his off-hand opinions almost authoritative. However, one of Mr. Park's outstanding traits as a lawyer was his industry. He invariably spent from eight to fourteen hours a day in actual work and seldom left his office in the afternoon before dark. Even during his last illness, and heedless of his physician's advice, he insisted on doing a full day's work in the office. His vacations were confined entirely to week-ends during the summer months at his home in Hendersonville. It follows as a natural corollary that he was thorough in everything he undertook. He believed in the adage that a case well pleaded is a case half won. As a consequence, his pleadings were models of the art. He thoroughly grounded himself in the facts and the law of the particular matter in hand so that when he went into court or before an administrative tribunal, he was perfectly versed in every phase of it. He was never known to be caught off guard or taken by surprise at some unexpected development. He canvassed all the possibilities in advance and was prepared for the "unexpected."

While an extremely fine advocate, his natural modesty and diffidence

did not readily lend themselves to the rough and tumble character of a courtroom. He did not possess that quality known in the vernacular as "cockiness"; he was rather admirably lacking in this particular trait. But paradoxically, his modesty and diffidence, his lack of any oratorical effort and effect, frequently were the strongest weapons in his arsenal. They convinced the judge and jury alike of his sincerity and of his conviction of the righteousness of his cause.

Mr. Park had an exalted conception of the functions and standards of his profession. He would never take a technical advantage of an opponent's inadvertence. The law to him was never a business but a profession in which the strict adherence to and observance of fundamental ethical concepts were of indispensable importance. He truly regarded a lawyer as an officer of the court and his profession was one dedicated to the furtherance of justice under the law. He assumed his relationship to his client, to the court, and to the public to be that of a trustee. The fee that might be involved was a secondary and minor factor. He never commercialized his profession, but, on the contrary, often had to be reminded to render a client a bill for services. Often, he undertook to represent a very unpopular cause and suffered bitter criticism for so doing, knowing well all the while that he would not receive one penny for his services. Under the most trying circumstances, his keen sense of duty never faltered. He was an admirable example of the lofty ideals of his chosen profession.

J. B. Park was a great public servant aside from his legal contributions. From 1901 to 1905, he served the city of Greenwood as its mayor and it was under his administration that a modern sewerage system was installed at a cost of over one hundred thousand dollars, which was indeed no small undertaking for a village the size of Greenwood at that time. It was also during his term as mayor that Greenwood secured what is now Lander College, which was largely gained through his personal efforts and management of the financial arrangements. But it was his efforts as a private citizen which secured for his adopted city many of its greatest assets. It was largely through his tireless efforts that Greenwood was chosen as the southern terminus of the Piedmont and Northern Railway over several other competing towns. During the World War, Mr. Park was County Chairman for the Second, Third and Fourth Liberty Loan Drives, all which were most successful. It was probably in the field of educational administration that he rendered his greatest service to his community. He was zealously devoted to raising the standards of education. For fifteen years he served faithfully on the Board of Trustees of the City Schools and it is much to his credit that the City of Greenwood boasts of the fine physical plants as well as the high standards in its public school system. Not only was he very instrumental in inducing Bailey Military Academy to come to Greenwood, but for many years as a trustee of this institution, he was its greatest supporter. He did not know the word defeat and his time was ever at the complete disposal of his community. It is needless to attempt enumeration of the innumerable capacities in which he served the city of Greenwood, but let it suffice to say that he was a leader in every phase of civic life.

In 1906, Mr. Park married Miss Lillias Klugh of Coronaca, who survives him. There are four children of this union: Joe Fowler, a prominent at-

torney of Greenwood and a member of the firm of Park, Tinsley and McGowan; Julia (Mrs. Allen Ashley), now of Columbia; and the Misses Martha and Lillias of Greenwood. He was completely devoted to his family which served as a constant source of strength in aiding him so ably to fulfill the exacting and unending demands of his public and professional career. His family life was a beautiful compliment to an ideal life.

"Jim" Park, as he was affectionately known among his friends, was a lovable personality and a spirit of rare charm. To know him made life a different experience. He was of the strictest integrity and had a character of true nobility. He was a man of such instinctive modesty that his best work was little known save to his intimate friends. An example of this trait and of his generous heart is the fact that for a number of years he aided several young people without means of their own to secure a college education and to prepare themselves for a professional career. He never mentioned these cases and it was only through the beneficiaries themselves that the fact was ever known. One of his closest friends in describing him said: "He was the soul of honor, the personification of scholarship, and was the ideal gentleman and friend." He was for a long time elder in the First Presbyterian Church and a devoted worker in his church. Also, he was a Mason, Knight Templar and Shriner. For many years he was an active member of the Kiwanis Club until his health forced him to resign.

It is but natural to believe that his passing was as he would have wished it: summoned by his Maker while in the active practice of his beloved profession. On the 16th day of November, 1932, while arguing a motion in the Court of Common Pleas, he suffered a heart attack of which he died at his home a few hours later. His creed was laid out and expressed centuries ago, "to do justly, and to love mercy, and to walk humbly with thy God."

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