SIXTH ANNUAL MEETING
WILL BE HELD AT PITTSBURGH,
AUGUST 25, 26, and 27.
HOTEL ROOSEVELT

POLAMERICAN LAW JOURNAL

VOL. 1 JUNE, 1938 NO. 1

Contents

Subscription Price, $1.00 per year **Single Copies $ .50**

Published Semi-Annually in June and December, by the
NATIONAL ASSOCIATION OF THE POLISH AMERICAN BAR
160 North La Salle Street, Chicago, Illinois
S. R. Pulaski, Editor

OFFICIAL DIRECTORY

PRESIDENT

Lawrence F. Zygmunt	139 N. Clark Street	Chicago, Ill.

VICE-PRESIDENT

Sidney Grabowski	Connell Building	Scranton, Penn.

SECRETARY

Paul V. Pallasch	2424 Fullerton Avenue	Chicago, Ill.

TREASURER

Joseph S. Matala	313 Amherst Street	Buffalo, N. Y.

GENERAL COUNCIL

Stanley W. Wisnioski	11 Beacon Street	Boston Mass.
Victor Kulaski	9309 Jos. Campau Avenue	Detroit, Mich.
S. D. J. Bruski		Winona, Minn.
George H. Zator		Long Island, N. Y.
Anthony A. Filipiak	720 West Chicago Avenue	East Chicago, Ind.

STATE VICE-PRESIDENTS

Walter J. Sidor	487 Main Street	Hartford, Conn .
Helen Fleming Czachorski	155 N. Clark Street	Chicago, Ill.
Walter C. Jaworski	4948 Magoun Avenue	East Chicago, Ind.
Adam S. Gregorius	11 E. Lexington Street	Baltimore, Md.
Stanley W. Wisnioski	11 Beacon Street	Boston, Mass.
S. S. Zamierowski	G. R. Trust Co. Building	Grand Rapids, Mich.
S. D. J. Bruski		Winona, Minn.
Felix A. Purrell	1008 Elm Street	Manchester, N. H.
Joseph R. Paprocki	Union Trust Building	Rochester, N. Y.
Frank L. Benkoski	Hippodrome Building	Cleveland, Ohio
Sidney Grabowski	Connell Building	Scranton, Penn.
Frank Pinkos	902 Union Trust Building	Providence, R. I.
T. F. B. Wasielewski	726 W. Mitchell Street	Milwaukee, Wis.

EDITOR OF THE JOURNAL

S. R. Pulaski
160 North La Salle Street
Chicago, Illinois.

BUSINESS MANAGER

John S. Wegerzyn
1200 North Ashland Avenue
Chicago, Illinois

POLAMERICAN
LAW JOURNAL

VOL. 1 JUNE, 1938 NO. 1

THE JOURNAL

In presenting to the legal profession the first number of a new work, it is proper to state the views and purposes with which it has been undertaken. The field of law is crowded with a large number of periodicals published every month. One may immediately argue that this would be a duplication and an effort which may not produce any worthwhile results. We believe that any effort must be deserving of encouragement which may tend to interest a different group of lawyers, in the several States, to do research and to make a study of the rules and regulations governing other Jurisdictions, especially of those subjects which are not merely local. If this Journal encourages only a small number to devote their time to further research in their profession, we feel that the project is worthwhile.

Reference is often made to the dignity of the learned profession of law. We think this dignity may best be promoted by the lawyer himself when he has made that honest and continued study which carries him beyond the mere knowledge of legal rules. We therefore believe that, if there were at any time a doubt as to the function of the National Association of the Polish-American Bar, there is none now.

This issue of the *Journal* is its introduction to the profession and to the public, and is necessarily experimental. We do not intend to make it merely a house organ. We therefore invite your independent thinking. It is hoped that the busy lawyer may find here a convenient medium for the expression of his ideas.

The *Journal* will be devoted principally to the exposition in popular language of the actual state of laws, civil and criminal, together with particular essays on those branches of the law, a knowledge of which may be most practically useful to men and women engaged in active practice. In endeavoring to be useful,

we also desire to be entertaining, and have therefore, embraced in our scheme the introduction of a suitable quantity of the lighter matter.

To our members of the Bar in the different States we appeal with confidence for assistance in the present undertaking. This being our first venture we feel there is much one could do to improve. We were considerably troubled as to our ability to finance the first number; and because of that, the work on the Journal did not take form until May 1, 1938. We will appreciate not only your criticisms of our expression of principles and administration, but also all suggestions and complaints that you have to make.

The editor sincerely wishes to express to the members of the Chicago Chapter his appreciation not only for their encouragement, but also for their financial contributions which have made this publication possible.

THE EDITOR.

ASSOCIATION

Our object shall be the encouragement of cordial intercourse among the members of the American Bar of Polish descent; to foster and encourage the highest of ideals in the professional conduct of the members to the end that the membership develop enviable reputation of honesty, integrity, ability and civic service; to promote the administration of justice and uniformity of legislation and of judicial decision throughout the nation, uphold the honor of the profession of law and assist and encourage all our people and their organizations in their social and economic problems.

THE SPECULATIONS OF THURMAN W. ARNOLD*

by

J. LEO SULLIVAN

There is no opponent so difficult to contend with as that one whose metaphysics is in a state of excellent confusion and yet whose supporting illustrations have all the truth becoming to facts. To argue with such a man, especially in this day of discredited metaphysics, and to do so in the face of his facts, is to enter the lists with little hope but that of confirming those who are already of the same belief as we ourselves profess. For if the conclusions we draw from a sound metaphysics do not work the miracle of creating a new and conforming array of facts, actualities or events, our opponent will conclude that his metaphysics is as sound as his facts are inescapable. But this conclusion does not necessarily follow. There is one thing about metaphysics that is not said often or clearly enough: that it is the philosophy of truth before it is the philosophy of fact; and that its use is one thing, and the presumptions about it, residing in the mind of such observers as Thurman W. Arnold,[1] quite another thing. This is not the same as to say that fact bears no relationship to truth; but it is as much as to say that the author of *The Folklore of Capitalism* is none too clear in his own mind as to the distinction that does obtain between them.

No matter how deep in philosophy may reside the last analysis of a practical problem, a solution satisfactory to opposing parties may often be found without touching upon the metaphysical consciously and deliberately. But if it is agreed that the problem cannot be solved without searching for ultimate causes, the metaphysical discussion will have to be consistent, the definitions clear and mutually acceptable, the statements in the nature of declarations (and not of implications), and the tone of the discussion logical rather than literary. It is because the error of Arnold's book resides mainly in his failure to observe these rules, though he plunges into speculations of the highest order, that we have limited our review of his work largely to an examina-

---

*_The Folklore of Capitalism_ by Thurman W. Arnold, Yale University Press, 1937.

[1]Professor of Law, Yale University Law School, since 1931. Assistant U. S. Attorney General in charge of Anti-trust law enforcement. Author: The Symbols of Government, Yale Press, 1935. Contributor to various legal periodicals.

tion and attempted refutation of his thesis—as we think we understand it—by proceeding through an examination of his loose terminology.

We have another reason for restricting ourselves in our analysis of the work before us; and we declare it with no false humility. Our ignorance of the mysteries of capitalism is profound. Some one more capable than this reviewer must tackle that problem. Had the author of *The Folklore of Capitalism* limited himself to the purely practical, or had he discussed Capitalism in all its speculative aspects without an abusive employment of terms which belong in the province of metaphysics, we should have hesitated to pass judgment on the work. But these things he has not done. He has actually made the issue metaphysical—if not in offering a consistent and systematic metaphysics, at least in dabbling in the metaphysical. And he does all this by way of a Herculean effort to discover some reconciliation between what ought to be and what is.

The thing which seems to trouble Mr. Arnold is this: the old order is passing; yet the new order is having a difficult time of it because of the life that is still left in the old. There are still taboos. We have had a shake-up in the past ten years—a shake-up that has made us excited and fearful for the economic structure. Yet we are not attempting a solution along purely business or even political lines because we are being bothered about the *philosophy* of government all the way down to the philosophy of banking, or, as Mr. Arnold would put it, to the "theology" of banking. We keep a close eye on what is going on in Europe; and we speculate about the success or failure of all the *-isms*—Fascism, Communism, Capitalism, or whatever form the struggle assumes. We argue from the old "theology" that they will not succeed; and if they do appear to succeed we still argue from the old theology. We insist upon clinging to the old creed in spite of the new practice. Those who engage in debates occasioned by the changing order cannot altogether get away from theory, philosophy, the old taboos of theology and folklore, and yet cannot resign these with facts. And Mr. Arnold finds this bothersome. There is always the old priesthood which warns the faithful against the new gods. Democracy, for example, is a beautiful ideal of our early American theology; but something has gone wrong. The Constitution of the United States was once "a hair shirt, through the wearing of which salvation could be attained",[3] and the Supreme Court was the protection of that Constitution; but now the written decisions of that Court

[3] p. 337

are a lot of learned literature. The Depression "witnessed the greatest flood of legal and economic literature the world has ever known . . . Legal doctrine grew so huge it became difficult to argue a case without presenting a longer brief than the case could bear".[3]

But none of all this is news to anyone. Some distinction has always been made between the ideal and the actual, between theory and fact, between aspiration and attainment. Material for thought, and even cause for worry, there may be. But the distress occasioned does not demand the construction of a new and monstrous philosophy or "theology" of human conduct.

Mr. Arnold seems to be aware of the conflict between two orders—the order of truth and the order of fact. This is why he constantly hovers about the metaphysical. We see as clearly, and as sadly, as he does, the seeming irreconcilability of the two; we see the fact of the everlasting conflict between what a man naturally aspires to and what he actually attains, what creeds and institutions are for and what they actually accomplish. That law is a good thing and that we can hope to gain something by a discovery and declaration of the law, is a truth; that litigation has become complex and confused, and a Roman holiday for clever and unscrupulous lawyers, is a fact. But that we must now construct a philosophy out of that disagreeable fact, a philosophy to defend the abuse, is putting philosophy to a use with which it is unfamiliar.

We harp on this distinction between truth and fact simply because there is such a distinction and because Arnold seems to do everything with it but understand it. It is like the old argument about the "irreconcilability" of God's omniscience and man's free will, which all thoughtful men ponder but which only the wise refuse to "reconcile." Everyone who thinks about the matter successfully knows, as Arnold does, that "in judging and observing creeds and philosophies, it is necessary first of all to recognize that life is something like a drama and that a drama is not successful without a hero and villain"; but only one without the ability to understand the difference between aspiration and achievement would say, as Arnold does, that "no creed can be successful without a hero and a villain"[4] and then let that statement stand with its implications. As elsewhere in his book, he fails to observe essential differences. Drama represents life largely as an *art*, and records both what men should do and (as Mr. Arnold is certainly aware if he is acquainted with the

---

[3]pp. 115-116
[4]p. 178

theatre), in the main, what men actually do. But the purpose of creed is primarily to declare a *science* of life. Mr. Arnold's beautiful analogy, therefore, hardly holds, no matter what truth there may be in his observation that life is made interesting—that life *is* life—because of its contrasts and conflicts. There is something real and thrilling in the experience of a mother who sees her son surely recovered from pneumonia; but it would be monstrous of her to suggest that her son expose himself to the disease so that she might have the happiness of seeing him recover. We know as well as does the author of *The Folklore of Capitalism* that happiness will always be desirable, and that we cannot know happiness if we do not know unhappiness—as we cannot appreciate the dignity of the law unless we have seen its abuse; but we shall stop short of encouraging more and greater unhappiness and more and bigger scoundrels so that we shall see further into the beauty of "universal truth". In any event we shall not feel ourselves driven to the philosophical legerdemain of Mr. Arnold: "A social need which runs counter to an abstract ideal will always be incompetently met until it gets *a philosophy of its own.* The process of building up *new abstractions* to justify filling new needs is always troublesome in any society, and may be violent".[5]

What Mr. Arnold does not seem to be able to comprehend is that the ideal, *by nature,* is something that cannot be realized in its perfection. It is true that we sometimes have false ideals; and that it is then not only possible but logical and necessary to strive for an ideal that can be defended by a philosophy. But if we persist in calling the old ideal just that, then we must content ourselves with an attempt to examine the "social need which runs counter to the ideal" in the light of the philosophy of the ideal.

There are two characteristics of *The Folklore of Capitalism,* after that which we mentioned at the outset, which make it difficult for one to review the work. One of these is the author's insistence upon using the terminology of philosophy (incorrectly), and the other is a satirical tone which is ineffective because it is confusing. To this reviewer at least, he seems to have participated in a fight, but only as an interested observer who reports on it later as something real, regrettable—and hopeless. He points out a real cause of conflict, but seems slightly amused that it is so bad that nobody can do anything about it.

---

[5]p. 378. (Unless otherwise indicated, all italics are ours).

Had Arnold not presumed to go philosophical, especially in his chapter on the futility of definition and the meaning of terms[6], we should not remind him that at the basis of language, as of everything else, is to be found the philosophical, or the ultimate explanation. But with all his show of erudition here he is pathetically wanting in the ability successfully to handle *those terms which he must of necessity use if he is to write his book at all.* The terms which he uses with an assumption of ease and grace and which he presumably thinks to be outside the field of conflict are the terms which he most shamefully abuses; and of both the literal meaning and the suggestions of these he seems to be ignorant or indifferent.

Just what does he mean by *folklore?* It appears that he is unable to cope with the very thing which assumes first importance in his mind. His use of the term is confused with that of *theology* and *mythology.* And around all that he writes there is an air of indifference to distinctions in definitions.

Yet in his use of the term *folklore,* Arnold has not only found a term to serve as part of the title of his book, a term which indicates the road he is going to take, but has also selected a term which, because of its logic or denotation, and its rhetoric or connotation—or, as he would say, its emotional value—symbolizes the foundation error of his reasoning. Unless we have read the book with a want of understanding, he does not distinguish sufficiently between *folklore* and *theology.* He may not think a distinction is possible. But we have never been at a loss to understand what thousands of writers before him have meant when they made a distinction. And we cannot be convinced that there are so many cross-currents of thought today and so many conflicting social ideals or ideas that the terms have only now become synonymous.

We need not be informed that Arnold is not using the term *theology* in the strictly technical sense in which it is used in religion. Indeed, we should be surprised to find him using *any* term for an abstraction in a strictly technical sense. But he *is* employing the term. And it is not unfair of us to determine if his employment of it is a use or an abuse. Furthermore, there is a relationship, but not an identity, between the terms *theology* and *folklore;* and though he may be at liberty to apply them either to religion or Regimentation, he is not at liberty to use them capriciously.

The term *theology* belongs in the classification of the logical or scientific, and is the term by which we discuss in a purely

---

[6]The Traps Which Lie in Definitions and Polar Terms, Chapter VII.

speculative fashion and without interest or passion, the *idea* of the "divine".[7] We do not subscribe to Mohammedan theology; but this fact does not render us incapable of understanding what Mohammedans believe. We do not subscribe to the Hitler philosophy of government; but this does not make futile the hope of understanding that philosophy. The term *folklore* belongs in the classification of the literary or artistic, and is the term by which we discuss the traditions, legends, and myths which represent the character of a people. And, to continue the illustrations, while we may understand both the Mohammedan theology and the Hitler philosophy, we cannot *appreciate* either.

What then, is the interrelationship of the two terms? *Theology* is what the notion or belief is in itself, with all its deductions in the order of reasoning; *folklore* is that belief living in the life of the people, and is personal and colorful. The theology may be false—whether it be the theology of a religion or the "theology" of banking; but if it is false, it is false in the order of reason, and is made to appear so by a process of reasoning and not by unfavorable emotional response—to which Mr. Arnold is extremely susceptible. Folklore may depart from its own theology, and certainly is an *adaptation* of it, with the strengths and weaknesses that come from the addition of the personal. But it is still distinguishable from its own theology.

Applying this reasoning to the material of Mr. Arnold's book, what do we observe? The first thing we ourselves observe is that objection may be taken to errant folklore without coming to the conclusion that the theology at the foundation of it must be scrapped. The framers of the Constitution recognized this in the beginning. At least, the American people have always appreciated this reasoning, since we have had amendments *to* the Constitution—not amendments that resulted in the *annihilation* of the Constitution. But Mr. Arnold cannot see in what sense theologies may remain sound, though not perfectly realized.

In his chapter on *The Traps Which Lie in Definitions and Polar Terms* he does as clever a bit of reasoning as we have seen. But he makes a serious mistake in attempting to be profound, for he begins only where the real profundities leave off; and while he seems to have got to the root of the trouble, he has really revealed the root of his own trouble. We both appreciated and enjoyed what he has to say about the farmer's attempt to define the difference between a horse and a duck.[8] But we can appreciate his deductions about the definition of *distinction* only

---

[7]Our use of the quotes is a concession to Mr. Arnold, and an indication that we recognize his figurative use of the term *theology*.

[8]pp. 1801-81

because we appreciate his own inability to define. "The mind of the scholar . . . is able to penetrate to the real essence of the distinction [between a horse and a duck], which is value."[9] But it isn't. The real essence of a distinction between things is founded on the difference of the *essences*. A horse is not different from a duck *essentially* in that a horse can pull a buggy and a duck cannot; but in the fact that a horse just isn't a duck. If Mr. Arnold reasons in this fashion about cattle and fowl, can he be trusted to solve the philosophical problem involved in the shifting economic order?

As we are in doubt about Mr. Arnold's understanding of metaphysics, so we are suspicious of his knowledge of history, and especially of the philosophies which motivated action in periods of history foreign to Mr. Arnold. Certainly, if he cannot be said to be ignorant of the past, he can be said to be quite incapable of appreciating how the past thought. He has much to say of the Middle Ages and, "symbolically" perhaps, of the Church of the Middle Ages. But either he does not understand the Middle Ages or we shall have to revise our understanding as well as review our history. When he tells us of the "medieval search for the *magic formula* of *universal truth*"[10] we wonder if he wishes us to understand him to refer to just what he says, universal truth, or if we are to follow the line suggested by his *magic formula* and turn our attention to alchemy. *Universal truth* has but one meaning to the student of philosophy, and certainly to the student whose tradition is one with that of medieval philosophers; and in the terminology of these philosophers the term *magic formula* has no place. Mr. Arnold may borrow the terms of philosophy and theology, terms that were handled skillfully by the schoolmen of the Middle Ages, but he cannot find himself at home with the thought of the Middle Ages. One might even dare to say that he is at least unsure of the interpretation of causes. To him, what is of another age is truly phenomenal, in that it is "unknown" or "something that appears to be". Yet he will continue to delve into the past for his analogies; and, if he is as unsure of what motivates today as he is of what motivated yesterday, he can hardly be relied upon to make a faultless examination into the economics of our own day. We are always skeptical of his reasoning, as we are fearful of his sardonic humor. "Practical remedies, like sanitation, were not sufficiently mysterious [in the Middle Ages) to be respected."[11] Is it that they

---

[9]p. 181.
[10]p. 21.
[11]p. 56.

were not sufficiently *mysterious*, or that they were not sufficiently *known?*

We wish that Mr. Arnold had not shown that affection for "theology" which prompted him to go to it directly for his explanations, with the result that one never quite knows whether he has gone all the way back to the ultimate in one magnificent leap and is trying to tell us that the metaphysical is at the basis of everything, or if he is only laboring in the delusion that the immediate explanation is metaphysical. For example: "Most of the interesting and picturesque wars have been fought not over practical interests but over *pure* metaphysics."[12] If he means that at the basis of everything, including wars, (and not only the "interesting and picturesque"), is the metaphysical, he is telling us nothing new. If he means that before the English kings made their excursions into France during the Hundred Years' War—which we always believed to be an "interesting and picturesque" war—they consulted the learned metaphysicians of the land, we find it hard to agree with him. If his use of the term *pure metaphysics* is deliberate, he is unhistorical; if it is not, he is careless.

In the same manner he makes too much of the political and commercial difficulties of our own day. He makes too much of them, not in the sense that they are not real, but in the sense that he makes the difficulty arise out of something occult and contradictory. He seems unable to cope with complexity or opposition, and he cites the complexities and oppositions with the air of one who has first made the discovery. "The depression witnessed the greatest flood of legal and economic literature the world has ever known . . . It became impossible in the law school for students to write even about simple things without an amount of labor that was appalling . . . The situation was similar to that of the Church when ministers were multiplying treatises, and sermons went to 'sixthly' and 'seventhly'. This created a great counter-literature written by people called realists, which in turn called forth a new set of defenders of the faith. Legal doctrine grew so huge it became difficult to argue a case without presenting a longer brief than the case could bear."[13] What about it? A Zulu gets a stomach-ache; and so does a resident of Peoria. Both may cure it by a harmless purgative. But the Zulu gets appendicitis—(I presume it is safe to say that he might)—and dies because he does not know how to cure it. Should the resident of Peoria, who may happen to suffer from the same, resign himself to death simply because he may hope to be cured only after

[12] p. 90.
[13] p. 167.

a long and impressive diagnosis by learned physicians? Is the end of every conflict that grows out of a circumstance and a complicated civilization to be an impasse?

Fatal to Mr. Arnold's reasoning, or at least to our ability to follow him successfully, is the light-heartedness with which he jumps by analogy from one order to another. And the analogous argument, as he must have learned, is a treacherous argument. "A reformer who wants to abolish injustice and create a world in which nothing but justice prevails is like a man who wants to make everything 'up'." This is amusing; but it is not logical. He sees the point of resemblance between the two ideas; but he does not see the significant difference. *Up* and *down* have to do with the physical; and down is as real as up. But *justice* and *injustice* have to do with the spiritual; and injustice is the *absence* of justice. Again, "Indeed, a social organization may be compared to the organizations of physical energy described by scientists as 'matter'."[14] "Indeed" not! "Matter" does not lead a "social" life; and, however many the resemblances, there is one significant respect in which a man is not mere matter. Give a geranium all that is necessary for growth, and the geranium will grow; but give Mary Jane all that is necessary for growth, and she may still pine away out of love for Robert Taylor. This failure to recognize the transcending element in man is one of the stupidities of eugenics. One cannot breed human beings with the same serene security from surprise as one can breed cows. Yet the reason for this is something that does not seem to impress the sponsors of eugenics—or Mr. Arnold. And, apart from any argument about analogies in what Mr. Arnold has to say of the lovers of justice, does Mr. Arnold understand what the lover of justice is about? Does that lover "want" (in the sense that he *insists)* to *abolish* injustice; or does he "want" (in the sense that he *hopes)* to further the cause of justice? And, in attempting this, does he attempt the impossible?

Mr. Arnold is right in his belief that there is too much see-sawing back and forth. He is right sometimes also when he smiles at the alarm evidenced by defenders of the old theologies, mythologies or folklore, every time a man or body of men strikes out in apparent disregard of the same. We are with him in his belief that the experiment in Russia or the experiment in Germany may work even though it is "theologically" unsound. We shall be surprised at neither the success nor the failure of the Roosevelt conception of government. And we shall not be surprised, because we know that power, even in the sense of mere

---

[14]p. 24.

moral or physical force, can make things "effective"—at least for a time. But where we are often with Mr. Arnold, we are not with him for the same reason. He makes a fine point, for example, in his observation on the civil war in Spain. "Both the Rebels and the Loyalists in Spain are fighting for justice. That is what enables them to kill so many people in such a consecrated way."[15] This is a cruel observation. But it is not without its truth or its lesson. What Mr. Arnold evidently does not observe, however, or consider of moment, is the fact that both the Rebels and the Loyalists may be *subjectively* right.

We remarked in the beginning that, while Mr. Arnold is confused in his metaphysics and "theology", he is often correct in his facts; and while it may be said of him that he sees an irreconcilability where there is only a conflict, he cannot be said to have overemphasized the conflict. We cannot agree with him that theologies, either about religion or politics or law, must be scrapped because there *is* a conflict; we cannot agree with a greater absurdity which he more likely proposes: that the theology be let live to be effective only if it doesn't too surely "have an effect"; but we do agree that we shall have to determine just what and how, much any theology is expected to accomplish; and we have a right to insist that if the defenders of the theology continue to defend it in theory they must not complain if we insist that they put it into practice. The encyclicals of the Holy See touching upon the matter of social justice are profound without being obscure, and are ideal without being beyond the hope of a high degree of attainment. But it is becoming increasingly difficult for the layman to reconcile the preacher's splendid discourses on social justice and charity with the same preacher's application when that preacher happens to be, as well, the layman's employer.

When Mr. Arnold touches on the matter of humanitarianism he puts his finger on a real evil, and one that we are only slowly coming to recognize as such; but not only does he not label it as a *necessary* evil, he actually countenances it. "A friend of mine, the head of a moderately large law firm, at great personal loss kept all of his law clerks during the depression. He was also a director of a public utility. As a director he voted to fire employees and cut wages and at the same time actually increased the salaries of certain executive officials. While acting for the company he was *unconsciously compelled*[16] to assume the myth-

---

[15]p. 168.

[16]This is casuistic to the point of the sophistical. Was the man's liberty impaired in one instance because he was part of an organization, and not in the other because he was the head of it?

ology of the hard-boiled public-utility magnate. As a person he was a different individual. Rosenwald, as head of Sears, Roebuck and Company, paid low wages and was uninterested in better working conditions for his employees. As an individual he was one of the greatest philanthropists. He had a complicated explanation for these two different roles and seemed to believe that he had thought the whole thing out logically. Instances of this kind among our knights errant of business are too commonplace to develop further. *Liberals*, observing this phenomenon through the spectacles of their *theories*, are unable to understand it. They therefore *assume* that businessmen are hypocrites, not realizing that they are observing a fundamental *principle* of human organization."[17]

If we were to limit ourselves to one quotation from *The Folklore of Capitalism* to serve as an illustration of Arnold's reasonable complaint and yet his inability to cope with a problem it would be the one just given. With Rosenwald "charity" there is certainly something wrong. But is it only the *Liberals* who can take objection to it? Is it only *theory*, and the theory of Liberals at that, which stands opposed to such abuse of wealth and power? Is it only an *assumption* to say that such businessmen are hypocrites? And is it only observing a fundamental *principle* of human organization to rob from ones employees, to whom one has ones first obligation, to add one more doubtfully necessary structure to a group of university buildings? Must one have less to eat so that another shall have more to learn about chemistry? For Mr. Rosenwald (and for Mr. Arnold) the course was clear—to create better conditions for employees and then, if possible, to endow a charitable institution. Why obscure the issue?

Mr. Arnold closes his book with *Some Principles* of *Political Dynamics*,[18] his timorous offering of a solution; and he ends, as he began, in an orgy of the illogical. He says of his last chapter that it is one "in which a science *about* law and economics is distinguished from a science *of* law and economics." (Italics his).[19] He recommends the science *about* law and economics. But there is no science "about" anything! There is *information* about it; but the information is not the science. "The following somewhat *sketchy principles*(!) are set out only to show the kind of observations which can be made from the platform of such a science. Most of them are of course 'half truths'."[20] They are "sketchy" and "half truths", and yet he offers them as principles!

---

[17]pp. 353-354.
[18]Chapter XIV, pp. 347 et seq.
[19]p. 347.
[20]p. 349.

We do not wish to be credited with using the *argumentum ad populum* against Mr. Arnold, as some of our readers may fear, to see us quote the paragraph which follows—for human instincts (a "survival", perhaps, of the old "folklore") recoil at the implication that "all possible affection" for a child should disappear when the child is most in need of affection. But this paragraph may well serve as an epitaph on the tomb of the defunct metaphysics of the author of *The Folklore of Capitalism:*

> Struggling churches and colleges are often supported by people who haven't the slightest belief in their utility because they feel that it is not consistent or logical to change their attitudes. The psychology which makes possible the survival of such institutions is similar to the psychology which compels parents or relatives to keep an idiot child at great expense for medical care and nurse's services, long after all possible affection for the child has disappeared. This accounts for the support of thousands of absurd organizations long after they are no more than a burden. Keeping them going seems the only decent thing to do.[21]

[21] p. 355.

THE FEDERAL RESERVE SYSTEM

by

M. S. SZYMCZAK

Member, Board of Governors
of the Federal Reserve System.

The Federal Reserve System, now 25 years old, comprises about 6,335 member banks, national and state, the 12 Federal Reserve banks with their 25 branches, the Federal Open Market Committee, the Federal Advisory Council, and the Board of Governors in Washington. The System was called into being by those developments which make our own period in history so profoundly different from that period in which the older mutual savings institutions were organized. One hundred years ago, individual banks were still more or less isolated in their own communities.

With the development of modern transportation and communication, and all the rest that goes to make up this dynamic, machine civilization, interdependence became more and more the prevailing condition under which banks had to operate. With the increased volume of demand deposits and with the increased use of bank checks as a medium of payment, *commercial banks,* were necessarily drawn closer and closer together.

In the absence of central banking facilities, commercial banks developed a correspondent relationship between banks in the country and banks in the larger centers. The correspondent system of interbank deposits brought the scattered independent banks of the country into close relation with the money markets, enabling them to utilize those markets both as outlets for the investment of their surplus funds and, at times, as sources from which additional funds might be secured.

The correspondent relationship by itself, however, could not adequately meet the changing requirements of our financial and economic order, and that for two principal reasons. First, it was wholly voluntary; and second, the institutions it embraced were all run for profit.

These shortcomings were recognized when the Federal Reserve System was established. The Federal Reserve banks were set up under the authority of Congress as *public* instrumentalities. Since they are *not* operated for profit, the Federal Reserve banks never experience that conflict which in the case of privately managed

institutions may arise between the *public* interest, on the one hand, and the personal interests of the stockholders, on the other. The Federal Reserve banks supplied the bond that was needed between the separate *commercial* banking institutions of the country. It made them better able to cope with the conditions of our modern industrial life—conditions profoundly different from those that prevailed when banking first began in this country. Let me describe what *I* consider the *more important* specific powers that the Federal Reserve banks have been given in order that they might fulfill their purpose.

First is their lending power. Before the organization of the Federal Reserve System, our commercial banks always faced the nerve-racking possibility that their loanable funds, since they were limited by their own reserves, might be quickly drained off in periods of national emergency. And all too often when banks in correspondent centers felt a sudden demand for credit both from their own local customers and from their correspondents in the hinterland, they simply collapsed under the strain.

As a lender of last resort, the Federal Reserve banks are under no such limitation. Through their statutory power to create credit, either through lending directly to member banks or through the *purchase* of investments, Federal Reserve banks can bring about almost any desired expansion in member bank reserves. Large member bank reserves, of course, tend to encourage the expansion of commercial bank lending and investing. Or if need be, through high rediscount rates and the *sale* of securities in the open market, the Federal Reserve banks can effect a reduction in member bank reserves, and by this means discourage commercial bank lending. The policies of the Reserve banks are in both instances alike determined solely by consideration of the general welfare.

Bank deposits, especially those transferable by check, constitute the major part of the means of payment in the United States. The importance of an adequate volume of this means of payment is *self-evident* yet *difficult to measure.* On the one hand, it is a fact that demand deposits serve their principal purpose as a means of discharging money payment, and their availability in adequate volume is as important as the availability of currency and coin, although in a somewhat different way.

On the other hand, mere volume of deposits is not enough; there has to be use. This use is reflected in the turnover or velocity of deposits. The indefinite relation of a given volume of money to the volume of monetary transactions that may be effected by it is rather obvious. We only need to remember that

a dollar bill may be carried in one's pocketbook for days without effecting a single payment; but the same dollar, if spent by one person after another, may in the course of the same period of time effect several dollars' worth of transactions. The existing volume of bank deposits, when turned over repeatedly, is in the same way capable of effecting monetary payments equal to many times its own volume. The "X" in the problem is velocity, and velocity of circulation cannot be controlled in a world of free men and free markets.

The Federal Reserve System, operating through the twelve Federal Reserve banks and the Board of Governors, is empowered to perform certain central banking functions, and the primary purpose of such functions is to make the supply of money, not merely in the form of currency but mainly in the form of deposits, *adequate* for an active and healthy volume of business. Naturally, responsibility for the use of the funds made available rests in other hands. The Federal Reserve System can insure an adequate supply of funds to lend, but it cannot insure that borrowers will want to use them. It does not—it cannot—exercise an absolute *control* over the use of credit; it does exercise an *influence* over the use of credit. Its object is, in the first place, to encourage sound business activity and, in the second, to discourage unsound business activity in so far as either, or both, depends or depend upon the country's ultimate credit facilities, for these ultimate credit facilities are the special charge of the Federal Reserve System.

Another important central banking function of the Federal Reserve System, closely allied with what I have just been discussing, is that of issuing currency, known as Federal Reserve notes, and supplying other currency and coin. As many of you recall, before the establishment of the System the machinery for the provision of currency was inefficient. The currency lacked elasticity. The Federal Reserve banks make it possible now for seasonal and other demands for currency to be met smoothly and adequately.

Still another function of the System is to furnish a nationwide and uniform means for the transfer of funds and for the clearance and collection of checks and other items. It is a necessary condition of the use of checks as a means of payment on the scale with which we are familiar that their clearance and collection should be facilitated in every way possible.

The Federal Reserve System likewise performs many other bank supervisory and credit functions. The System acts as the Fiscal Agent of the United States Government and renders other

important services for the various agencies of our Government. No other central banking organization in the world has such facilities as we for the collection and analysis of information. And certainly no other central bank publishes so fully the facts and considerations upon which its action is based.

In conclusion, I should like to assure you that in the determination of the System's policy and action, the welfare of the country as a whole is the sole object of our concern. The Federal Reserve banks and the Board were established for the purpose of serving the *public* interest, and there is neither any consideration of profit nor other motive, to interfere with their obedience to that interest.

WHY LAWYERS?

by

S. R. PULASKI

One of the interesting paradoxes a man learns after years of vigorous thought about anything of importance is that that thing is probably of extreme importance largely because men continue feverishly to underestimate it. If two hundred seasoned business men get themselves into a lather of language about the uselessness of lawyers, one can bet heavily that the legal profession is venerable and indispensable.

This ought to be of some consolation to lawyers who are depressed, or driven by irritation into counter-argument, by the attacks and threats of drastic reform that appear with unhappy frequency. It ought to strengthen their conviction that the profession is of consequence, since it is so passionately pestered—and since the intelligent man knows that no sane man girds himself gloriously for battle against an enemy of no consequence. And, to the good of everyone concerned, it ought to make clear that if there is something wrong in particular there is something right in general.

There is no concealing the fact that *some* men have been victimized by *some* lawyers, just as they have been victimized by some doctors, some merchants—and some other *laymen*. We do not live in Utopia, as any harrassed lawyer can tell you who has tried to reconcile the theory of the law and John Doe's particular case. But the critical layman would be the first one to scorn the lawyer who would make no effort to bring John Doe's case to a successful close before the Bar of Justice. Imagine the consternation of Mr. Doe should his lawyer close a troubled consultation with the cry and the resolve: "The opposing attorney might be a rascal. Let us start a world-wide movement to destroy the legal profession".

Of course our newspapers do not carry screaming headlines reading WORLD-WIDE MOVEMENT ON FOOT TO DESTROY THE LEGAL PROFESSION, any more than they carry headlines reading WORLD-WIDE MOVEMENT AGAINST GOVERNMENT—or anything else quite so literal and shocking. Perhaps we should be better off if the issue were so directly stated; for the danger to an institution is more insidious when there is the impassioned, unintelligent and indirect attack. There may be both an honorable and personal reason for voting for ones

friend who aspires to the Bench, though one does not know the metaphysics behind law and government; but to insist, afterwards, that one has a right to be an anarchist because ones friend has proved himself a poor Judge is wandering far from the realm of sense. And yet this is what much of the hue and cry amounts to when one quietly surveys the scene of conflict and learns that reformers are out not so much to correct as to crush.

It is their inability to see the distinction between the use and the abuse of an institution that has made radical reformers odious in every civilization; for when they start out by *re*forming they generally end up by *de*forming. They become dangerous leaders because they themselves are too ignorant of the very essence of a thing to know just how far to go in their re-forming to get back to the form; and, if they are intelligent enough to know that they do not know everything about the thing with which they are driven to quarrel, they are too embittered, by what they have suffered personally, to help correct particular evils, called abuses, and still support the thing itself, which has a use.

The lawyer and, as a consequence, the legal profession, suffers from this passion in opposition and confusion in argument. Passion alone, dangerous as it is, might be of use in correction when disorder needs a drastic treatment. This was the recommendation of classic satire—that it was satire and not sarcasm; and that it was used in alliance with logic, not in defiant disregard of it. But in our onslaught on evil today we seem to have grown peevish and illogical. In an attempt to restore order to a thing we proceed with every indication of eventually destroying the whole order of things. As we have almost succeeded in destroying marriage because some of us have suffered personally from an irreconcilable marital conflict, we would destroy jurisprudence because we have been abused by a lawyer.

It may be argued that things are pretty bad right now. But then it was always argued that things were pretty bad "right now." The sentimental Duke in Shakespeare's *Twelfth Night* objected to the "light airs and recollected terms of these most brisk and giddy-paced times" much as the lovers of the old masters object today to the light airs of *our* giddy-paced times. But the dramatic action of that play does not provide that the Duke shall smash the musicians' instruments over their heads and vow death to all music.

There is something wrong today with some lawyers—just as there was always something wrong with some lawyers, doctors, priests and candlestick makers. Concede, even, that there is something alarmingly at fault. We must however stop short of

saying that there is something radically wrong, if by this we mean that we must destroy all faith in the profession and declare it an unnecessary institution. And we must halt because the destruction of the institution would create a greater evil than its continued imperfect existence could provoke. There are some things which must endure, no matter how much necessary modification they must undergo and no matter how much they are abused. It is only sublime folly to condemn the use because of the abuse. He is not necessarily a brilliant dentist who decapitates a patient to relieve him of a bad tooth. Yet this is the only kind of cure that can seemingly result from the activity of the unthinking critics we hear today.

The legal profession is as venerable as antiquity; and the sanctity which surrounds it must have a reason. That reason can be found in the nature of law and the philosophy of the individual and society. So that the answer to the question, "Why lawyers?" may be simply this: Because lawyers are as necessary as the law.

In spite of all quibbling, the one ambition of the legal profession is to administer justice under the law. Chief Justice Ryan expressed this excellently in an address before the University of Wisconsin Law School:

> "This is the true ambition of the lawyer: To obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law adopted under His authority; to minister His justice by the nearest approach to it under the municipal law which human intelligence and conscience can accomplish. To serve man by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society according to law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer before God and man according to the scope of his office and duty for the true and just administration of the municipal law. There go to this ambition, high integrity of character and life; inherent love of truth and right; intense sense of obedience, of subordination to law, because it is law; deep reverence of all authority, human and divine; generous sympathy with man, and profound dependence on God. These we can all command. There should go high intelligence. That we cannot command. But every reasonable degree of intelligence can conquer adequate knowledge for meritorious service in the profession." [1]

---

[1] Winslow, The Story of a Great Court.

JUDICIAL INDEPENDENCE

LIFE TENURE vs. ELECTION FOR TERM OF YEARS

by

STANLEY W. WISNIOSKI [1]

Much has been said and written of late on the subject of tenure of office of judges. The past decade has witnessed more actual, active interest of the Bench and Bar on this important question than has the preceding half century. Many illuminating papers have been written on the subject by distinguished members of the Bar. The American Bar Association has created a committee to give attention to this important question.

The welfare and the liberty and the rights of all depend on our judiciary. Our courts are the guardians of our property and of our personal liberty. To them only may we look for the protection of our constitutional rights as individuals. Certainly, all will concede that our judical system should be so fabricated and should rest upon the principles that equal justice be dispensed to all; that our judges should be independent and free of any attachments or forces, however slight these may be, which might have the tendency to cause them to deviate from the honest and impartial administration of justice to all. Right should never give way to might. Right depends upon the ability and the interpretation of the judges who sit in judgment. We have enacted many laws for the good and the protection of the majority, but these laws may benefit us not at all, if they are poorly or partially administered.

The 17th Century in England found the custom established that judges were appointed for life or during good behaviour. This custom was brought to this country by the colonists, and our federal judiciary today still holds such tenure. However, the situation as to tenure in the different states, has changed. Today, in a majority of our states, the judges are elected by popular vote of the people, to serve for a term of years. Many reasons have been given in explanation of this change; all are credible. Perhaps the chief reason was that after the adoption of our Declaration of Independence, many judges still retained the tendency to apply the English interpretations, rules and procedure, and it was felt by the people that the judges were hostile. Given this feeling, it was natural that the people would attempt to curb

---

[1]Commissioner, Industrial Accident Board Commonwealth of Massachusetts.

the power of these judges, and to do so, to attack the security of their tenure.

Tenure of office by executive appointment for life, or during good behaviour, is today found only in the federal judiciary, and in the States of Massachusetts, Connecticut, New Hampshire and Rhode Island. In a few other states, executive appointment is made for a term exceeding ten years, but not for life. In the great majority of the states, the judges are today elected by popular vote for a term of office under ten years.

Now, just why all this thought, attention and agitation regarding the tenure of office of judges. Tenure by executive appointment for life or during good behaviour, has worked well in the states where used. As has been said, a judge should be independent of any attachment or forces which might tend to influence him in deciding litigation and interpreting our laws. It is but natural that a man of integrity, having been so appointed a judge, and being assured of a tenure for life or during good behaviour, finds himself in a position wherein he is independent. He is in a position to maintain the integrity of his trust. He is above the demand of any majority or adverse power. He need not condescend in any manner to any person or organization, in order to maintain his "vote pulling power". He is free to impartially administer the law and to serve his government of laws. He is all that a judge should be — a guardian of our Constitution and an impartial interpreter of our laws.

It is, of course, true that there are among the judges who hold office by popular election, many who are capable and of unimpeachable character, but they are too far in the minority. The judiciary should be composed only of men of high standing, able, honest and unfettered either by anxiety for re-election or by "political creditors". And it is true that in the system whereby judges are elected by popular vote, political obligation is no small factor. The candidate must become involved in politics. He must appeal to the people in order to get their vote, and he has to meet the competing candidates; in short, he must sell himself to the people, and to do this, the candidate must have publicity, must make himself known, perhaps commit himself to actual promises, or in any event, he impliedly commits himself. For, can it be said that his candidacy would be successful without his workers, or even backers? The fact that the candidate has a personality, a force of argument, or backing, resulting in his election, does not mean that he will make a good judge. Mere political ability and publicity do not constitute judicial caliber. But granted, that the successful candidate is of high standing and judicial caliber, his term is one for years only, and he knows that he must again meet the voting public. His natural

anxiety to be re-elected is not conducive to the strictly impartial administration of his judicial duties.

Insecurity of tenure breaks down the independence of the judiciary; the independence that is so essential to honest, impartial and effective administration of justice. We must have judges who are secure in their tenure and who are thereby freed from the necessity of entering politics; judges who will neither arbitrarily abuse their power, nor be forced or even inclined to the misuse thereof.

The system of life tenure by executive appointment, as before mentioned, has worked remarkably well in the few states where it is in vogue. To be sure, there should be some check or safeguard over the appointing agency, usually the governor, to the end that the appointive power be not abused through appointments other than those based on merit and qualifications. Where the appointive power rests solety with the governor, subject to the consent or confirmation of a council, which council is also elected by popular vote, there still remains the possibility of political consideration entering into the making of an appointment.

It has been aptly suggested that where the appointive power rests with the governor, there should be an experienced judicial commission, whose duty it would be to select an eligible list of several nominees. Such a judicial commission would, no doubt, be comprised of able men, high in the profession. Even lay representation on such commission would have value in promoting public confidence, and respect for the courts. It would not be likely that such commission would include in its list of nominees, any person who would not be qualified to ably and honorably perform his duties on the Bench. The governor would be obliged to confer the appointment upon one of such nominees, and the executive power of appointment would still remain, but would be affirmatively limited.

THE 1938 NATIONAL CONVENTION

Pittsburgh, Pennsylvania, has been chosen as the Convention City for the Sixth Annual Meeting of the National Association of the Polish-American Bar. On August 25, 26, and 27, 1938, at the Roosevelt Hotel in that city, the members of this Association, in conjunction with the Physicians' and Dentists' Association will come together again.

The past five Conventions of the Association have gone on record as being among the most notable gatherings ever held in this country. We therefore invite you and your friends to attend, and particularly urge that you be present at all the business sessions of this important gathering. There has never been a time when the duty on the part of a lawyer to take an active interest in the promotion and development of the legal profession was as apparent as it is today. You can render a splendid service to your Association and to the advancement of legal education by attending, for this Convention will provide great opportunities for collective thinking about the law, the Polish lawyer, and the legal profession.

The Committee in charge is expending every effort to make the Convention impressive, inspiring, and entertaining—one which will make you realize that the Association is something more than a name. The details of the preliminary plans for the Convention are now being formed by the members of the local Chapter residing in Pittsburgh. The local Chapters throughout the country are urged to devote time to the study of national and local problems with which this Association is concerned, and evidence interest in the opportunity offered by the united and harmonious action of our organization for the improvement of the legal profession and the law.

Mr. Lawrence Zygmunt, President of the Association, announces that two decisions have been made as to the 1938 meeting:

1. One of the early sessions of the Meeting will afford an opportunity to meet and greet all new members and all members who are attending the Association's Meeting for the first time.

2. The Association Program will include a session at which an "Open Forum" will be conducted with full and free opportunity for any member of the Association to present and discuss, within a reasonable time limit, any resolution or matter which pertains to the legal profession and the purposes and work of our Association.

Some consideration must be given by the Convention to the study of dues and the establishment of a sound financial system that will permit our organization to function more effectively. Included in this study will be the very important matter of financing and publishing our Journal.

Those who were present at the Boston Convention last August, will recall how exciting, vital, and refreshing it was. The Convention was friendly and jovial, and brought many lawyers of the country together for the first time.

We repeat, therefore, pack up your law books on a high book shelf, and loaf a while. If you have a nickle, enjoy yourself! Spend it!

Pause, traveler, here!
And I shall quench thy thirst
With ancient vintages;
Bind up thy growing wounds;
And, with an ancient tale,
Point out to-morrow's pilgrimage!

PETRAZYCKI'S CONCEPTION OF LAW

LEON PETRAZYCKI,1864-1931

It is not our purpose at this time to give an exhaustive study of Professor Petrazycki, because his jurisprudence cannot be studied fully otherwise than in his Russian works, of which a small part is available in German translation. A complete translation was made into Polish of his *Introduction Into The Study Of Law And Morals, Principles Of An Emotional Psychology*, 3rd edition, published in 1930, shortly before his death at the age of 64, in Warsaw. But we invite attention to the person and teachings of a man, the proof of whose attainments is seen both in his concept of jurisprudence and the distinguished positions which he held.

Leon Petrazycki was graduated from the Russian University of Kiev, and was Professor at the University of Petersburg until 1918. After the Bolshevik Revolution, he associated himself with the University of Warsaw as Professor of Jurisprudence. Petrazycki was not only the greatest legal philosopher of Russia and Poland, but his influence was also felt in Germany after the publication of the two volumes, *A Doctrine Of Income, (Die Lehre vom Einkommen*, 1893 and 1895). An insight into his theory of law is made easier by an understanding of the difficulty of his position while resident in Russia. As a Pole he was placed in a position whereby he could realize the conflict of loyalties, making it difficult for him to accept as supreme and final the system of Russian law. Nevertheless, he was active in Russian political life. In 1906, he put his signature to a manifesto of which he did not approve and for which he later served a short term of imprisonment.

According to Sorokin, "among numerous and various psychological theories of law and its social role, possibly the most elaborate is the theory of Professor Leon Petrazycki." [1] To quote Sorokin indirectly or in substance, the essence of Petrazycki's theory is that law is a specific psychical experience. Outside of the human mind, it does not exist as law, but only as a symbol of law, which without a corresponding psychical experience, is incomprehensible and represents a mere combination of various physical phenomena. Two principal varieties of law are: official law, enacted by state officials; and, the unofficial law, which may very often be contradictory to the official law. Official "laws,"

---

[1]Contemporary Sociological Theories by Pitirim Sorokin.

courts, and judges are nothing but instruments for the realization of the distributive function of law. In order that the distribution of rights and duties may be efficient, there must be some power or authority through which the distribution is enforced and protected. On this basis appeared the Government, the state, law agents, legislatures, courts, judges, etc.

Chief Justice Story seems to have been of the same opinion when he said, "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." [2]

To conclude our short sketch of jurisprudence as treated by Petrazycki, we wish to quote from Professor Meyendorff, who says,

"Jurisprudence as treated by Petrazycki offers a wide horizon. It prepares the student for an international outlook, for a historic perspective, for a sociological and anthropological approach, and sharpens the eye for significant details. His theory of jurisprudence is the one which I think more than any other takes into account the process of human motivation, contemplates both alternating stages—change and stabilization in constant succession—without prejudice, and fosters the understanding of a variety of types and degrees of culture. Ultimately it works for a tolerance intolerable to the partisans of swift action, but characteristic of the preachers of and believers in Science." [3]

S. R. PULASKI.

---

[2]Swift v. Tyson, 16 Pet. 1, 1842 which case was disapproved by the decision in the Erie Railroad Co. v. Tompkins, U. S. Supreme Court Case,

[3]*Modern Theories of Law*, "Leon Petrazycki," A. MEYENDORFF. London, Oxford University Press, 1933.

MOTOR CARRIERS

The Motor Carrier Act was approved on August 9, 1935, and became fully effective on April 1, 1936. The definition of such a carrier as given in section 203 (a) (15) is as follow:

> The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements and whether directly or by a lease or any other arrangements, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

Contract carriage is a form of private carriage, as distinguished from the carriage for the general public which common carriers hold themselves out to perform. That the business of common carriers is a public calling and subject as such to public regulation has long been recognized. It has become evident, particularly in the motor-carrier field, that private carriage also is sufficiently affected with public interest to warrant public regulation, at least to an extent. The term "contract carrier" was coined in State statutes for the regulation of motor carriers. In a number of these statutes, protection of the common carrier was expressly recited as the purpose of regulating the contract carrier. In others, this purpose appeared by necessary implication. The justification for such regulation, because of the public interest by which the contract carrier is affected, was well stated in Stephenson vs Binford, 53 Fed. (2d) 509. The Court said:

> We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound togeher and so inter-dependent that the public may not continue to have a safe and dependable system of transportation unless private (contract) carriers operating on the same roads with common carriers are brought under just and reasonable regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so.

This principle is inherent in the Motor Carrier Act. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest ,and the regulation of contract carriers is designed and

confined with that end in view. For that reason it differs from the common carrier regulation.

Thus, the ICC is authorized to prescribe minimum charges for contract carriers, but not maximum charges. No need exists, as to such carriers, for protecting the public against exorbitant charges, because the contracting shippers are well able to protect their own interests in this respect. The patent object of Congress is to protect the common carriers against cut-throat competition. This appears explicitly in section 218 (b), which enjoins the ICC in prescribing minimum charges for contract carriers, to "give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part". The same thought is found in other provisions, notably section 209 governing the issue of permits to contract carriers, as compared with section 207, which has to do with the issue of certificates to common carriers. The test in the latter instance is public convenience and necessity, but in the issue of permits it is consistency with the public interest, and the policy declared in section 202 (a). That policy lays stress upon the "development of a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense", upon the fostering of "sound economic conditions" in such transportation, and upon the avoidance of "unfair or destructive competitive practices".

Section 209 (b) provides, among other things that in issuing permits to contract carriers, the ICC shall:

> specify in the permit the business of the contract carrier covered thereby and the scope thereof, and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier.

A contract carrier has certain inherent advantages in competition over a common carrier. There is a great difference in the conditions under which traffic can be hauled for shippers by motor carriers, even when the traffic is of the same kind. Naturally the traffic of the larger shippers, who can offer volume and steady movement, is particularly desirable. The common carrier holding itself out to carry traffic of a certain description must serve all who seek its services, and under the act it must serve them without unjust discrimination and adhere to published rates. The contract carrier, on the other hand, is free to pick and choose from among shippers, and under the act it may discriminate in its service to them and its charges may be called

in question only if they are found to fall below a reasonable minimum level. By reason of these circumstances contract carriers are enabled to give a higher type of special and personal service to their shippers than is possible for common carriers; and it is the need and demand for this service which constitutes the chief advantage of and justification for the contract carrier in the present motor transportation system.

The inherent and inevitable disadvantage of the common carrier is accentuated and becomes a source of positive peril to them when competitors, claiming to be contract carrier, are promiscuous in their dealings with shippers, shop around among them freely, and confine their actual contracts to individual shipments. Under such conditions, shippers, especially those who have a large volume of traffic to offer, may play the contract carrier against the common carrier and the contract carriers against each other, with the result that the unfair and destructive competition which Congress sought in the act to abate is instead intensified, particularly in view of the fact that the publication of their specific rates, as required by the act, makes the common carriers open targets. Ultimately, also, such conditions prove detrimental, not only to the carriers, both common and contract, but to the shippers, the public safety, and the welfare of the employees.

Not only is this true, but conditions of this character greatly impede the practical administration of the act, because they make it exceedingly difficult to locate the line of distinction between those who are common carriers and those who are contract carriers. As a matter of law, it is more than probable that many of those who now profess to be contract carriers are in reality common carriers.

LEON C. NYKA.

ART AT THE BAR

WHISTLER v. RUSKIN

Anyone with a first-hand knowledge of what transpires in the courts of justice in any part of the world, or any one of the millions who have seen the motion-picture dramatizations of actual or fictional trials, knows how small a part statute law plays in that element of a trial which supplies the dramatic. Sometimes this drama has its source in the confusion which grows out of the difficulty of determining and applying the law, a confusion which lends fuel to the fire of capable, clever and witty judges and lawyers; sometimes it is supplied by a tragic or comic circumstance which surrounds the case or parties involved; and sometimes it is found in the immediate or remote background of the principles, a background sufficiently known to a public that will sit with a greater concentration of interest and anticipation of thrill than they could know in the theatre.

The English public which was present for the hearing of the case Whistler v. Ruskin on November 15, 1878 could not complain that their concentration and anticipation of exciting entertainment went unrewarded; for the case offered that interest which grows out of all the circumstances we have mentioned as making drama of a court proceedings.

If John Ruskin is remembered at all by the student of English Literature who goes unwillingly to the duty of reading the classic authors, he is remembered as that ponderous and dogmatic critic of the arts who wrote nothing comprehensible and entertaining save *The King of the Golden River;* but to the Englishman of the second half of the nineteenth century who could lay and claim to culture, the author of *Modern Painters, The Seven Lamps of Architecture* and *The Stones of Venice* was, however dogmatic, the first critic of his time and force to be reckoned with. Painters might paint, and paint well, against the circumscribed opinions of John Ruskin, but when they went begging for buyers they did not foolishly suppose that the voice of Ruskin would be unheard by the English public. As one who regarded this influence wittily expressed himself in *Punch:*

I paints and paints,
Hears no complaints,
And sells before I'm dry,
Till Savage Ruskin
Sticks his tusk in,
And nobody will buy.

This is a condition of art and business a little strange to the public of our own day. If our critics are taken seriously or can over-awe, their influence is felt within the province of art; certainly any excitement occasioned by their conflict with artists hardly endures, or it exerts far less influence than the same criticism would exert in the England of Ruskin.

That the suit for libel brought by Whistler against Ruskin is celebrated is perhaps due, however, not so much to any peculiar condition of art or relationship of artist, critic and vendor of paintings, as to the prominence and personality of both Whistler and Ruskin and the fact that an attempt was made to administer justice in a case about as intangible as could be brought in to trouble judge and jury. And it is the personalities and the intangibility that engage the attention of this writer.

Ruskin's relationship with the public was peculiar. Of an extremely sensitive nature and classical turn of mind and one from whom, therefore, one might expect a loftiness of view as well as of diction that should hardly interest the public at large, his *dictum* on art was something that could make painter and public alike pause. Perhaps it was because he did not always couch his views in that excellence of diction which makes him odious to the high school boy with a distaste for anything more classic than the interesting tales of a Stevenson. He could be caustic in his expressions of disapproval, as well as arbitrary in his decisions. And it was because he was unfortunately clear and caustic in his criticism of Whistler that he found himself involved in a lawsuit with a man who was easily his match in invective understandable to the common mind.

If John Ruskin's egotism found expression in dogmatic utterances on art, James McNeill Whistler's found expression in the production of works of art which must have irritated Ruskin in much the same manner as the works of the ultra-modernists irritate the disciples of an earlier and more conservative school. Added to this, Whistler affected in his private as well as his professional life a contempt of tradition and public opinion strongly suggestive of Oscar Wilde, a contempt that must have been exceedingly painful to a man of Ruskin's refinement and respect for conventions. Critics other than Ruskin had treated Whistler roughly; and he had answered them with equal severity but less dignity, and with positive relish in his vulgar, if witty, reply. And when Ruskin, for whom Whistler seemed to lie in wait, assailed him in language which evidently seemed to Ruskin fitting to the occasion and the man, he did not merely talk back. He brought suit for libel.

Of some of Whistler's Thames "nocturnes", including the "Nocturne in Black and Gold—The Falling Rock", which he had exhibited at Grosvenor Gallery and for which he asked a price beyond its (to Ruskin) evident worth, Ruskin wrote: "For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the Gallery in which the ill-educated conceit of the artists so nearly approaches the aspect of wilful imposture. I have seen and heard much of Cockney impudence before now; but never expected to hear a cox-comb ask two hundred guineas for flinging a pot of paint in the public's face." For this criticism Whistler felt that Ruskin, not he, should pay—and to the tune of £1000.

Ruskin, who had suffered, and who was to suffer increasingly to the end, from mental strain that was unbalancing, and often left him physically ill, was unable to appear for trial and was represented by his friend Burne-Jones who assumed the unwelcome task of giving expert evidence for the defense. Whether this was favorable, in the sense of gratifying, to Whistler, is a matter for speculation. At any rate, Whistler had the field to himself and did not need to fear Ruskin's resources in extemporaneous wit and irony; and he made capital of the opportunity.

The case hinged, naturally, on the justice of Ruskin's devastating criticism of Whistler's painting—which meant, in consequence, an attempt to assign some tangible commercial value to Whistler's work. For the Court, with no pretensions to an ability to evaluate a work of art, the task was troublesome. Whistler, with his highly-cultivated taste for the embarrassing, was at home in the confusion.

The Attorney-General (for the defense) was eager to know how long it took Whistler to "knock off" (an unfortunate choice of language in an address to Whistler) the Cremorne Nocturne, and being answered that it took roughly two days, hastily expressed his surprise that Whistler asked two hundred guineas for for only two days' work.

Whistler—"No; I ask it for the knowledge of a lifetime."

Att'y-Gen.—"Now do you think that anybody looking at that picture might come to the conclusion that it had no peculiar beauty?"

Whistler—"I have strong evidence that Mr. Ruskin did come to that conclusion."

Att'y-Gen.—"Do you think now that you could make me see the beauty of that picture?"

Whistler—(After a dramatic pause, in which he gazed with studied look from questioner to picture)—"No. Do you know I

fear it would be as hopeless as for the musician to pour his notes into the ear of a deaf man."

It is no wonder that the Attorney-General, in his address to the jury, remarked that he "did not know when so much amusement had been offered to the British public as by Mr. Whistler's pictures."

The record has it that Whistler won, with damages at a farthing and the costs to Ruskin, £386 12s. 4d.—and Whistler made public his satisfaction thereafter by wearing the farthing attached to his watch-chain..

In a moldy old volume containing the life of an old Doctor, a celebrated professor of law, there is recorded an incident that goes to show the dangers which may beset a member of the legal fraternity should he be too much given to benevolence. This Professor became very rich[1] and his later days were given to alleviating the troubles of the poor. As he grew old, he purchased a mule and used to ride about the country. Whenever he met a poor man, he stopped his mule and gave the poor man a small piece of money. After a while the mule became so accustomed to the Professor's peculiarity that whenever he saw a poor man he stopped of himself and would not go on until the poor unfortunate had received a gift. When the doctor finally died, no one could be found to ride the mule.

Mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

Continue the studying of your books and not to spend your time on the old stock.

Be truly impartial.

Be a light to jurors to open their eyes, but not a guide to lead them by the nose.

Let your speech be with gravity, and not talkative, nor with impertinent flying out to show Learning.

—FRANCIS BACON.

[1]This is doubtful, but it is so reported.

THE CONSTITUTION

A draft constitution has been drawn up and circulated to all the members. We urge that you study the constitution, and if any changes in that document are necessary that you be prepared to make such recommendations.