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VOLUME III PART 1

THE YEAR BOOK

OF THE

SELDEN SOCIETY

JANUARY, 1939

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THE YEAR BOOK
OF THE
SELDEN SOCIETY

VOLUME III JANUARY, 1939 PART 1

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TO DEAN J. NELSON FRIERSON,

WHO FOR THE PAST THIRTY YEARS HAS FREELY GIVEN OF HIMSELF AND HIS SERVICES TO PROMOTE LEGAL EDUCATION IN SOUTH CAROLINA, AND TO BETTER FIT THOSE COMING UNDER HIS TUTELAGE, NOT ONLY FOR THE PRACTICE OF LAW, BUT FOR THE CAREER OF LIVING AS WELL, THIS ISSUE IS RESPECTFULLY DEDICATED.

THE YEAR BOOK
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SELDEN SOCIETY

VOL. III JANUARY, 1939 PART I

The Passing of a Landmark

BY J. NELSON FRIERSON*

The plan of a Federal Constitution having been finally adopted on the 17th of September, 1787, by the Constitutional Convention charged with the duty of framing said instrument, it was later submitted to Congress and on the 28th of September, 1787, Congress unanimously resolved that the proposed Constitution should be transmitted to the Legislatures of the several states in order that it should be submitted to a convention of delegates chosen by the people thereof. This having been done and the constitution having been ratified by eleven states, Congress, on the 13th of September, 1788, passed a resolution naming the first Wednesday of March following as the time and New York City as the place for commencing proceedings under the Constitution. Congress therefore assembled on March 4, 1789, and Senate Bill, Number 1, at this first session of the first Congress was introduced and later became the famous Federal Judiciary Act of September 24, 1789. It is Chapter XX as set forth in the volume entitled "Act passed at the First Session of the First Congress of the United States of America, Begun and Held at the City of New York, On Wednesday, the Fourth of March, in the Year MDCCLXXXIX, and of the Independence of the United States the Thirteenth." The Act consists of 35 sections. Section 34 is very short and reads as follows:

"Sec. 34. *And be it further enacted,* That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

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It has been learned, through the researches of a very competent scholar (Charles Warren) that this section 34 was not contained in the original Draft Bill, but was added later as an entirely new section. As a result of such research and of a careful study of the Draft Bill itself, it seems clearly apparent that section 34 was added as an amendment to the Draft Bill in order to make it "perfectly certain that the Federal Courts were simply to administer State laws."

Prior to 1842, there seems never to have been any doubt that the word "laws" in Section 34 included the common law of a state as well as the statute law. In that year, however, at the January term, was decided the celebrated case of *Swift v. Tyson.*[1] The opinion of the Court was written by Justice Story. The case came to the Supreme Court from the Southern District of New York and involved the question whether a pre-existing debt constituted valuable consideration for a negotiable instrument. The common law of the State of New York was "that a pre-existing debt was not a sufficient consideration," and it was contended, on the trial of the case that Section 34 of the Judiciary Act made it obligatory upon the United States Trial Court to follow the decisions of the Courts of New York which had established the common law rule above referred to. In his opinion Justice Story says:

"In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves laws."

The Court then proceeded to construe Section 34 of the Judiciary Act and held that the word "laws" as used therein was strictly limited to local statutes and to local usages (such as titles to real estate) and did not extend "to contracts and other instruments of a commercial nature." Under this construction, the Supreme Court proceeded to follow its own view of the commercial law bearing upon the question before it and arrived at the conclusion (directly contrary to that arrived at by the courts of the State of New York), "that a pre-existing debt does constitute a valuable consideration . . . , as applicable to negotiable instruments."

The decision in *Swift v. Tyson,* described by the Supreme Court of one State as an "unfortunate misstep" has been the

1. 16 Pet. (U. S.) 1.

subject of much controversy ever since it was rendered nearly 100 years ago. Nevertheless, it has been considered and followed as the law regulating the practice in the United States Courts, in cases involving jurisdiction on the ground of diversity of citizenship, until April 25, 1938, when the doctrine was definitely abandoned by the Supreme Court of the United States in the case of *Erie Railroad Company v. Tompkins*.[2] The opinion of the Court was delivered by Mr. Justice Brandeis who referred to the recent researches of Mr. Charles Warren[3] as having established that the construction given to Section 34 by the Supreme Court in the case of *Swift v. Tyson* was erroneous; and that the purpose of Congress in adopting Section 34 was to make certain that the Federal Courts, in diversity of citizenship cases, would apply as their rules of decision, the unwritten law of the state, as well as the written or statute law. Mr. Justice Brandeis pointed out that:

"Experience in applying the doctrine of *Swift v. Tyson,* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."

He further pointed out that while: "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State," the result of the decision in *Swift v. Tyson* had actually "introduced grave discrimination by non-citizens against citizens," and therefore "the doctrine rendered impossible equal protection of the law. In attempting uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State."

The opinion further states that there is no Federal general common law and that the laws of a state, which Section 34 provides shall be regarded as rules of decision, binding upon the Courts of the United States conducting therein trials at common law, consist not only of the statutes of the state enacted by its legislature, but also of the decisions of the highest court of the state.

Thus passed a notable landmark which has greatly influenced the administration of justice in the Federal Courts for almost a century.

2. 82 Law Ed. 787.
3. "New Light on the History of the Federal Judiciary Act of 1789," 37 Harvard Law Review 81-88. (1923).

Retention of Possession as a Fraud upon Creditors

BY JOHN B. MCCUTCHEON

For countless decades the policy of the law both in this country and others has been to protect creditors against any acts or contracts by the debtor to the injury of such creditors, whether those acts or contracts operate as direct frauds, or merely as constructive frauds.

It was to subserve this policy that the early English statute of 13 Elizabeth, c. 5, was passed, which in effect declared that conveyances of goods and chattels not made in good faith, and on good consideration, but for the use of the person conveying them, or made to hinder, delay, or defraud creditors, were void. The doctrine as to fraudulent retention of possession had its original basis on this statute. Notwithstanding the fact that in its beginning the doctrine had application to creditors only, statutory enactments and Court decisions have since that time treated this retention of possession as a fraud on subsequent purchasers as well as creditors. The period from the embodiment of the first enactment until the present day has witnessed the passage of various statutes, both in this country and in England, with the sole purpose of protection of creditors. A discussion of these statutes in this treatise would be inadvisable, and we make mention of them only for the purpose of emphasizing the jealousy with which the law has guarded the rights of creditors. It seems but just that the law should prevent the property of debtors from being fraudulently placed beyond the reach of creditors by secret or pretended transfers.

This doctrine of fraud is to a large extent interwoven with the old common law requirement of delivery of possession. The necessity of delivery by the seller in the early part of the law, and the theory of seizin in its earlier stages explains in a large measure the strictness with which the courts dealt with the matter of retention of possession and the doctrine that such retention was fraudulent per se. That delivery of possession was originally essential to the transfer of ownership of a chattel is not questioned. However, in our present stage of enlightened justice, even though possession is still of vital importance, it is not the equivalent of title and it seems well

established that property will pass without delivery. As a natural consequence, the early theory that retention of possession was conclusively fraudulent has been modified and relaxed to some degree in modern times.

It is not the purpose of this treatise to attempt any assidous exploration of the entire field of fraud on creditors, but rather to treat of the effect to be given to contracts of sale in cases where the property is to remain in the possession of the vendor. As to the parties themselves, the sale is undoubtedly valid. The difficulty arises when the rights of third party creditors or purchasers are involved. In respect to creditors, unless the sale is entirely bona fide, or unless the possession of the vendor appears merely as a condition of an executory contract, the sale is void as being a fraud on creditors. One finds much judicial utterance to the effect that where a bill of sale or conveyance is absolute and the vendor retains possession a presumption of fraud would in all cases arise. This statement, it is believed, is logically correct; but whether the mere fact that the vendor retains possession is to be considered as affording prima facie evidence of fraud which may be rebutted by proof, or as affording conclusive evidence of fraud, is a question which has been open to much doubt and in respect to which judicial expression has been hopelessly conflicting and confused. In fact, few questions in the law have given rise to a greater conflict of authority than the one under consideration. In view of the fact that no general rule can be laid down, and that the determination of the question depends wholly on the decisions in each jurisdiction, our attention and thought will be mainly directed to the development of the law as it has taken place in this State.

To fully appreciate this problem a brief insight into its early English history and development might not be amiss. The initial case on the subject was *Twynes case*,[1] decided during the reign of Queen Elizabeth. The facts of the case were briefly as follows: One Pierce was indebted to Twyne and also to C. Pending the action by C to recover his demand, Pierce, being possessed of certain goods, secretly conveyed all his goods to Twyne in satisfaction of the debt due Twyne. Pierce continued in possession of part of the goods, treating them as his own. C having obtained a judgment in his action,

1. 3 Coke 80.

attempted to levy execution on the goods and was resisted by Twyne. On issue being presented as to whether the conveyance was fraudulent, it was so adjudged on the ground, *inter alia*, that "the donor continued in possession and used them as his own, and by reason thereof he traded and trafficked with others and defaulted and deceived them."

The next leading case was that of *Edwards v. Harben.*[2] There one Mercer offered to Harben a bill of sale of certain goods as security for a debt. Harben refused to take the bill of sale, unless he was permitted, at the end of fourteen days, should the debt remain unpaid, to take possession of the goods and sell them in satisfaction of the debt. The bill of sale, absolute on its face, was executed to Harben. Mercer died within fourteen days and at the end of the period Harben took possession of the goods and sold them. Edwards, a creditor of Mercer, brought suit charging Harben as executor in his own wrong. The issue tendered was whether the bill of sale, absolute on its face, was fraudulent because not accompanied by delivery of possession. The Court there held the bill of sale fraudulent *per se.* Buller J., in speaking for the Court, stated that "unless possession accompanies and follows the deed, it is fraudulent and void." But it must be noted that a distinction was made between bills of sale which were to take place immediately and those which were to take place at some future time, on the performance of a condition. In the latter circumstances possession would be consistent with the deed and would not avoid it. The writer of the opinion proceeded further to state that "if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent. On the other hand there are cases, where the vendor has continued in possession and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed." It is this dicta in the case that must not be overlooked. Much confusion in other jurisdictions may be explained by the fact that courts have blindly followed this above case, overlooking entirely the dicta of Buller.

This doctrine (that retention of possession under an absolute bill of sale affords a conclusive presumption of fraud) seems to have been modified in England by the current of

[2] 2 T. R. 587.

later decisions. In the case of *Lady Arundell v. Phipps*,[3] we find the statement of Lord Eldon that "the mere circumstance of possession of chattels, however familiar it may be to say it proves fraud, amounts to no more than that it is prima facie evidence of property in the man possessing, until a title not fraudulent is shown, under which the possession has followed." Justice Parke in the case of *Martindale v. Booth*[4] declares that the want of delivery of possession does not render the deed of sale of chattel absolutely void. He makes note of the dictum in *Edwards v. Harben*,[5] and concludes that want of delivery is only evidence that the transfer is colorable.

It would seem that by the modern rule in England the mere fact that there is no change of possession after an absolute bill of sale would not, of itself, constitute such a fraud as to avoid the sale. It is a badge of fraud, which, taken along with other circumstances, may afford a conclusive presumption of fraud or it may be rebutted and explained.

Before attempting any treatment of the South Carolina decisions on this subject, let us note briefly the early doctrine which prevailed in the Federal jurisdiction, and the status of the law there at present. Perhaps the earliest judicial expression in our Federal Courts was that of Chief Justice Marshall of the United States Supreme Court in the case of *Hamilton v. Russell*.[6] There the learned Chief Justice, after quoting at length from the decision of *Edwards v. Harben*,[7] stated:

"This Court is of the same opinion. We think the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud unless possession accompanies and follows the deed."

The strict doctrine of constructive fraud obtained for some time among the Federal Courts, but was modified in the case of *Warner v. Norton*,[8] decided in 1858. In that opinion we find Justice McClean declaring that "for many years in the

3. 10 Vesey 145.
4. 3 Barn & Adol. 505.
5. Supra, 2.
6. 1 Cranch 309; 2 L. Ed. 118.
7. Supra, 2.
8. 20 How. 448; 15 L. Ed. 950.

past the tendency has been in England and in the United States to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is prima facie fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose." The later case of *Splain v. Goodrich Rubber Co.*,[9] seems to put the doctrine at rest among the Courts in the Federal jurisdiction. That controversy arose in this manner: Hartman, a retailer in tires, was indebted to Fisk Rubber Co. and Goodrich Rubber Co. Being unable to meet his bills, he arranged to return the tires to the Goodrich Co. at a price to be credited on his bill. Later in the same day, the Fisk Co. had an attachment levied on Hartman's property, including the Goodrich tires. Suit was immediately brought by the Goodrich Co. against Splain, the Marshal, to recover the tires. It was contended that Hartman had not conveyed his title to the Goodrich Co. at the time the levy was made, and attention was called to the case of *Hamilton v. Russell*,[10] wherein it was held that when possession did not accompany the sale it was fraudulent and void. However, the Court of Appeals followed the reasoning in the decision of *Warner v. Norton*,[11] and concluded that the failure to deliver possession did not render the sale void, but was a fact to be considered by the jury in determining whether or not the sale was fraudulent.

The conclusion deduced from these cases is, we believe, that at present the doctrine prevails in the Federal Courts that retention of possession is a badge of fraud affording a prima facie presumption of fraud.

Having noticed briefly the judicial views on this subject, as expressed by the English Courts and our Federal Courts, we shall direct our attention at some length to the reported cases in our own jurisdiction. The question in this State was for a period of years embarrassed by decisions which were utterly contradictory and irreconcilable. Any attempt on our part, therefore, to reconcile the opinions and statements of the Court would be futile, even though some few have ventured so to do.

9. 290 F. 275.
10. Supra, 6.
11. Supra, 8.

The first reported case in this State was that of *De Bardleben v. Beekman,*[12] which was decided in 1793. There the Court, evidently following the case of *Edwards v. Harben,*[13] applied the rule that retention of possession was conclusively fraudulent. The dictum in the *Edwards* decision was entirely overlooked. The facts of the case briefly were these: One Beekman executed bills of sale to his nephew transferring certain slaves. The transaction was for value and was made in good faith, Beekman being indebted at the time to his nephew. Part of the slaves were left in the possession of Beekman, the seller, they being necessary for his attendance and comfort. Suit was brought by the creditors of Beekman to set the transaction aside as fraudulent. The Court, notwithstanding the bona fides of the transaction, held that as possession did not accompany the bills of sale it was void as to creditors. The statement was made in the course of the opinion that "possession is the criterion of personal property, and the vendee's permitting the vendor to continue in possession, is prima facie, to countenance fraud by giving the vendor a false credit."

Again, in the year 1811, it would appear that the Court in this State was continuing to follow the stringent rule that retention of possession was fraudulent *per se.* We find the Court in the case of *Croft v. Arthur,*[14] citing the decision of *De Bardleben v. Beekman.*[15] In the *Croft case* there was an executed bill of sale for negroes on a pretended valuable consideration, the donor retaining the custody of the same. At the time of the transaction the donor was heavily indebted, and the bill of sale immediately preceded judgments then being obtained against him. No proof was given to explain the retention of possession and no evidence offered that valuable consideration passed. The court, in its opinion, declared that the later cases have gone to establish the point that where the possession does not follow the deed it is of itself a fraud and vitiates the deed, unless the vendor's remaining in possession be consistent with the terms of the deed. In citing the *De Bardleben case* we find the Court using the following language:

"In that case the Court decreed that possession not going

12. 1 Des. Eq. 346.
13. Supra, 2.
14. 3 Des. Eq. 223.
15. Supra, 12.

with the deed and the deed not being recorded, the deed was void as to creditors, though the transaction was acknowledged to be fair."

Perhaps an attempted explanation of this decision could be made in view of the fact that no account was given and no circumstances shown to remove the presumption of fraud. In such situation the conclusion that there was fraud *per se* might not be questioned. At least it would be consistent with the construction that retention of possession, when not accounted for, is conclusive evidence of fraud. There is also the added fact that the determination of this case did not call for any minute examination by the court on this instant point. It is possible, therefore, that the court did not necessarily intend to adhere to or approve the earlier rule.

In the case of *Kennedy v. Ross*,[16] the court blindly adhered to the rule as announced in the Edwards decision. There a bill of sale, absolute on its face, for certain negroes was executed for valuable consideration. Possession, however, remained in the vendor. The bill of sale was avoided on the ground that where the vendor continues in possession as the visible owner the sale is fraudulent against creditors. It was further declared by the court that the payment of a valuable consideration would not alter the case. "The fraud consists" said Justice Nott, "in exhibiting the party to the world as being a man of substance by permitting him to keep property in his possession whch is not his own, and obtaining credit by these false appearances." Attempts have been made to explain this decision on the ground that there was no testimony to account for the continuance of possession in the vendor.

In the same year that the Kennedy case was decided, the Court handed down its opinion in the case of *Kidd v. Mitchell*,[17] which seems, at least to us, to imply that retention of possession by the vendor is only prima facie evidence of fraud. The donor, father of the donee, made a bill of sale of a negro to his minor son. Possession continued in the father who, at the time of the transaction, was indebted to some extent. It was there announced that a deed is not fraudulent merely because the vendor continued in possession; it is deemed

16. 2 Mills Const. 125.
17. 1 Not. & Mc. 334.

so as against creditors and subsequent purchasers without notice. Found in the language of the opinion is this recital:

"But in this case the vendee was in possession. He was a minor and under the guardianship of his father; the possession was therefore consistent with the nature of the instrument."

Interesting to note, in connection with a bill of sale executed to a minor where the parent retains the possession, is the obiter dicta of Judge Nott in the case of *Madden v. Day*, [18] an 1830 decision. There a father, indebted at the time, made a gift of a slave to his son, the father retaining possession. On the issue of retention of possession as a presumption of fraud, Judge Nott expresses the opinion that the vendor's continuing possession is usually considered as furnishing such evidence of fraud as will render the property liable to claims of creditors, even against a bona fide purchaser for value. As this was a case of a gift, the only circumstances which could have been shown to repel the presumption of fraud was that the possession by the father of the property of his infant son was not inconsistent with the terms of the bill of sale. Speaking on that point Judge Nott declared that "if it may be evaded by so flimsy a pretext, as by conveying to one under his own roof, and for whom he is bound to provide, the rule is of little value. I am not disposed to volunteer an opinion in favor of such a claim, unless accompanied by some other evidence of title than mere proof of gift."

The first apparent modification of this rigorous doctrine presented itself in the case of *Terry v. Belcher*,[19] which was decided several months after the Madden decision. A report of the facts showed that Terry had executed a bill of sale of certain slaves. At the time of the transaction Terry was practically insolvent, and a suit was pending against him at the hands of one of his creditors. Terry continued in possession of the slaves under an agreement to pay hire for the use of the same. Evidence was adduced that the vendee paid valuable consideration and that the transaction was made in good faith. The Court, in affirming a judgment for the vendee, laid down the rule that the vendor's retention of possession after an absolute sale of chattels is not conclusive, but prima facie evidence of fraud. The possession, it will be noted, was shown to

18. 1 Bailey 337.
19. 1 Bailey 568.

have been retained for a bona fide purpose, namely, on rent or hire.

Directly contra to the dicta of Judge Nott as set out in the opinion of *Madden v. Day*,[20] is the conclusion reached by the Supreme Court in the case of *Howard v. Williams*.[21] There the proposition was announced that the retention of possession by the donor after an absolute gift of personal chattels is not conclusive, but merely prima facie evidence of fraud, and that this presumption would be repelled altogether in the case of a gift by a parent to a child, where it appeared that the latter was a minor and resided with the parent.

The modification of the earlier doctrine claimed the approval of the Court in the reported case of *Smith v. Henry*.[22] We find the judicial expression of Judge O'Neal to the effect that, in view of the decisions of *Terry v. Belcher*[23] and *Howard v. Williams*,[24] the retention of possession by a vendor was susceptible of explanation, and where possession is shown to have been retained for a bona fide purpose, as rent or hire, or by a parent for his infant child, then the sale is not vitiated by fraud. As to his own personal opinion, however, Judge O'Neal remained a disciple of the old doctrine, it being his impression that retention of possession by the vendor after an absolute sale was fraudulent *per se*. On the facts as adduced at trial, the Court concluded that the retention of possession had not been sufficiently explained. It was there declared that the fact that the vendee was a sister-in-law of the vendor, and resided with the latter, would not afford a sufficient explanation of the vendor's retention of possession. It was not the relation of parent and minor child. This was deemed to be the distinction between the instant case and the *Howard case*.

It would appear, then, that by the beginning of the year of 1831, the courts had reached a point in the law, at least for a time, that where proof was given that retention of possession was for a proper and bona fide purpose, the presumption of fraud would be rebutted. And we think it equally as clear at that time, as evidenced by the *Smith case*, that the presumption of fraud was not repelled by the mere showing of a transaction

20. Supra, 18.
21. 1 Bailey 575.
22. 2 Bailey 118.
23. Supra, 19.
24. Supra, 21.

in good faith, even though the parties to the transaction resided together.

In the case of *Cordery v. Zealy,*[25] decided a month later than *Smith v. Henry,* [26] we find the question again confused to some degree by certain judicial declarations. There, we note expressions from the bench that the possession of the donor after the execution of a deed was evidence that it was fraudulent both against existing and subsequent creditors. Going still further, the writer of that opinion voiced the view, that "in the case of subsequent creditors, without explicit notice, I should think the possession was conclusive evidence of fraud. For they credit him on the faith of the property in his possession and as to them he should be regarded as owner." Yet, in the further language of the court we find the recital that "in all events and in all cases, it (retention of possession) is, however, evidence of fraud, until fully and clearly explained." In face of the last statement, it might be possible to construe the case as enunciating the doctrine that retention of possession is conclusively fraudulent unless explained satisfactorily.

The law in this field was further beclouded by two cases decided at the same term of court in 1832—the decisions of *Farr v. Sims,*[27] and *Brock v. Bowman.*[28] In the opinion of *Farr v. Sims,* the Court cited the ruling of the *Howard case,* wherein it was maintained that a gift from the parent to the minor child was valid against subsequent creditors, even though the parent retained possession. It was the conclusion of the Court, however, that *Howard v. Williams,*[29] had been overruled by the case of *Cordery v. Zealy,*[30] and *Brock v. Bowman,*[31] and that the better rule appeared to be that where a gift was made and the donor retained possession, it would be void as against subsequent creditors without notice. The decision was placed on the basis that possession is prima facie evidence of right to personal property, and that one should not be permitted to be the ostensible owner of a slave, obtain credit on such apparent ownership, and then when misfortune overtakes him,

25. 2 Bailey 205.
26. Supra, 22.
27. Rich. Eq. cases, 122.
28. Rich. Eq. cases, 185.
29. Supra, 21.
30. Supra, 25.
31. Supra, 28.

be permitted to say to his creditors that the chattel had been previously given to his child. "Retention of possession after an absolute sale or gift," stated the Court, "as between adults, furnishes a presumption in law that both are fraudulent. This Court does not think that the mere relation of parent and minor child should diminish that presumption."

The decision of *Brock v. Bowman*,[32] followed the ruling as set out in the *Farr case*; the bench there declaring that if the donor, after having made a gift, retains posssession, it is absolutely void as to subsequent creditors without notice. "They are legally presumed to give credit on the faith of the property in the debtor's possession."

At this stage of judicial interpretation, it would be difficult to determine the exact status of the law as regarded retention of possession as evidence of fraud.

In 1833, the reported decision of *Smith v. Henry*,[33] still further confused the law, and to a large degree, obscured the vision of the essential elements involved in the subject by injecting into the doctrine of retention of possession, the additional element of a pre-existing indebtedness as consideration, and its effect on the transaction. The facts established on the trial of the case were these: Meachem, heavily indebted at the time and on the verge of insolvency, made a conveyance of his property to the plaintiff, his sister-in-law, who was residing with him, the consideration therefor being a precedent debt. Possession remained in Meachem as the apparent owner. The issue was made as to whether or not the transaction was fraudulent as against Meachem's creditors. It was declared by the bench that the true basis for the doctrine of retention of possession as a fraud was not the fact that by allowing the vendor to remain in possession after the sale the vendee enabled him to obtain false credit; neither was it the true ground that it tended to delay creditors, who, relying on the appearence of property in the debtor, were prevented from taking proper means to enforce their demands. The Court viewed the true ground as being the affording of an opportunity to the debtor to secure to himself an advantage at the expense of creditors, as the price of preference to one of the creditors. Viewing this as the foundation of the doctrine the court de-

32. Supra, 28.
33. 1 Hill 16.

clared that where goods are given in satisfaction of a pre-existing debt, and the vendor retains possession, it is conclusive evidence of fraud.

Two years later, our court handed down its decision in the case of *Gist v. Pressley*,[34] which to a marked degree clarified the law on the subject. It is true that the controversy there involved was the retention of possession after a mortgage; but however that might be, the principles announced there have a direct bearing on the subject under review. In that case the mortgagor, at the time indebted, executed a mortgage to the mortgagee, who permitted the slaves covered by the mortgage to remain in the possession of the mortgagor. It was strongly contended, in an attempt to set aside the mortgage, that where a conveyance is made by an insolvent person in payment of a pre-existing debt, and the grantor is allowed to retain possession, that in such situation there is a conclusive presumption of fraud. In a well reasoned opinion by Judge Harper, it was declared that retention of possession did not of itself avoid the transaction, nor was it conclusive evidence of fraud. Rather was it a circumstance to be considered. In the words of Judge Harper:

"I have before ventured to express the opinion that the true ground in Twynes case was lost sight of in succeeding cases and the distinction overlooked between cases in which the retention of possession is conclusive evidence or only one of the badges of fraud."

In would seem, then, that the Court had again aligned itself with those cases in which the early stringent rule had been modified. Yet, the Court did not definitely checkmate the confusion created by *Smith v. Henry*,[35] that where the consideration was a pre-existing debt and possession retained, the transaction was presumed to be conclusively fraudulent. We find the statement in the Court's opinion to the effect that he who advances on security of a mortgage stands on a different ground from a creditor to whom the debtor's goods are

34. 2 Hills Eq. 318.

35. Supra, 33. This case, previously cited, was the second appeal to the Court in the case of Smith v. Henry, reported in 2 Bailey 118. There is a statement of high authority to the effect that on the second appeal the Court did not intend to follow the stringent rule of retention being conclusively fraudulent. See the opinion of Justice McIver in Nelson v. Good, 20 S. C. 235.

mortgaged to secure a previous debt. Where the conveyance is made to satisfy a debt created at the time, the retention of possession would not be conclusive evidence of fraud, but one of the badges of fraud, susceptible of explanation. It will be noted, therefore, that some confusion still remained at this time as regarded the retention of possession after a transaction based on pre-existing indebtedness.

In 1837, we find the embryo of a development which in subsequent decisions was to modify the stringent rule as set out in *Smith v. Henry*.[36] In *Jones v. Blake*,[37] we note a definite beginning of the doctrine that, even though the transaction is based on a preceding debt, if it is shown that the possession was not retained as a benefit to the debtor, but under an independent and subsequent bona fide contract, then in such circumstances the transaction will be upheld. In that reported case a father transferred certain slaves to his daughter in satisfaction of a pre-existing debt. Possession of the slaves continued in the father under an agreement to pay hire. The conclusion was reached that the law did not permit a debtor to secure an advantage to himself at the expense of the creditors, as the price of preference given to one creditor over another. Yet the court directed attention to the fact that the father retained possession under an agreement to hire and that it could not be said that his retention of possession under such a stipulation was a benefit to him. Concluding that no advantage had been secured by the father, the Court upheld the transaction, even though based on consideration of a preceding debt.

In the case of *Maples v. Maples*,[38] notwithstanding the fact that the court upheld the mortgage, we note certain expressions in the course of the opinion that appear to cause some doubt on the doctrine that retention of possession after a transaction based on pre-existing indebtedness is not conclusive evidence of fraud. From the report it appeared that a son, having used certain money of his mother, gave his mother a bond and mortgage on slaves. The son, residing with the mother, continued to use the slaves. It was established that the mother, in taking the mortgage, acted in good faith, and that she took the same to prevent the son from dissipating the

36. Supra, 33 and 35.
37. 2 Hills Eq. 629.
38. Rice Eq. 300.

entire estate. In upholding the mortgage, the Court declared that if possession of the vendor is consistent with the character of the transaction, *or if the sale is not to secure a pre-existing debt, but in consideration of a price actually paid,* then the retention of possession does not invalidate the transfer. Even though the transaction was there upheld on the ground that retention of possession was consistent with the character of the transaction, the intimation may be drawn from the statement used that where the transaction is based on pre-existing indebtedness it will not be upheld.

Further discord appeared in the case of *Anderson v. Fuller,*[39] wherein the Court applied the rule as laid down in *Smith v. Henry,*[40] that retention of possession after a transaction based on pre-existing debt was conclusively fraudulent. This rule, the Court declared, was based on the principle that such a transaction would be giving the debtor an advantage to which he was not entitled. Such a transaction creates a presumption that the preference which has been given was the price of the undue advantage. The law draws the conclusion of fraud from these circumstances, which is incapable of being rebutted or explained, so states the Court.

The next reported case on the subject is that of *Footman v. Pendergrass,*[41] wherein the bench adhered to the modification of the doctrine of constructive fraud in the retention of possession. The transfer of the slaves in that case was voluntary, being made to the wife of the donor. Possession continued in the donor; and it was earnestly insisted that the transfer, being voluntary, was void as against subsequent creditors and purchasers. It was there decreed that the voluntary character of the transfer was not conclusive evidence of fraud, and that where the object of the transfer was to make provision for the wife and children who were living with the donor, then his possession was consistent with the terms of the deed and repelled the presumption of fraud. The continued possession of the donor was merely a badge of fraud subject to explanation.

Again we recur to the subject of retention of possession after a transfer based on pre-existing indebtedness. In *Pringle v. Rhame,*[42] an 1856 decision, the Court adopted its former posi-

39. McMul. Eq. 27.
40. Supra, 33 and 35.
41. 3 Rich. Eq. 33.
42. 10 Rich. Law 72.

tion, as taken in the case of *Jones v. Blake*,[43] that retention of possession after a transaction founded on preceding indebtedness was not fraudulent *per se*. There was the additional element in the *Pringle* decision of the retention of possession under an agreement for hire. This opinion established the proposition that where the retention of possession by the vendor or donor was under an agreement or payment of hire, then in that situation no advantage could be said to have been secured by the debtor, and the transaction would thereby be upheld. Attention should be called to the fact that in this immediate case and in that of *Jones v. Blake*,[44] the modification of the earlier doctrine was not based alone on the ground that the continuance in possession was in pursuance of a hire agreement. Rather was the modification placed on the broader ground that the hire agreement evidenced the fact that retention was not the price of a preference which the vendee or donee had secured over other creditors, but was a bona fide possession.

In *Cureton v. Doby*,[45] the doctrine was again approved. In the words of the Court:

"It will not be contended that a possession is fraudulent which is in accordance with the terms of the deed."

In *Guignard v. Aldrich*,[46] the issue was presented for adjudication as to whether the fact that the purchaser at a sheriff's sale (being a creditor of the debtor) permitted the debtor to retain possession after the sale would render the sale fraudulent as to other creditors. It was there announced that the principle of retention of possession as a badge of fraud did not apply to sheriff's sales. It is worthy of note, however, that the judge on the circuit maintained that even in the case of a private sale by a debtor to his creditor, the fact that the debtor continued in control following the sale was not conclusive evidence of fraud, yet that factor with concurring suspicious circumstances might justify the jury in inferring fraud. "This inference," says the trial judge, "may be repelled by proof of a bona fide hiring to the debtor or something equivalent."

A safe conclusion could be drawn, that at this period in the law, judicial opinion approved the doctrine that, notwithstand-

43. Supra, 37.
44. Supra, 37.
45. 10 Rich. Eq. 411.
46. 10 Rich. Eq. 253.

ing the fact that possession is retained after a transfer based on a precedent debt, when it appears that possession is not retained as a benefit to the debtor but under an independent and subsequent bona fide contract, it is open to explanation.

In the year 1858 a new light was thrown on the subject of retention of possession as a constructive fraud. Judging from the decision of *Lott v. DeGraffenreid,*[47] the only proof apparently necessary to rebut this presumption of fraud was that the transaction be made in good faith. As appeared from the facts, a mother had transferred certain slaves to her son along with certain real estate. Following the sale the mother resided on a portion of the son's estate and exercised control over four of the slaves for the purpose of her comfort and convenience. Quoting from the opinion: "The custody of Mrs. De Graffenreid of the four slaves allowed for her convenience, after his purchase in January, 1836, is too well accounted for by reasons and principles, the direct opposite of fraud, to require or allow its being set down to that account." This doctrine received support again in the case of *Perkins v. Douglas.*[48]

Evidently in 1882 the doctrine, as modified, still claimed the approval of the bench; for in *Kohn v. Meyer,*[49] is the recital that when a person in debt at the time makes a transfer of all or a large part of his personal property and retains possession, using and actually claiming it as his own, it would require strong evidence to repel the presumption arising from such continued possession.

The confusion and discord of the early cases was put at rest in this State by the well reasoned decision in the case of *Nelson v. Good,*[50] wherein the Court promulgated a concise and lucid principle for the determination of this question. In that controversy, which was an action to set aside a sale as fraudulent, Good, a merchant, executed a bill of sale of his entire merchandise to one Cox, to secure the latter against loss on his suretyship on several notes of Good. At the time of the transaction, Good was utterly insolvent, and several suits had been commenced against him at the hands of creditors. Under the transaction the goods were left in the possession of Good to dispose of them as the agent of Cox. In his

47. 10 Rich. Eq. 346.
48. 52 S. C. 129.
49. 19 S. C. 190.
50. 20 S. C. 223.

opinion, Justice McIver attempted to explain the earlier cases in this State (holding retention of possession fraudulent *per se*) on the ground that in those cases no endeavors were made to account for the continuance of possession in the vendor or donor. After reviewing at length the cases in this jurisdiction the writer of the opinion concluded that where nothing more is established than retention of possession, the presumption of fraud becomes conclusive. "But when satisfactory evidence is offered to explain them (badges of fraud), it then becomes a question of fact, to be determined by that branch of the court invested with jurisdiction to determine issues of fact, whether under all the circumstances the transaction brought in question is bona fide or fraudulent." That, as we view it, is the present day doctrine on the subject; and doubtless the case of *Nelson v. Good*,[51] would now be followed with approval.

In *Pregnall v. Miller*,[52] the Court followed the rule as set out in the *Nelson* decision and re-affirmed the doctrine announced in the opinions of *Jones v. Blake*[53] and *Pringle v. Rhame*.[54] In the *Pregnall* case there was a sale of an engine and certain iron, the purchase price being a pre-existing debt. A portion of the goods was left in the possession of the vendor. Two issues were presented for adjudication, namely, whether the vendor's continuance in possession after the sale rendered the same conclusively fraudulent, and whether the retention of possession after a sale based on pre-existing debt rendered the sale void as a matter of law. In this particular case the court answered both questions in the negative. As to the first point, the Court declared that retention of possession was a badge of fraud open to explanation. As to the second point, it was concluded that whether the consideration be a pre-existing indebtedness or a present consideration, the cases stand on the same footing, and the character of the possession becomes a question of fact and must be submitted to the jury with the burden upon the vendee.

One might hastily conclude from the decision in *Werts v. Spearman*,[55] that the court had recurred to its former position, that retention of possession after a transaction based

51. Supra, 50.
52. 21 S. C. 385.
53. Supra, 37.
54. Supra, 42.
55. 22 S. C. 200.

on preceding indebtedness was fraudulent *per se.* However, on a close examination of that case, the explanation will be found in the fact that the burden of satisfactorily accounting for retention of possession was not fully discharged. As a natural consequence, therefore, the transaction was avoided. Notwithstanding, the conclusion reached, the Court approved the principle enunciated in the *Pregnall* case to the effect that continued possession is an open question in each case with the burden of explaining it satisfactorily on the party attempting to sustain the transaction.

In 1896 the application of the old rule again appeared on the judicial horizon in the adjudicated case of *Kirven v. Pinckney,*[56] wherein the Court announced that in order to have a consumated exchange of personal property, there should be a transfer of possession.

The discord if any was in fact created by the *Kirven case,* was of short duration, for in *Perkins v. Douglas,*[57] the doctrine was again judicially reiterated that retention of possession, while a badge of fraud, was not conclusive evidence of fraud except when not satisfactorily explained. As was heretofore mentioned, we find authority in this opinion also for the proposition that proof of good faith is sufficient to repel the presumption of fraud.

The notion that retention of possession is a factor susceptible of explanation was strengthened in *McGee v. Wells,*[58] wherein it was admitted as the true rule, that retention of possession concurring with other badges of fraud constituted such strong evidence that they would be regarded as conclusive unless accompanied by most satisfactory testimony. Yet they do not constitute such a presumption of fraud as to be irrebuttable.

Despite the confusion during the transition period in this field of the law, and despite the divergent views which have at times retarded the progress of the law on this subject, we believe that at the present time the concise rule as enunciated in the decision of *Nelson v. Good,*[59] would receive the approval of both bench and bar. We think it safe to conclude that in all cases the retention of possession, when sufficiently explained by evidence, is a question of fact for the determination of the jury.

56. 47 S. C. 229.
57. Supra, 48.
58. 52 S. C. 472.
59. Supra, 50.

Privileges and Immunities Under The Fourteenth Amendment

WILLIAM A. ROGERS AND NATHANIEL L. BARNWELL

In the Constitution of the United States appears the following clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[1]

The question immediately arises, what are the privileges and immunities of citizens of the United States:

"No fixed general rule can be given; no specification can embrace every instance now existing, and of course not those coming in future time, and such rule or specification can only be illustrated. * * * Privileges and immunities of the federal citizen may arise from new legislation, so that legislation be within the scope of National authority. This shows the futility, the danger of any infallible definition of privilege or immunities. * * * The capacity for expansion must be allowed else the Constitution would defeat our purpose as the basic law."[2]

In the minds of the framers of the Fourteenth Amendment, the privileges and immunities of national citizenship were fundamental; the same privileges and immunities guaranteed to the citizens of the several states; the same privileges which Mr. Justice Washington said, "may 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 restraint as the Government may prescribe for the general good of the whole."[3] The framers "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."[4]

The aim of the framers was rudely thwarted in 1873, however, when the Supreme Court of the United States construed the Fourteenth Amendment for the first time.[5] The

1. U. S. Consitution, XIVth Amendment.
2. "The Fourteenth Amendment" by Brannin, P. 65.
3. Corfield v. Coryell, Wash. CC 371.
4. "The Fourteenth Amendment and the States," (1912) by Charles Collins.
5. Slaughter House cases, 16 Wall. 36; 21 Law Ed. 394.

majority of the Court decided (with four Judges dissenting) that Federal citizenship was not the same as State citizenship. "Privileges of State citizenship," said the Court, "had from earliest time been held to include those rights which are fundamental. Nor was it the purpose of Congress to transfer these rights to the protection of the Federal Government. For if such had been their purpose they would have stated it in explicit language." Further, the phrase "privileges and immunities of citizens of the United States" seemed to the Court to connote privileges which a citizen of the United States possesses in contrast and in addition to privileges which he possesses as a citizen of a State.

The dissenting Justices in the *Slaughter House Cases* severely criticized the majority's holding. Mr. Justice Field interpreted the Fourteenth Amendment as "intended to give effect to the declaration of 1776, of inalienable rights; rights which are the gift of the Creator, which the law does not confer but only recognizes." These rights, said Field, "are the natural rights of man."[6] He would include in these natural rights those guaranteeing life, liberty, and property.

These criticisms kept cropping up in later cases.[7]

The privileges of Federal citizenship, said the court, are those arising from or owing their existence to the Federal Government, its natural character, its constitution or its laws. . . . These privileges of natural citizenship enumerated by Justice Miller in his majority opinion are: the right of a citizen "to come to the seat of government, to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to share in administering its functions. He has right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices,

6. It would be interesting to trace the development of the idea of man's "natural rights." For the early expressions of this thought, see "The Social Contract," by Rousseau.

7. Bartemeyer v. Iowa, 18 Wall. 129. Mr. Justice Fields, concurring: "It (the Fourteenth Amendment) recognized, if it did not create, a national citizenship and made all persons citizens except those who preferred to remain under the protection of a foreign government; and declared that their privileges and immunities, which embraced the fundamental rights belonging to citizens of all free governments, should not be abridged by any state. This national citizenship is primary and not secondary. It clothes its possessor, or would do so if not shorn of its efficiency by construction, with the right, when its privileges and im-

and courts of justice in the several States."[8] Other privileges listed are: (1) to demand protection of the United States Government when on the high seas or within the jurisdiction of a foreign government; (2) the right to peacefully assemble and petition redress of grievances; (3) the privilege of writ of *habeas corpus*; (4) the right to use the navigable waters of the United States; (5) all rights secured to our citizens by treaties with foreign nations; (6) the right of any citizen of the United States to become a citizen of any state in the Union by *bona fide* residence therein, with the same rights as other citizens of that state.

In *Twining v. State of New York*,[9] the court discussed very fully the privileges and immunities sought to be protected by the Fourteenth Amendment, and in reaffirming the views of the majority in the *Slaughter House cases* the court definitely stated that the "Bill of Rights," or first eight amendments of the United States Constitution, were not among the privileges and immunities of citizens of the United States. "Among the rights and privileges of national citizenship," said the court, "are the right to pass freely from state to state;[10] the right to petition Congress for the redress of grievances;[11] the right to vote for national officers;[12] the right to enter public lands;[13] the right to be protected against violence while in the lawful custody of the United States Marshall;[14] the right to inform the United States authorities of violation of its laws."[15]

The effect of the court's decision in the *Slaughter House*

munities are invaded by partial and discriminating legislation, to appeal from his state to his nation, and gives him the assurance that, for his protection, he can involve the whole power of his government."
In "The Supreme Court and the Fourteenth Amendment" by Corwin, (7 Mich. Law Rev. 643) it is pointed out how the dissents of Justices Fields and Bradley in the Slaughter House cases and in later decisions influenced modern constitutional law; and how the dissents paved the way to the modern interpretation of the "due process" clause.

8. Crandall v. Nevada, 6 Wall. 36.
9. 211 U. S. 78. It was held in this case that exemption from compulsory self incrimination was not a privilege or immunity of national citizenship.
10. Crandall v. Nevada, 6 Wall. 34.
11. U. S. v. Cruikshank, 92 U. S. 542.
12. Ex Parte Yarborough, 110 U. S. 659.
13. U. S. v. Waddell, 112 U. S. 76.
14. Logan v. U. S., 144 U. S. 263.
15. In Re Quarrels, 158 U. S. 532.

cases was to leave to the State those rights which they had exclusively exercised before the adoption of the Fourteenth Amendment. This meant that the privileges and immunities clause, instead of centralizing power in the Federal Government, (as the framers had hoped it would do), became in the light of the Supreme Court decision, a practically "forgotten" clause in the Constitution. The decision, it would seem, was sound because it prevented the States from becoming mere instrumentalities of the Federal Government. Nevertheless it is difficult to answer Mr. Justice Fields' criticism: "The majority's construction rendered the clause a vain and idle enactment which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."

In fact later cases have proved Mr. Justice Field to have been somewhat of a prophet. Numerous cases have come before the United States Supreme Court involving the construction of the "privileges and immunities" clause. But in the vast majority of these cases the Supreme Court has decided that the privilege or immunity in question was not one of national citizenship. For instance it has been held: that the regulation and control of markets by a state for the sale of provisions is not an abridgement of the privileges and immunities of a citizen of the United States;[16] that the right of a woman to vote is not a privilege or immunity of national citizenship;[17] that a state statute limiting the dower rights of a nonresident does not abridge the privileges and immunities of a United States citizen;[18] that the right to sell intoxicating liquor by retail is not a privilege of a citizen of the United States;[19] that state prohibition statutes forbidding the manufacture of intoxicating liquor is a valid exercise of its police power and not an encroachment upon privileges of national citizenship;[20] that a state statute limiting the hours of service from ten to eight hours a day is a valid exercise of a state's police power and is not an abridgement of the privileges and immunities of a citizen of the United States;[21] that a city ordinance forbidding public addresses on public grounds without

16. Natal v. Louisiana, 139 U. S. 632.
17. Minor v. Happersett, 21 Wall. 162.
18. Ferry v. Spokane Ry., 258 U. S. 314; Bartemeyer v. Iowa, 18 Wall 138.
19. Giozzo v. Tiernan, 148 U. S. 662; Crowley v. Christensen, 137 U. S. 91.
20. Kidd v. Pearson, 128 U. S. 16; Mugler v. Kansas, 123 U. S. 657.
21. Holden v. Hardy, 169 U. S. 580.

permit from the mayor does not violate the "privileges and immunities" clause of the Fourteenth Amendment;[22] that a state statute making it a crime for junk dealers to buy and receive property used by or belonging to a public utility without ascertaining by diligent inquiry whether the person selling or delivering the same had a legal right to do so does not abridge one's privilege as a national citizen;[23] that a state statute forbidding the depiction of the American flag for advertising purposes does not conflict with the "privileges and immunities" clause;[24] that a statute providing that in the construction of public works by the state or municipality, or by persons contracting with state or municipality, only citizens of the United States shall be employed, does not encroach on the privileges of national citizenship;[25] that a state statute providing that in railroad cases involving negligence, contributory negligence is not a complete defense, is not an abridgement of federal immunities;[26] that the right of a woman to practice law is not a privilege or immunity of national citizenship;[27] that a state statute providing that a telegraph company should be liable for non-delivery of telegrams is not an encroachment upon the "privileges and immunities" clause.[28]

It is important at this time to bring out that no new privileges or immunities were created by the privileges and immunities clause;[29] and, as these privileges and immunities owe their existence exclusively to the Constitution and the laws enacted under it, the states had not power to abridge them even before the passage of the Fourteenth Amendment.[30]

Following the decision of the *Slaughter House cases*, another great question involving the Fourteenth Amendment (and the privileges and immunities clause) came before the United States Supreme Court. Congress had passed a Civil Rights Bill, the first and second sections of which provided in effect that the accomodations in inns, theatres, railroads, and other public places, should be open to all, and that if any person

22. Davis v. Mass., 167 U. S. 44.
23. Rosenthal v. People of State of N. Y., 226 U. S. 260.
24. Halter v. State of Neb., 205 U. S. 33.
25. Hein v. McCall, 239 U. S. 175.
26. Mo. P. & R. v. Castle, 224 U. S. 544.
27. Bradwell v. Illinois, 16 Wall. 139.
28. W. U. Telegraph Company v. Commercial Milling Co., 218 U. S. 406.
29. Bartemeyer v. Iowa, supra, 18.
30. Crandall v. Nevada, supra, 10.

should deny accomodation to anyone because of his race, color or previous condition of servitude, he should be fined or imprisoned, or both. Defendants were convicted under the Act, and on writ of error to the United States Supreme Court, argued that the above sections were unconstitutional. The Supreme Court, in a decision by Mr. Justice Bradley (109 U. S. 3) affirmed their argument and declared that Congress did not have the power to determine (in a broad field) what were the privileges and immunities which a state could not abridge; that the Fourteenth Amendment was *prohibitory* upon the states; and that "it (Fourteenth Amendment) does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but is intended to provide modes of relief against state legislation, or state action of the kinds referred to." In other words, Congress could pass *corrective* legislation but not *direct* legislation, where civil rights were concerned. For, "that would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them."

Thus it seems that the decision in the *Slaughter House cases* was strengthened by that in the *Civil Rights case.* For both decisions curbed the trend towards centralization of power in the Federal Government and made secure to the states the power to legislate over those fundamental rights which they had exercised prior to the adoption of the Fourteenth Amendment.

A chief purpose for the inclusion of the "privileges and immunities" clause in the Fourteenth Amendment was to prevent discrimination by the states against the then newly freed negroes. But while the Supreme Court has held state statutes discriminating against negroes to be unconstitutional, it has based its decisions not on the privileges and immunities clause, but on other clauses in the Fourteenth Amendment. The reason for this, we think, is due to the practical oblivion into which the privileges and immunities clause has fallen due to the *Slaughter House* decisions and later holdings. In *Nixon v. Herndon,*[31] a Texas statute denying negroes the right to vote in Democratic primaries, came before the United States Su-

31. 273 U. S. 536.

preme Court. The statute provided that "in no event shall a negro be eligible to participate in a Democratic Party primary election held in the state of Texas." The court, speaking through Mr. Justice Holmes, held the statute unconstitutional. The basis of the court's holding was that the plaintiff was a citizen of the United States and was denied equal protection of the laws; both of which rights he was entitled to under the Fourteenth Amendment.

In *Mills v. Green*,[32] a suit had been brought by a citizen of the United States to restrain the supervisor of registration of the State of South Carolina from performing certain acts under the registration laws of the State. A state statute had been passed containing numerous restrictions which one had to comply with before being allowed to register. In the Federal Court, it was contended by the plaintiff that the statute was aimed at preventing the negroes from voting, and evidence was introduced to show that the negroes were effectually barred by the statute. The court sustained the contention of the plaintiff, declaring that while the right of suffrage is not a necessary attribute of federal citizenship it is such an attribute as is exempt from discrimination in the exercise of that right on account of race and previous condition of servitude, and while the right to vote in the state comes from the state—the right of exemption from prohibited discrimination comes from the United States." (The appeal to the Supreme Court of the United States was dismissed on other grounds).

These cases emphasized in the public mind the idea that the United States Supreme Court considered the privileges and immunities clause as a mere appendix to the Constitution. But a recent case,[33] decided in 1935, seems to have resurrected the "forgotten" clause. A statute of Vermont levied a tax on interest derived from money earned outside the state, while exempting from the tax interest on money loaned within the state. On appeal to the Supreme Court of United States, the statute was declared unconstitutional. Although it appears that the Court could have predicated its decision on other grounds,[34] it held that privileges of national citizenship had

32. 37 Fed. 818.
33. Colgate v. Harvey, 296 U. S. 404.
34. The decision could probably have been based on the due process clause. Allgeyer v. Ga., 165 U. S. 578; Truex v. Raich, 239 U. S. 33.

been abridged. Nowhere in the decision did the Supreme Court mention "fundamental rights," yet from a careful reading of the decision, it appears that, in effect, the court was turning toward the "fundamental rights" theory. The court declared that although the Fourteenth Amendment did not create a national citizenship, it did intend to make that citizenship "paramount and dominant" instead of "derivative and dependent" upon state citizenship.

The new departure made by the Supreme Court in the *Colgate case* can more readily be seen by reading the trenchant dissent of Mr. Justice Stone. As he forcefully states, "the privilege and immunities clause has consistently been construed as protecting only interests growing out of the relationship between the citizen and the national government, created by the court, and the federal laws. Appeals to the court to extend the clause beyond these limitations have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have been held not to be protected from state action by the "privilege and immunity clause."

It is a matter of considerable interest whether the Supreme Court will extend the principle in the *Colgate case* or whether it will isolate the case. If the principle is extended then necessarily the importance of the *Slaughter House cases* will be proportionately lessened. It is possible that the *Colgate case* may become the forerunner of cases construing the first eight amendments to be privileges of national citizenship.

The drift of the times seems to be towards the centralization of power in one government. This is true not only abroad but at home. This trend is particularly noticeable in recent legislation and decisions. Congress has passed a wages and hours bill. The passage of a federal anti-lynching bill was prevented by filibuster. *Ashwander v. Tenn. Valley Authority*,[35] decided that the United States could sell electricity in competition with public utilities. In fact, it might be said that we are embarking on an era of centralization comparable to the era just following the Civil War, when the Fourteenth Amendment was passed. Will this centralization be checked, or does the spirit of the times demand still greater extension of power in the Federal Government? The Supreme Court in the long

35. 297 U. S. 288.

run is governed by the desires and wishes of the people. As Mr. Justice Holmes states, "the very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and conditions, the unconscious result of instinctive preferences than inarticulate convictions, but none the less traceable to views of public policy in the last analysis."[36]

36. "The Common Law" by Holmes.

Piepowder Courts

BY SAM ROGOL

It is quite certain that, as early as the middle of the thirteenth century, cases between merchants were conducted according to a procedure quite unlike that of the common law courts. The greater part of the foreign trade of England, and indeed the whole of Europe at that time, was conducted at the great fairs, held at fixed places and at fixed times in each year, to which merchants of all countries came. In each of these fairs a court sat to administer speedy justice by the Law Merchant to the merchants who frequented these fairs, and in case of a legal issue or trial, to have the law declared on the basis of mercantile customs by the merchants who were present. These courts were called "courts pepoudrous, so called because justice was administered while the dust fell from the feet, so quick were the courts supposed to be."[1] The term piepowder (piepoudras, pede pulverosi) is said to have been given to mercantile courts by some writers because "the courts were frequented by chapmen with dirty feet, who wandered from mart to mart."[2] The name was perhaps originally a nickname; but it became general, and was adopted as the official style of the court. This court was incident to every fair and market because it was essential that there be speedy justice for both the advancement of trade and traffic. Blackstone declares that the reason for their original institution seems to have been to do justice expeditiously among the class of persons that resort from distant places to a fair or market, since it is probable that no inferior court might be able to serve its process, or execute its judgment, or both, on the parties, and, therefore, unless these courts had been created, the complainant would have had to resort to superior courts. The chief object of the courts of piepowder therefore, was to give courage to merchant strangers to come with their wares and merchandise into the realm.

Not the least of the advantages which attracted foreign merchants to the fairs was the guaranty of speedy justice. Merchants were men of action, and the contemplative habit of

1. Colson's Huffcut on Negotiable Instruments, page 18.
2. Holdsworth's History of English Law, Vol. 1, page 536.

English common law Judges did not fit in well with their necessities. They insisted upon having not only justice, but speedy justice. This was secured to them in a manner, as above mentioned, by the institution of a court piepowder as an incident of every fair and market. The procedure of these merchant courts was quite different from and much more expeditious than the common law courts. The procedure of the court was summary, swift, and sure, and its sessions were continuous. These characteristics were common to all courts pepoudrous. It was a procedure with which merchants were familiar. The fundamentals of the Law Merchant were based on good faith and mutual confidence and these were carried over into the courts used for the transaction of their business.

The procedure of these courts was in striking contrast with the slow and stately procedure of the common law tribunals, which were not always open to suitors. The common law Courts lasted only a few hours each day when they met, and were not from hour to hour throughout the day like the courts of piepowder. Judges of common law courts also took plenty of time to deliberate. Until well in the sixteenth century the prohibition of usury was absolute in common law courts, that is to say, the exaction of interest at any rate, however small, upon money lent was illegal.[3] Another defect of the common law system was the absurd rule of evidence that no one who had any interest in the result of a case was a competent witness. For the indifference of the common law to commerce there are various reasons. The chief source of wealth in earlier times was land and the law was mostly concerned with land and its tenure. Another defect of the common law system of courts was that its procedure was hopelessly complicated.

The courts of piepowder were administered by different persons. The court, "if it belonged to a borough, was held by the mayor or bailiffs of the borough, if it belonged to the lord, by his steward; and the borough or the lord was responsible for the maintenance of order during the period of the fair."[4] Although the court was held by the mayor, bailiffs or stewards, the judges of the court in the thirteenth and fourteenth centuries were the merchants who attended the fair. Its special

3. 52 Law Quarterly Review 30.
4. Supra, note 2.

field was in suits for payment of debts, fulfillment of contracts, and other causes arising from trade. It could exercise this jurisdiction irrespective of the amount at issue in the case, and it could hear cases which had arisen outside of the limits of the fair. In some cases the jurisdiction of the ordinary courts was superseded during the time of the fair, while in other instances, the court of piepowder was regarded merely as a special session of the ordinary borough court during the fair, and during the remainder of the year, the law merchant was administered in the ordinary borough court.

The records of these courts are few, for obviously law reporters were at a premium at that time. It is thus seen that this body of mercantile law had grown up by custom from the needs of the traveling merchants who needed above everything else the protection of dependable courts of law with which they were familiar, and of speedy trials so that their departure for other markets might not be delayed. This body of law remained largely unwritten, and varied but little from one country to another. It can be said that the law merchant, more than any other branch of the law, is the outgrowth of custom. As the law merchant was considered as custom, it was the usual procedure to leave the custom and the facts to the jury without any directions in the point of law, with the result that cases were rarely reported as laying down any particular rule or principle, because it was almost impossible to separate the customs from the facts.[5]

As late as 1785, one finds that such mercantile courts existed and prospered in our own State. By Act No. 1255 of Acts of Laws of State of South Carolina for 1785, page 652, it was stipulated that there shall be a court of piepowder during the fair weeks to be held in the town of "Winnsborough." One of the provisions of the Act was:

"Which fairs shall be holden, together with a court of piepowder, and with all liabilities and free customs to such fairs appertaining, or which ought or may appertain, according to the usage and custom of fairs; and for the more regular government of the said several fairs, the majority of the inhabitants of the said town are authorized and empowered to elect and appoint such person or persons as they shall think fit to be directors or rulers of said fairs, so appointed and

5. 3 Columbia Law Review 135.

commissioned as aforesaid, are hereby empowered to have and hold a court of piepowder, together with all liberty and free customs to such appertaining, and that they, and every of them, may have and hold there, at their and every of their respective courts, from day to day, and from hour to hour, from time to time, upon all occasions, plaints and pleas of a court of piepowder, together with all summons, attachments, arrests, issues, fines, redemptions, and commodities, and other rights whatsoever, to the said court of piepowder appertaining without any impediments, let, or hindrance whatsoever."[6]

At the beginning of the fifteenth century the courts of piepowder showed signs of becoming absorbed into the common law system which had adopted certain of its rules, and by the latter half of this century, the court of piepowder was declining in importance. It was during this period that the Court of Common Pleas decided that the person who held the court and not the suitors should be its judge, a view which tended to diminish its usefulness, as it deprived the merchants who attended it of much of their power to shape directly the law which was administered in their trials. In 1477 there was a statute passed in England which limited the jurisdiction of the court of piepowder to matters arising within the limits of the fair and occurring during the time that the fair was held.[7] During the seventeenth century the courts of piepowder lost the remainder of their prestige when their decisions were held to be subject to review by the common law judges, the result being that the suitors were enticed or coerced into the courts of common law. The changing legal system combined with the social and economic changes caused the decay of these merchant courts, from which originated many of the principles followed as a result of its influence on the Law Merchant.

6. Acts of Laws of State of South Carolina for year 1785, No. 1255, page 652.
7. Supra, note 2.

THE YEAR BOOK
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THE YEAR BOOK

With this issue, THE YEAR BOOK begins the third year of its existence, having been begun in 1936-37. The entire publication is distinctly the product of the efforts and research of the students of the Law School, and has for its aim and purpose to afford a means of expression for the legal scholarship of the students. THE YEAR BOOK is not an attempt at a law review, and makes no pretense to entering into competition with such reviews.

A guest article has been included in this issue, which will doubtless prove both interesting and instructive, in view of the timeliness of the subject. It is hoped that the practice of printing guest articles will be continued in future issues, and to that end, the Editors welcome contributions of articles, comments, or correspondence by other law teachers, judges, and members of the bar.

There also appears in this issue, a section new to readers of THE YEAR BOOK. This department is entitled NOTES ON RECENT CASES, and is devoted to articles and discussions of late decisions of Supreme Court of South Carolina, which are believed to be worthy of comment. Not only will such articles prove valuable from the student's standpoint,

but it is believed that they will be of some interest, and of some possible value as well, to the practicing attorney. Any comments, criticisms, or suggestions concerning this new section, or THE YEAR BOOK as a whole will be welcomed.

THE SELDEN SOCIETY

The Selden Society was formed in the Law School of the University of South Carolina in the year 1933-34. Its founders believed that such an organization would be beneficial in promoting interest among the students in the history of Law, and in the scholarly aspects of the legal profession generally. Before the formation of the Society, no outlet or means of expression was afforded for the legal scholarship in the Law School.

The Society was patterned generally after the original Selden Society in England. The latter Society was established in England in 1887, at the instance of several noted legal scholars, notable among whom were the late Sir Frederick Pollock and Professor Maitland. The purpose of the Society was stated to be "to advance the knowledge and encourage the study of the history of English Law." Our Law School Library is a member of the original Selden Society.

After the Society was established in the Law School, meetings were held at regular intervals, and papers of legal interest were read before the body. Many of these papers dealt with topics of current legal interest, as the Society does not limit itself to purely historical study. Articles of a biographical nature, also, dealing with the lives of eminent Judges, mostly of this State, were prepared and delivered before the Society.

Until the year 1936-37, no effort was made to preserve in printed form the papers thus prepared. In that year, through the efforts of Mr. B. M. Thomson, Jr., now of the Charleston Bar, the more worthy papers were collected and printed under the title The Year Book of The Selden Society. When the relation between the original Selden Society and the Year Books is remembered, the origin of the name will be readily seen.

In 1937-38, with the financial co-operation of the University two issues of The Year Book were published. As with the first issue, they were sent to all practicing attorneys in the State of South Carolina.

The plans for the current year call for the publication of two issues also, of which this issue is the first.

THE LAW SCHOOL

THE LAW SCHOOL, established in the year 1867, is a member of the Association of American Law Schools, and is also among the law schools approved by the American Bar Association. During the past several years, the school has enjoyed a pleasing growth; the number of faculty members has been increased; and the Library continues to grow in size. The enrollment for the year 1937-38 was 108; for the present year, 109. Of this number, the third-year class is composed of 22 members; the second-year class of 41; and the first-year class of 46.

PRACTICE COURT. During the past year, a new course entitled Practice Court, and conducted by Judge M. S. Whaley, of the Law School faculty, was instituted in the curriculum of the Law School. The importance of a course of this type being realized, it was arranged to carry it on in conjunction with the course in Trial and Appellate Practice during the current semester; thus, the third-year students have advantage of the course for the whole year. The facts and testimony are taken from actual cases, and turned over to the student lawyers, two being assigned for each the plaintiff and the defendant, to prepare the case for trial. Thus, the student gets the benefit of carrying the case from the service of the summons to the decision on appeal.

FELLOWSHIPS. Two recent graduates of the Law School have been honored with fellowships at two of the country's leading law schools. Howard L. Burns, a former editor of The Yearbook, and a graduate of 1938, was awarded a fellowship at Harvard Law School and is at present engaged there in

graduate study. John C. Payne, a graduate of the Law School in 1937, was awarded a fellowship for the year of 1938-39 by Columbia University Law School.

THE LIBRARY. Under an Act passed by the 1937 Legislature, the Law School receives acts, Supreme Court reports, and codes for exchange purposes. To date, 182 volumes have been received by the Library in exchange.

During the past year, 781 volumes were added to the Library, exclusive of those received by exchange. On September 1, 1938, the Library consisted of 15,320 volumes. All of the state reports up to the National Reporter System are now in the Library.

As most of the lawyers of this State are graduates of the Law School, they are not only well aware of the abundant store of books in the Library, but they also realize that there are many gaps in our collection. Efforts are being made to build up a well rounded legal library for our potential lawyers as well as for the active practitioner. The University of South Carolina Law School Library welcomes its graduates to use the facilities of the Library, and also urges them to aid in its progress and welfare.

The Library needs the following:

All Acts of the General Assembly up to 1900.

Attorney General's Reports for the years: all prior to 1877; 1883-1894, both inclusive.

South Carolina Bar Association Transactions for the years: 1903; 1905; 1906; 1907 and 1909. Also 1884. Convention for the purpose of forming the association. Dec. 11; 37 p. Constitution and by-laws. 14 p.

Carolina Law Journal. Volume 1, number 3. (Published in 1831).

OFFICERS OF THE SELDEN SOCIETY

WILLIAM H. BLACKWELL ..... *Chancellor*

NATHANIEL L. BARNWELL ..... *Vice-Chancellor*

FELIX B. GREENE ..... *Warden of the Exchequer*

NOTES ON RECENT CASES

Liability of Husband for Wife's Tort

In an action against a husband and wife for damages for assault and battery, the plaintiff, a convention delegate at the time of said assault and battery, alleges that while he was attempting to cast his vote by standing, Enoch Smith, one of the defendants, called loudly and repeatedly, "Make them sit down. They are voting against us." Whereupon, the other defendant, Mrs. Enoch Smith, rushed toward the plaintiff and struck him in the face. The defendant's demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action, so as to hold the husband liable, as a matter of law, for the assault and battery charged therein, was overruled in the lower court, it being held, among other things, that the husband, because of the marital relation, was liable as several or joint tort-feasor with his wife. *Held,* the common law liability of a husband for the torts of his wife committed by her without his participation has been abrogated in South Carolina by statutes emancipating married women from their common law disabilities and subjecting them to all of the laws of the State without reference to the marital relation. Judgment modified. *Bryant v. Smith, et al.*[1]

At common law, the husband was held liable for the torts of his wife, and the reason behind the rule appears when the general law of husband and wife is considered. The husband had control, almost absolute, over his wife's person; was entitled as the result of marriage to her services, and consequently to her earnings, and to her goods and chattels. He had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate; and thus had dominion over her property and became the arbiter of her future.[2] At common law, the wife was in a condition of complete dependence; could not contract in her own name; was bound to obey her husband; and her legal existence was so merged in that of her husband that they were

1. 187 S. C. 453; 198 S. E. 20.
2. Martin v. Robson, 65 Ill. 129; 16 Am. Rep. 578.

termed and regarded as one person in law,[3] the husband being that one.[4] So complete was the husband's control, that even though the wife lived separate from him, supported her children, and earned a salary, the party owing her had no right to pay her, after notice from the husband not to do so. He could, in such case, sue for and recover the salary.[5]

In harmony with the prevailing common law principles, our court, in *Edwards v. Wessinger*,[6] approved the following rules with reference to the liability of the husband for the torts of the wife:

"(1) If the tort is committed in the presence of the husband, and nothing more appears, it is his sole tort, as the wife is considered to have acted under his coercion.

"(2) If the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort.

"(3) If the tort is committed in his presence, and against his will, it is her tort, and he is liable with her.

"(4) If the tort is committed out of his presence, but by his direction, she is jointly liable with him.

"(5) If the tort is committed out of his presence, and without his knowledge or consent, he is liable with her."

And so from this case it appears that the common law liability is still in force in South Carolina, unless abrogated by statutory enactments.

At common law, the husband was liable for the torts of his wife because he had almost absolute control of her person and her property. Before the enactment, in 1925, of Section 400 of S. C. Code, 1932, previous legislation in South Carolina had already gone very far towards complete emancipation of a married woman from all the common law disabilities of coverture. Sections 8574[7] and 8575[8] of the 1932 Code provide that married women shall have the right to own property of every kind, and hold the same in their own right; that they shall

3. Strouse v. Liepf, 101 Ala. 433; 14 So. 667; Flesh v. Lindsay, 115 Mo. 1; 37 Am. St. Rep. 374; 21 S. W. 907.
4. 13 R. C. L. 983.
5. Glover v. Proprietors of Drury Lane, 2 Chitty 117.
6. 65 S. C. 161; 43 S. E. 518; 95 Amer. St. Rep. 789. (1903).
7. Civ. C. '22, sec. 5539; Civ. C. '12, sec. 3760; Civ. C. '02, sec. 2667; G. S. 2036; R. S. 2166; 1870, XIV 325.
8. Civ. C. '22, sec. 5540; Civ. C. '12, sec. 3761; Civ. C. '02, sec. 2668; G. S. 2037; R. S. 2167; 1897, XX 1121; Const. 1895, Art. XVII, sec. 9.

have the right to contract with reference to their separate property, and sue and be sued with reference thereto. Sections 8572,[9] 8573,[10] and Section 657,[11] subsection 5, went further in lifting the restrictions from the rights of a married woman.

But the first radical departure from the common law principle in this State appears in Section 357 of the 1922 Code of Civil Procedure, where it was provided that "when a married woman is a party her husband must be joined with her, *except that*: 1. *When the action concerns her separate property, she may sue or be sued alone.*

In 1925, this section of the Code was repealed and re-enacted. As re-enacted it now appears as Section 400 of the 1932 Code, and reads: "A married woman may sue and be sued as if she were unmarried: Provided, that neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole . . ." But even before this Act, our Court held that a wife could maintain an action in tort against her husband for an assault and battery.[12] And under similiar statutes[13] in Illinois, the wife even prosecuted a suit against her husband for an unlawful interference with her property contrary to her wishes.[14]

In view of these successive legislative steps in the direction of a larger liberty and corresponding responsibility, the South Carolina Supreme Court has stated that the law of servitude in marriage is repealed in this State. There can be no just reason for holding the husband liable for the torts committed by his wife unless committed by his direction. The unity has been severed; the wife can be sued in all matters as if she were sole; the wife has control of her property. As the husband has no legal control over her person or her property, he should not be held for her wrongs.[15]

In Illinois, when the effect of statutes[16] similar to ours on the liability of a husband for his wife's torts came before the

9. G. S. 2035; R. S. 2164; 1870, XIV, 325.
10. R. S. 2165; 1887, XIX, 819.
11. 1870, XIV, sec. 298.
12. Prosser v. Prosser, 114 S. C. 45; 102 S. E. 787.
13. Session Laws of 1861, 143, and of 1869, 255.
14. Smerson v. Clayton, 32 Ill. 493.
15. Schuler v. Henry, 42 Colo. 367; 94 Pac. 360; 14 L. R. A. (N. S.) 1009.
16. Supra, note 13.

Supreme Court of that State, it was declared[17] that the statutes clearly indicated the intention of the legislature to abrogate the common law rule that husband and wife were one person, and to give the latter the right to control her own time, to manage her separate property, and contract with reference to it; and that while the statutes do not expressly repeal the common law rule that the husband is liable for the torts of the wife, they have made such modifications of his rights and her disabilities, as wholly to remove the reason for the liability which has for its consideration rights conferred.[13] The Illinois Supreme Court reasons that if "the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved."[19]

By its recent decision in conformity with the Illinois Court's decision above, the South Carolina Court has revoked the common law rule that the husband is liable for the torts of his wife, committed by her without his participation.

ALBERT L. JAMES.

17. Supra, note 2.
18. This decision of the Illinois Court has been followed in many jurisdictions as will be seen by reference to these annotated notes: 92 Am. St. Rep. 164; 131 Am. St. Rep. 130; 20 A. L. R. 528.
19. Supra, note 2.

Trial—Scintilla Rule—Directed Verdict

Plaintiff, a State game warden, arrested several persons for hunting without licenses on land belonging to defendant Carolina Forests, Inc. Defendant Wilson, manager and caretaker of the property, ordered plaintiff off the premises. Sometime later the two met elsewhere and an altercation ensued in which plaintiff was seriously injured by Wilson. Plaintiff brought suit against both Wilson and his employer, Carolina Forests, Inc., for the assault. Upon trial, motion was made by the corporate defendant for a directed verdict upon the grounds that there was no evidence that Wilson was acting within the scope of his employment at the time of the assault; that the evidence was insufficient to warrant a finding that Wilson was engaged in the scope of his employment; and that the only reasonable inference that could be drawn from the testimony was that the assault was committed by Wilson outside the scope of his duties to his master. The motion was granted, and the plaintiff appeals. *Held,* order granting directed verdict reversed, court saying: "This court has repeatedly held that if there be a scintilla of competent and relevant testimony upon the issue, it is the duty of the court to submit that issue to the jury." Also, there is another rule, "more founded on common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court and not a question of fact for the jury," this last being quoted by the Court from the case of *Nat. Bk. of Honea Path v. Barrett.*[1] Judged by either or both of these rules, says the Court, it was error to direct a verdict in favor of the defendant employer. *Wilson v. Plowden, et al.*[2]

After reading this opinion, the question arises, which of the two rules mentioned is the real rule to be followed in determining whether a directed verdict should be granted? Is the scintilla rule in force, and if so what interpretation has the court given it; or is the reasonable inference rule to be the guide?

The old scintilla rule, so-called, formerly prevailed in many jurisdictions, but now appears to have been rejected by all

1. 173 S. C. 1; 174 S. E. 581.
2. 186 S. C. 285; 195 S. E. 847.

courts with the exception of the courts of Alabama.[3] There, it is said that the scintilla rule is still in force. Under the old scintilla rule, if there was a mere scintilla of evidence in support of a case, it had to be submitted to the jury. A "scintilla" has been defined as a "spark," a "glimmer," "the smallest trace;"[4] so under the old rule, if there was any evidence at all, however small, tending to support the allegations of the complaint, the case had to be submitted to the jury. The courts of Ohio followed the rule for many years, but there was much criticism of it, and it was definitely rejected by the Court of Appeals in the case of *Hamden Lodge, etc. v. Ohio Fuel and Gas Co.*[5] In Kentucky, it has frequently been stated that the scintilla rule prevails, but the courts there have formulated their own definition of the term, so that it is not the old scintilla rule in effect.[6]

It has long ago been decided that the scintilla rule does not exist in the Federal Courts.[7] There the rule is more liberal, making the court virtually judge of the facts as well as the law for the purpose of determining whether or not a directed verdict should be granted. At the close of the evidence, it is said, the question always arises whether there is such substantial evidence in favor of the plaintiff's action as will sustain a verdict in his favor if rendered, and such as would warrant the trial court in refusing, in the exercise of its judicial discretion, to set aside a verdict in his favor, if rendered.[8]

Our Court has often stated that the scintilla rule prevails in this State.[9] However, it will be noted that the Court is always careful to state its conception of the scintilla of evidence necessary to carry the case to the jury. The scintilla of evidence upon which a case should be sent to the jury must be "real,

3. Norwood Hospital v. Brown, 122 Sou. 411; State v. Higbee, 138 Sou. 819; Commonwealth Life Ins. Co. v. Clark, 151 Sou. 604.
4. Words & Phrases, Bethea v. Floyd, 177 S. C. 521; 181 S. E. 721.
5. 127 O. St. 469; 189 N. E. 246. (1934).
6. Stanley's Adm'r. v. Duvin Coal Co., 237 Ky. 813; 36 S. W. (2nd.) 630. In Sympson Bros. Coal Co. v. Coomes, et al., 58 S. W. (2nd.) 594, it is said that there must be a scintilla of evidence within the meaning as defined by the Court.
7. Mt. Adams v. Lowery, 74 Fed. 463, wherein court said: "That there is a mere scintilla of evidence is not enough to prevent the withdrawal of the case from the jury. Such evidence is insufficient in law because so sufficient in fact." Berry v. Chase, 146 Fed. 625; Interstate Compress Co. v. Agnew, 276 Fed. 882; 10 Fed. (2nd.) 277; 61 Fed. (2nd.) 311; 65 Fed. (2nd.) 782.
8. Interstate Compress Co. v. Agnew, supra, note 7.
9. Dutton v. Atlantic Coast Line Ry., 104 S. C. 16; 88 S. C. 263. See cases cited in note 10, infra.

material, pertinent and relevant evidence, not speculative and theoretical deductions."[10]

In the case of *Turner v. American Motorist Ins. Co.* [11] the Court affirmed the existence of the scintilla rule, but proceeded to define it as meaning "some evidence arising out of the testimony, which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion." However, the Court goes on to say that: "Whilst adhering to the scintilla rule, this Court has recognized a rule *supplemental* (italics added) to the scintilla rule," and quotes the reasonable inference rule as stated in the *Bk. v. Barrett* case.[21]

That the old scintilla rule, as originally known, is not law in South Carolina may be understood from *Bethea v. Floyd*,[13] wherein both parties made motion for directed verdict, counsel for defendant qualifying his statement that question was one of law for the court by saying that there "may be a scintilla of evidence to go to the jury on the question of a holder in due course." It was held that the defendant practically admitted that there was no question for the jury, as a scintilla means "a gleam," "a glimmer," "a spark," "the least particle," "the smallest trace." Thus we get a definition of the word scintilla under the old rule proper, and also find that such a scintilla is not in the meaning of the court when it says that the scintilla rule is in effect in this State.

". . . . This court has laid down the rule that if there is any relevant and competent evidence bearing on the issue, it must be submitted to the jury. True, the court has also laid down the rule that if only one reasonable inference may be deduced from the evidence, it is a question of law to be determined by the court without reference to the jury."[14] When the evidence admits of only one reasonable inference, the court is under a duty to direct a verdict.[15] Nor is it sufficient that

10. Ford v. Kelsey, 4 Rich. 365. "A scintilla of evidence is any material evidence that if true would tend to establish the issues in the mind of a reasonable juror." Taylor v. Railroad Co., 78 S. C. 552; 59 S. E. 641. Also, Crosby v. Ry. Co., 81 S. C. 24; 61 S. E. 1064.
11. 176 S. C. 260; 180 S. E. 55.
12. Supra, note 1.
13. 177 S. C. 521; 181 S. E. 721.
14. Phillips v. Equitable Life Assur. Co. of U. S., 183 S. C. 431; 191 S. E. 226.
15. Sumter, et al. v. Amer. Surety Co., 174 S. C. 532; 178 S. E. 145: "It does not need citation of authorities to sustain the proposition that when the evidence admits of but one reasonable conclusion, it is the duty of the court to direct a verdict."

more than one inference may be drawn, but more than one reasonable inference.[16]

In applying the rule of a reasonable inference, there must first be some material and relevant evidence upon which the rule shall operate. There must always be present a scintilla of evidence before the rule may be invoked.[17] It appears that the reasonable inference rule is supplemental to the scintilla rule, and the court may first apply one and then the other.[18] Considering the evidence in the light most favorable to the party opposing the motion,[19] it appears there must first be a scintilla of competent, relevant, and material testimony tending to prove the facts alleged;[20] further, according to the language of the *Wilson case,* it would seem that even if this evidence be present, still a directed verdict is proper if only one reasonable inference can be drawn from it.[21] Thus, the scintilla rule as known in this state is qualified by the court's own definition of the term, and by the supplemental rule of a reasonable inference.

In the final analysis, then. it would seem that the real and true rule for determining whether or not a case has been made for the jury is the reasonable inference rule. The court should determine whether or not more than one reasonable inference can be drawn from the evidence presented; if so, the question is for the jury; otherwise, for the court. The reasonable inference rule, it seems, really incorporates within itself the scintilla rule as known in South Carolina. Much possible confusion of thought as to the two rules could be prevented if our Court should, as the Ohio Court did, declare that "the scintilla rule, when used to designate a rule of trial procedure, is confusing and misleading, and should be abandoned,"[22] and to declare the prevailing rule to be the rule of a reasonable inference.

WILLIAM H. BLACKWELL.

16. Nat. Bank of Honea Path v. Barrett, supra, note 1; Nalley v. Metropolitan Life Ins. Co., 178 S. C. 183; 182 S. E. 301; Nix v. Sov. Camp W. O. W., 180 S. C. 153; 185 S. E. 175.
17. Waring v. S. C. Power Co., 177 S. C. 295; 181 S. E. 1.
18. Hunsucker v. State Hy. Dept., 182 S. C. 441, at page 451; 189 S. E. 652.
19. Gantt v. Mutual Ben. Health & Acc. Ass'n., 174 S. C. 125; 176 S. E. 721; Lusk v. State Hy. Dept., 181 S. C. 101; 186 S. E. 786; Green v. Greenville County, 176 S. C. 433; 180 S. E. 471; Waring v. Power Co., 177 S. C. 295; 181 S. E. 1; McGuire v. Steinberg, 185 S. C. 97; 193 S. E. 205.
20. Supra, note 17.
21. Supra, note 18.
22. Hamden Lodge, etc. v. Ohio Fuel and Gas Co., supra, note 5. The Ohio Court stated the rule to be that where from the evidence reasonable minds may reasonably reach different conclusions, the case is for the jury.

Privilege Against Self-Incrimination—Witnesses

The South Carolina legislature, by Joint Resolution, created a Legislative Investigation Committee with power to subpoena witnesses. In order to aid the Committee in eliciting responses from witnesses, the legislature passed a statute providing "that no testimony should be used as evidence in any criminal proceeding against a witness, except in a prosecution for perjury." Richard Johnson was subpoenaed to appear before the Committee, and on being asked certain questions pertinent to the investigation, he refused (on advice of counsel) to answer, on the ground that his answers might tend to incriminate him. He was adjudged in contempt, and committed to the custody of the Marshal. He then applied to a Justice of the Supreme Court of South Carolina for a writ of *habeas corpus* which was granted. From this order the Committee appealed. *Held,* Ruling sustained. The constitutional guaranty against self-incrimination exempted petitioner from answering.[1] This privilege protects witnesses in hearings before legislative committees as well as in court. The immunity provisions of the statute were not broad enough to protect petitioner from all possible criminal prosecution, as testimony might uncover sources of information which would enable law-officers to make out a case against him. *Ex Parte Johnson.*[2]

History of the Privilege—A movement which began as a protest in England against certain procedure in Ecclesiastical Courts developed into a rule of evidence in common law courts. The American colonists embodied this "rule" into the U. S. Constitution. (Wigmore: Treatise, Section 2250, 1904 edition). This constitutional guaranty has been incorporated into the constitutions of all the States, save those of Iowa and New Jersey. And in Iowa it has been guaranteed by judicial decree. *State v. Height,* 111 Ia. 650; 91 N. W. 935.

The guaranty against self-incrimination disappears if absolute exemption from punishment for the offense is offered. If the legislature passes a statute removing bribery from the list of crimes, then if one confesses to bribery, he is not-incrimina-

1. Section 17, Article, Const. 1895. "Nor shall (any person) be compelled in any criminal case to be a witness against himself."
2. 196 S. E. 164.

ting himself. So legislatures have often granted complete amnesty to individual offenders in order to gain desired information.[3] In such cases, the constitutional privilege cannot be successfully pleaded. The twilight zone of conflicting rules exists where there is doubt whether the statute offers absolute immunity or not. As will be pointed out, the majority rule of today is opposite to what it was fifty years ago.

The holding of the Court in the present case was based on the proposition that a witness can not be compelled to testify where the testimony might "tend" to incriminate him. This has been the Federal rule since 1892, when the United States Supreme Court decided the case of *Counselman v. Hitchcock.*[4] In that case, section 860 of the revised Statutes provided that the evidence of a person shall not be used against him in any proceeding for a crime, or penalty, or forfeiture. Counselman refused to testify as a witness before a grand jury on the grounds, (a) that his answers might tend to incriminate him; and (b) that the constitutional provision that, "no person * * * shall be compelled in any criminal case to be a witness against himself," exempted him from answering. Counselman was adjudged in contempt by the District Court, and fined and imprisoned until he should answer. He applied for a writ of *habeas corpus* which the Circuit Court granted, returnable in ten days. In the trial before the Circuit Court, the writ was discharged, and Counselman's motion for release denied. On appeal to the United States Supreme Court, the Circuit Court's decision was reversed, the Supreme Court held that Counselman was entitled to discharge, reasoning as follows:

"In view of the constitutional provision, a statutory enactment to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

Prior to the Counselman decision, however, when the question arose in States whose constitutions contained provisions (as in the instant case)[5] identically or substantially the same as that of the Constitution of the United States (*viz*, that no person shall "be compelled in any criminal case to be a witness against himself), it was widely held that statutes similar to

3. (Kentucky Stats. 1899, 213; Kansas Gen. St. 1897, c. 102, 224.)
4. 142 U. S. 547.
5. See note 1, supra.

the one in the *Counselman* case made it lawful to compel a witness to testify.[6]

But since the *Counselman* case, several jurisdictions have left their old channels for the new current of judicial reasoning.[7]

In the light of these later decisions, the tendency seems to be toward construing the statutes strictly, while giving a rather broad interpretation to the Constitutional immunity clause.

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6. La Fontaine v. Southern Underwriters Association, 83 N. C. 132; Kneeland v. State, 62 Ga. 395. In the latter case, defendant was convicted for keeping a faro table and he appealed. It was argued that the Lower Court had erred in compelling other gamblers to testify over their objections, because it tended to incriminate them. The Constitution of 1887 was invoked. A provision read: "No person shall be compelled to give testimony tending in any manner to criminate himself." Section 4545 of the Code of Georgia enacted that "on the trial of any person for offending under Sections 4538, 4540, 4541, 4542, and 4547 of this division (offenses against gambling) any other person who may have played and bet at the same time or table shall be a competent witness, and shall be compelled to give evidence; and nothing said by such a witness shall at any time be received or given in evidence against him in any prosecution against the said witness except on an indictment for perjury, in any matter to which he may have testified." The Supreme Court of Georgia affirmed the lower court's decision. In the language of the learned Judge, "It is difficult then to see how that which can never be used against him can tend in the slightest degree to criminate the witness." Also see Ex Parte Baskell, 106 Mo. 602; U. S. v. McCarthy, 18 Fed. 87.
7. Compare Ex Parte Cohen, 104 Cal. 524; 38 P. 364, with Ex Parte Rowe, 7 Cal. 184; also People v. Kelly, 24 N. Y. 74, with People v. Forbes, 143 N. Y. 219 and Doyle v. Hofstader, 257 N. Y. 244. (Opinion by Judge Cardozo).

Libel and Slander—Repetition of Libel In Answer to Question

The plaintiff, Smith, was employed as a salesman in the store of defendant, Dunlop Co. An agent of the defendant came into the store, made some remarks to the manager, acted in an angry manner and finally said to plaintiff and the manager: "By God, I thought you birds were down here getting fat off of Dunlop. Now I know it. . . ." Plaintiff interrupted and asked him what he meant, and he said, "Stealing, by God." Plaintiff alleged that this was an accusation of plaintiff of the crime of larceny and was so understood by the persons standing around in the store. Defendant contended that the statements complained of were made in answer to plaintiff's own question, and must be held privileged because plaintiff brought it on himself. The lower court construed this as a single cause of action for slander *per se*, and the jury found for the plaintiff. The Supreme Court affirmed the decision, and on the question of privilege because made at request of person injured, the court speaking through Mr. Chief Justice Stabler, said:

"It is clear from the testimony quoted that the question asked by the plaintiff, in the circumstances disclosed, was for the purpose only of ascertaining what meaning Voiles intended to convey when he stated to Smith and Sturgeon, in his conversation with them about the business, that he knew they were 'getting fat off of Dunlop.' If this statement was susceptible of two meanings, one innocent and the other defamatory, as contended by the appellant, the plaintiff had a right to know just what the speaker meant. In the circumstances, the good faith of Smith in asking the question is apparent, and was a most natural and to be expected inquiry. Certainly, it does not appear that the publication of the slander was procured by any fraudulent contrivance on the part of Smith, with a view to an action." *Smith v. Dunlop Tire & Rubber Co., Inc.*, 186 S. C. 456; 196 S. E. 174. (1938)

The earliest case in the State on this point is one decided in 1838,[1] in which it was said that, if in answer to an inquiry the defendant does no more than acknowledge that he uttered the

1. Fonville v. McNease, Dud. 303; 31 Am. Dec. 556.

words, no action can be brought for their acknowledgement; the party injured must sue for the words previously spoken and use the acknowledgment as proof that those words had been spoken. It will be noted that in the principal case there was more than a mere acknowledgment.

In *Boling v. Clinton Cotton Mills., et al.*,[2] a 1931 decision, defendant called plaintiff into his office and charged him with adultery, no one else being present at the time; later plaintiff and his board of stewards interviewed defendant, and plaintiff asked him if he had made the statement, to which he replied that he had. The court sustained a demurrer to the cause of action. But here it was clear that plaintiff had invited or provoked the publication of the slander by defendant with a view to suing him for damages on account of the same.

A case similar to the principal case is that of *Thomas v. Southern Grocery Stores, Inc., et al.*[3] Plaintiff, manager of defendant's store, returned to the store accompanied by defendant's agent, who thereupon told plaintiff he was going to check him out. Plaintiff asked what he had done and why he was going to check him out, and the agent then read aloud the defamatory telegram in the presence of others. The Court held this was not privileged, that there was nothing to indicate that the publication solicited by plaintiff was procured by any fraudulent contrivance on his part with a view to an action; that on the contrary, it appeared that he sought the information in good faith.

It is generally held that the publication of a libel or slander invited or procured by the plaintiff is not sufficient to support an action for defamation.[4] A communication made confidentially and in good faith in answer to inquiries from one having an interest in the information sought is prima facie privileged. Indeed it is generally held that everyone owes it as a duty to his fellow men to state what he knows about a person when an inquiry is made, but the person to whom such inquiry is addressed cannot abuse his privilege in answering it.[5] So it has been held that slanderous statements against a bank elicited by tricks by detectives employed by the bank to trace the source of rumors against it, cannot be made the basis of

2. 163 S. C. 13; 161 S. E. 195.
3. 177 S. C. 411; 181 S. E. 565 (1935).
4. 17 R. C. L. 320.
5. 36 C. J. 1246.

an action by the bank.[6] And where a discharged employee asked her employer the reason why he discharged her, or requested him to repeat the statement made to another as to the reason, and in answer thereto he gave the reason, or repeated the statement, it would not support an action for slander.[7] The utterance of slanderous words in the presence of a sheriff who appeared at plaintiff's request has been held not actionable.[8] And where the business manager of one life insurance company, to whom the former cash clerk of another had applied for employment, was referred by the clerk to the cashier of the other company, and such cashier informed the business manager, on inquiry, that the clerk had been careless, the occasion of such communication was one of qualified privilege.[9]

Newell states the rule thus:[10] "If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged; for the plaintiff brought it on himself. But this rule does not apply where there has been a previous unprivileged publication by the defendant of the same libel or slander which causes the plaintiff's inquiry; for in that case it is the defendant who brings it on himself. A person is not to be allowed to entrap people into making statements to him on which he can take proceedings. . . . .But it makes a great difference if the rumors originated with the defendant, so that what he has himself previously said produces the plaintiff's inquiry."

And in 36 Corpus Juris 1246: ". . . It has been held that the rule (that a statement made in answer to inquiry is privileged) is not to be invoked where it appears that the inquiry was induced by prior defamatory statements made by defendant. . . . A republication or repetition of a defamatory charge, originally made by defendant, at the instance of plaintiff, in order to ascertain whether defendant made the charge, is not privileged, especially where such inquiry is made in good faith.

6. Ridgeway State Bank v. Bird, 185 Wis. 418; 202 N. W. 170; 37 A. L. R. 1343.
7. Rosenbaum v. Roche, 101 S. W. 1164; 46 Tex. Civ. App. 237.
8. Rivers v. Feazell, 58 S. W. (2d) 133.
9. Ecuyer v. N. Y. Life Ins. Co., 172 P. 359, 363; 101 Wash. 247; L. R. A. 1918E. 536.
10. Newell, Slander and Libel, 4th Ed. p. 452.

However, it seems that if plaintiff caused the inquiry to be made as a trick for the purpose of inducing defendant to repeat the defamation against plaintiff, plaintiff cannot make the words thus elicited a ground of action."

So in a Vermont case,[11] in an action of slander, where it appeared that a certain person, at the instance of the plaintiff, asked the defendant as to the truth of certain reports charging him with certain accusations against the plaintiff, which reports defendant said were true and went on to tell the circumstances, it was held that if the plaintiff caused the inquiry to be made as a trick for the purpose of inducing the defendant to utter a slander against her, she could not make the words thus elicited a ground of action, but that if the inquiry was made in good faith on the part of the plaintiff merely to ascertain whether the defendant had made such a charge, the words spoken on that occasion might be a ground of action, if they were spoken with malice, and that the question of malice was a fact to be submitted to the jury. Also, it has been held that the fact that an accusation of theft, made in the presence of others was made in answer to a direct question by the one accused of the theft, does not render it a privileged communication.[12] Slanderous words uttered by one concerning another on the occasion of the latter seeking a retraction of a prior slander are not privileged.[13] And where plaintiff asked defendant why he had treated plaintiff with so little consideration for a few days, it was held that this inquiry was not such an invitation to defendant to make a false charge of theft against plaintiff as to make it privileged.[14]

A case very similar to the principal one is that of *Griffiths v. Lewis*,[15] an English case decided in 1845. There the plaintiff inquired of defendant if he had accused her of using false weights in her trade. Defendant, in the presence of a third person, answered: "To be sure I did. You have done it for years."

The court held that the latter words were actionable, and not privileged by reason of the plaintiff's inquiry; the evidence showing that such inquiry was caused by a former state-

11. Nott v. Stoddard, 38 Vt. 25; 88 Am. Dec. 633.
12. Sanborn v. Fickett, 40 A. 66; 91 Me. 364.
13. Wharton v. Chunn, 115 S. W. 887; 53 Tex. Civ. App. 124.
14. Tabet v. Kaufman, 67 S. W. (2d) 1072.
15. 7 Q. B. 61; 53 E. C. L. 61; 115 Reprint 411.

ment of the defendant himself. Lord Denman said: "The words originally spoken were extremely injurious to the plaintiff, and she was bound to inquire about them. Then the defendant in answer to her inquiry, not only says that he made the statement, but makes it again. The question raised by the present argument is, in reality, whether the having uttered a slander once gives a privilege to repeat it. It has been the constant course of persons complaining of slander to ask the author whether he abides by the imputation; it has been considered unsafe to bring an action without doing so. No case goes the length of laying down that repetition of a calumny in answer to such a question is privileged."

HOKE ROBINSON.

ADDENDA

JURIST AND POET

Expressive of the late Justice Cothran's mastery of the use of words, the following is reproduced in the belief that it will prove to be of interest to readers of THE YEAR BOOK:

"During the time the land was owned by Hyatt, all of the trees in and around the graveyard were cut down, and the spot has long since grown up in weeds, bramble, and blackberry bushes. Not a single member of the family is shown to have visited it in more than twenty years; not a rake, hoe, or axe has broken the 'solemn stillness'; no fence has inclosed it; not a monument, or even a rude headstone, marks a single grave; the mounds even have long since disappeared, levelled with the ground, as if emphazing the consignment of 'dust to dust'; it has presented a picture of abject neglect; the silent sleepers have become, indeed, 'to dumb forgetfullness a prey.' It may appropriately have been called 'God's Acre', for He alone had visited it and hidden with undergrowth the human shame of neglect.

"Above the graves the blackberry hung,
In bloom and green its wreath,
And harebells swung as if they sung
The chimes of peace beneath"

Cothran, J. in dissenting opinion in *Frost v. Columbia Clay Company, et al.*, 130 S. C. 72.

* * *

VALUE OF A LIBRARY

"I began early to form a select and chosen library, and that object I have ever since kept steadily in view, and I have always found my library to constitute a great and essential source of felicity. It has been my mentor, my guardian genius, and has cherished in me a passion for letters which has literally grown with my growth and strengthened my strength."—*Chancellor Kent.*

CONDITIONS OF A LAWYER'S SUCCESS

"They are severe. He must acquire sound learning; he must be trained to clear thinking and to simple and direct expression; he must be both intellectually and morally honest; and he must have the quality of loyalty to every cause in which he enlists. He should have the tact which comes from real sympathy with his fellowmen, and he will be far better for the saving grace of a sense of humor which brings with it a sense of proportion and of good judgment.

"The lawyer who exercises these qualities is certain of professional emoluments greater than those received by the members of any other profession, old or new. But he is certain of far more than this. As he goes on in life, a multitude of personal relations grow up between him and his clients. Some of these clients are strong and able, and with them the relation is mutual respect and helpfulness. Others are weak and dependent, and to them he furnishes not merely learning, but support and strength of character and moral fiber. The feeling of all is characterized by confidence and trust. The growth of his own character responds to the requirements of this esteem. In time other people come to feel and to adopt, to a great degree, the opinion and attitude of the clients who knew him best. And so he rounds out his career in possession of that priceless solace of age, the respect and affection of the community which makes up this world."—*Elihu Root, in "Duties of American Lawyers," an address before the Yale Law School,* 1904.

* * *

READING

"Happy is he who has laid up in his youth, and held fast in all fortune, a genuine and passionate love for reading."—*Rufus Choate.*

* * *

UPON ENTERING THE STUDY OF LAW

. . . To a rich friend, whose son was about to study law: "Sir, let your son forthwith spend his fortune, marry and spend his wife's, and then he may be expected to apply with energy to his profession."—*Lord Kenyon.*

TRUTHS MUST BE PROVED

"A very wise man has said that 'short of the multiplication table there is no truth and no fact which must not be proved over again as if it had never been proven, from time to time."—*Elihu Root in "Experiments in Government," at Princeton University. April* 1913.

* * *

TRUSTS

"Trusts are children of equity; and in a Court of equity they are at home, under the family rooftree, and around the hearth of their ancestors."—*Bleckley, J., in Kupperman v. McGehee,* 63 Ga. 250.

* * *

LAWYERS

"Some people think that a lawyer's business is to make white black; but his real business is to make white white in spite of the stained and soiled condition which renders its true color questionable. He is simply an intellectual washing machine." —*Bleckley, J.* (Ga.).

* * *

RECEIVER

"A receiver is a gun that is a good deal easier to fire off than it is to control after it is fired."—*Justice Holmes.*

* * *

DRUNKEN WITNESS

"I can see him now, his mouth stretching over the wide desolation of his meaningless face,—a fountain of falsehood and a sepulcher of rum."—*Conkling.*

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