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Editorials

EDITORIALS

THE BENEVOLENT COLONY OF GEORGIA.

The benevolent colony of Georgia has degenerated, at least in one phase of her civic life, into a condition of pitiable stupidity. We are not calling a spade an ocean greyhound nor a Pierce-Arrow. Stupidity is the word. A ten year old boy in the state of Georgia who has snitched a bag of peanuts or a bottle of coca-cola (valued at a nickle) can be legally committed to the chain gang, or for eleven years to a reformatory institution. One hundred and eighty years ago Georgia was a benevolent colony. It was a refuge for the unfortunate. General James Oglethorpe, her founder, had been touched by the awful condition of men and women who were confined in English prisons—particularly those who were imprisoned for debt. He proposed the colonization of such unfortunates in America and aroused enthusiastic support. His was a plan that enlisted the aid of the philanthropist preachers, the Wesleys and Whitefield. To the new settlement came Protestant exiles from Salzburg, Germany; Moravians and Scotch Highlanders were there: all high born stock. After 1752, when Georgia became a crown colony, she continued to be a refuge for the oppressed and the best blood of Europe peopled her pleasant meadows. The Georgians of our generation may be pardoned for some pride in an ancestry which they had no part in choosing. But James Oglethorpe, Anthony Ashley Cooper, George Whitefield, and the Wesleys must sometimes be constrained to turn over in their graves. Particularly so when the people of this "Empire State" enacted a law providing that when a minor under 16 years of age is found guilty of a misdemeanor the judge shall have discretion only to send him to the chain gang or to commit him to the industrial farm or other institution; if the latter course is chosen, commitment shall be for and during the minority of the person so committed.

William H. Hutson, Esq., of the Chicago Bar, has recently investigated one case which has come under this nefarious statute. Three years ago one Ollie Taylor, ten years old, stole a bottle of coca-cola. He was tried and sentenced to spend a term of eleven years in the Georgia reformatory. The Supreme Court of the state sustained the sentence and refused to interfere when the father of the boy instituted habeas corpus proceedings against the keeper of the reformatory. Mr. Hutson secured from the clerk of the Supreme Court a certified copy of

the Court's opinion. The facts in the case as set forth in that opinion are quoted here from the Chicago *Tribune* for April 9, 1913. Mr. Hutson assures the writer that they are stated here exactly as he found them in the certified document from the Supreme Court of Georgia: (See *Taylor v. Means,* 77 S. E. 374).

"O. F. Taylor instituted habeas corpus proceedings against T. A. E. Means, charging that the defendant was illegally detaining petitioner's son, Ollie Taylor, a youth about 13 years of age, and setting up that petitioner was entitled to the possession and services of his said minor son.

"The lower court refused to liberate the child and the Supreme Court held that it had no power to do so under existing laws. Continuing, the Supreme Court states the circumstances as follows:

"'When a little more than 10 years of age, Ollie Taylor had pleaded guilty to an accusation charging him with an offense which amounted to a misdemeanor —to-wit, the theft of a bottle of coca cola, of the value of 5 cents. The order and conduct of the life of the boy while confined in the industrial farm is as follows: Arise from 4:45 a. m. to 6 o'clock a. m.; eat breakfast from 5 to 7 a. m.; do chores from breakfast to 8:30 a. m.; attend school from 8:30 to 11:30; dinner at 12 m.; play from dinner to 1:30; work at jobs suitable to his strength from 1:30 to thirty minutes before supper; supper anywhere from 4:30 to 6, owing to the season of the year; study from supper to 7:30 or 8 in winter and in summer from 6:30 to 7:30; then to bed; bathe, work private garden and play baseball Saturday; play house games Saturday nights; Sunday rise as on any other day; breakfast, thence to Sunday school; exercise by drill or gymnastics; dinner; preaching in the afternoon and singing at night; discipline is military.'

"The court held as follows: 'The sentence in the present case is not one imposing punishment under the purely penal statutes of the state; the purpose of the sentence is not punishment alone, but restraint and correction under circumstances that shall tend to the mental and moral uplift of the child and the proper formation of his character.

"'Where a minor under age of 16 is convicted of a misdemeanor * * * the act of the legislature confers on the presiding judge a discretion to send him to the chain gang, or to the industrial farm, but if he is sent to the industrial farm, or other similar institution, the legislature has declared that such a sentence shall be for and during the minority of such person. * * * The courts were not given any discretion or authority * * * to send a minor to the industrial farm for a less time than that above mentioned, or to discharge him before his reaching majority, on a writ of habeas corpus.'"

The "gentleman from Georgia" will find little in this case to increase his confidence in the greatness of his state. He will have to return to his coat of arms and to his family tree that carries him back a half dozen generations to a period when Georgia *was* a benevolent colony; to a period when high minded seekers after liberty and justice for all unfortunate souls sturdily pressed back the boundaries of the southern wilderness. He must forget the present in which most men are proud to live.

Were it not for this gush from the southern court about restraining the babe in circumstances that shall tend to its mental and moral uplift one might charitably assume that the supreme interpreters of Georgia's law are impartially applying the statute to the case on the theory that the best way to correct a bad law is to enforce it. On the other hand it is fair to assume in our generation that men who are not

entirely out of touch with the better educational and humanitarian spirit that is beginning to pervade our courts would turn something inside out in an effort to circumvent a statute that is as base of common sense as this one, unless Empire State sentiment supports it.

The people of Georgia are responsible. It goes without saying that the case of Ollie Taylor has already received, or will receive so much publicity that they will repeal this statute and enact a sane law to take its place. But the credit that they will secure by responding thus to external stimulation rather than acting on their own initiative is hardly worth mentioning. By observing the negative virtue of refraining in the future from silly legislation relating to minors, they may, however, win the gratitude of their enlightened contemporaries.

ROBERT H. GAULT.

HEREDITY AND RESPONSIBILITY.

In the intense interest in human conduct and its regulation which is now dominant in the public attention, there is naturally an increasing inquiry as to causes and the elements which control and influence man and his actions. For some reason there seems to be a turning to the purely biological study of human development to find the explanation of social phenomena and as in biological thought there seems now current a return to the old preformist doctrines which are virtually a denial of development, we see their influence on the views now advanced as to conduct and social relations in a metaphysical predeterminism as rigid as the old theological predestination. Applied to practical affairs, this attitude results in the view that people are not responsible for their conduct and that praise for good actions is due to some more or less remote Isabella de Vermandois and punishment for bad ones "should be visited only upon the parents to the third or fourth generations." It is refreshing to listen to a scientist who in his treatment of the problems of heredity and development does not entirely divorce himself from his common sense and treat them merely as exercises in non-euclidean geometry. In his presidential address before the American Society of Naturalists as its Cleveland meeting, entitled "Heredity and Responsibility," which is published in *Science,* for January 10, Professor Edwin G. Conklin, of Princeton University, called attenton to the absurdity of some extreme applications which are being made of certain biological theories. He says: "We once thought that men were free to do right or wrong, and that they were responsible for their deeds; now we learn that our reactions are predetermined by heredity and that we can no more control them than we can control our heart beats. For

ages men have believed in the influence of example, in the uplift of high ideals, in the power of an absorbing purpose; for ages men have lived and died for what they believed to be duty and truth, and have received the homage of mankind; or they have lived malevolent and criminal lives and have been despised by men and punished by society. But if our reactions, habits, characters are predetermined in the germ plasm such men have deserved neither praise nor blame. If personality is determined by heredity alone all teaching, preaching, government is useless; freedom, responsibility, duty are delusions; whether men are useful or useless members of society depends upon their inheritance, and the only hope for the race is in eugenics—always supposing that enough freedom is left to men or society to control the important function of choosing a mate. * * * Do our studies of heredity lead us to any such radical conclusions? If they do we must accept them like brave men. But when theories lead to such revolutionary results it behooves us to examine carefully those theories to see if there is not somewhere a fundamental flaw in them." Professon Conklin shows that the fundamental error of the determinist view is in practically denying development altogether. Characteristics are not actual in the germ but potential and their actual appearance depends upon many complicated reactions of the germinal units with one another and with environment. The results of development are not determined by heredity alone, but also by extrinsic causes. "Things can not be predetermined in heredity which are not also predetermined in environment." Functional activity, or use, is also of importance and the factors which control behavior are not merely the stimulus and the heredity constitution, but also the experiences through which the organism has passed and the habits it has formed. Professor Conklin's conclusions are well worth bearing in mind. "To hold," he says, "that everything has been predetermined, that nothing is self determined, that all our traits and acts are fixed beyond the possibility of change is an enervating philosophy and is not good science, for it does not accord with the evidence. It is amazing that men whose daily lives contradict this paralyzing philosophy still hold it, as it were, in some water-tight compartment of the brain, while in all the other parts of their being their acts proclaim that they believe in their powers of self control; they set themselves hard tasks, they overcome great difficulties, they work until it hurts, and yet in the philosophical compartment of their minds they can say that it was all predetermined in heredity and from the foundations of the world. * * * Because we can find no place in our philosophy and logic for self determination shall we cease to be scientists and close our eyes to the evi-

dences? The first duty of science is to appeal to fact and to settle later with logic and philosophy. Is it not a fact that the possibilities of our inheritance depend for their realization upon development, one of the most important factors of which is use, functional activity in response to stimuli? Is it not a fact that belief in our responsibility energizes our lives and gives vigor to our mental and moral fiber? Is it not a fact that shifting all responsibility from men to their heredity or to that part of their environment which is beyond their control helps to make them irresponsible? This debilitating philosophy in which everything is predetermined, in which there is no possibility of chance or control, in which there is hypertrophy of intellect and atrophy of will, is a symptom of senility, whether in men or nations. We need to return to the joys of a childhood age in which men believed themselves free to do, to think, to strive, in which life was full of high endeavor and the world was crowded with great emprise. We need to think of the possibilities of development as well as of the limitations of heredity. Chance, heredity, environment, have settled many things for us; we are hedged about by bounds we can not pass; but those bounds are not so narrow as we are sometimes taught, and within them we have a considerable degree of freedom and responsibility."

EDWARD LINDSEY.

THE METHOD OF TREATING THE CRIMINAL INSANE IN GERMANY.

We naturally do not relish always being exhorted to emulate a foreign country. In many instances it is with quite good sense that we resist the exhorter; particularly in those cases in which we are urged to adopt a European system of education, of relief for the poor, or what not. Differences in social customs and traditions may make transplanting impossible, or at least unwise.

This observation does not apply, however, when we have presented to us the superior advantages of the method of treating the criminal insane in Germany. The principle of that method has slowly been making its way in this country and it has been justifying itself at every turn. See our best juvenile court practise, for example. Little by little we will extend the principle.

Dr. W. J. Hickson, of Vineland, New Jersey, last February described the German system before the Illinois Adult Probation Association at the City Club in Chicago. The address is published in a bulletin of the City Club (Vol. VI, 4). We quote below from what Dr. Hickson had to say. On page 106 of this issue we quote also at length

from an address by Dr. William A. White, Superintendent of the Government Hospital for the Insane at Washington, which was delivered more than two years ago. It will always be pertinent in connection with the treatment of abnormal classes in our criminal courts.

A selection from Dr. Hickson's paper follows:

"Let us suppose a case for an illustration. A man commits a crime (in Germany), is arrested and taken with the data in the case before the examining judge who corresponds to the grand jury in America. If the judge sees in the conduct of the prisoner, the nature of the crime, the evidence, or what not, a suspicion that the accused was not mentally normal at the time of the crime, or if the prisoner himself, his attorney, relatives, friends, or any one else should raise this question, the judge is constrained to instigate an examination of the matter by experts. If the insanity is very apparent, the matter is usually decided by the expert. There is seldom more than one. He makes the examination of the accused wherever he may be confined. In cases, however, where there is any question about the matter, or where simulation is suspected, at the request of the expert or experts, the accused may be sent to the observation pavilion of an insane asylum for study. It is not permitted to detain him in this institution for a longer period than six weeks for such a purpose. Such clinics with their psychopathological laboratories are to be found in all the larger cities of Germany, sometimes in connection with a general hospital for the insane; in many cases they are independent institutions. If, in the judgment of the experts, the prisoner was insane according to paragraph 51 of the code, at the time of the deed, the examining judge declares him not guilty and hence, as far as the courts are concerned, he is entirely free from any further prosecution as far as the act in question is concerned. He cannot be discharged from the insane asylum at any time, however, without the sanction of the prosecuting attorney excepting as this discharge is specifically provided for in the statutes.

"The same methods are brought into use also in deciding the mental status of witnesses and of parties in civil cases.

"What then are the advantages of the Germany system over our own? In a few words, they are these:

First. "They have an insanity act based on intelligent scientific data, adjusted to fit all forms of mental disease. Ours on the contrary, 'the right and wrong test,' is applicable only to one form of mental disease and yet we try to measure all cases by it, with the unsatisfactory results which we all know too well."

Second. "The question as to the sanity of the case is settled at the very outset. This leaves the field clear for the trial to proceed on the merits of the case and the judge, prosecuting attorney, and jury are free to go ahead fearlessly

without any qualms in the performance of their duties. It practically eliminates the misuse of the insanity plea as a last resort. It prevents the defense from taking the court by surprise with the plea of insanity and an array of experts to back it up which the court is not prepared to meet."

Third. "The court appoints the experts who, according to law, are bound to serve and their emoluments are regulated also. This obviates the employment of an array of talent by both sides to refute each other regardless of the facts in the case, which tends only to bemuddle the minds of the jury. Apropos of this, someone has well said that there is nothing more certain than the uncertainty of the honest opinions of individuals composing the jury. Consequently there need be no surprise at the varying verdicts which are returned as to the sanity or insanity of a criminal. In Germany, the judge decides on the expert evidence submitted, as he is both by training and experience best qualified for this important duty."

Fourth. "It puts the rich and the poor on equal footing, which is quite in contrast with the present methods in vogue in America.

Fifth. "If the case should really be one of insanity, trials as carried out in the United States are most prejudicial to the mental condition of the case and if he should be convicted and sentenced and be released at the expiration of his term, it will be only a short time when he will probably again be in the toils of the law, as many of these cases are slaves to their diseases and their criminal acts are only symptoms and manifestations of it. Thus it is that the vicious circle is established, and the dreary repetition of a short period of freedom and a long period in the penitentiary is instituted. By the German method, all of this is avoided. The insane are practically always detected and sent to an institution where the proper care is administered both as regards the rights of the patient and those of the public."

Sixth. "In borderland cases where there is a question of lessened responsibility, the judge has the discretion to administer a mild punishment. Under our present system, a defendant must be declared either guilty or not guilty."

Seventh. "To introduce the German procedure will not necessitate any very radical changes in American methods. We have simply placed the cart before the horse. If we would place the time of making the plea of insanity at the outset of the proceedings, we would at once secure one of the advantages of their system."

Eighth. "Our judges and public prosecutors should be made to feel as German officials do, that they are just as responsible to see justice done to the innocent as to the guilty, and that their merits should not be based solely on the number of convictions they secure."

"Of course, the treatment of this whole subject presupposes the existence of well equipped psychopathological laboratories such as they have in all the largest cities of Germany. Medicine takes advantage of every possible means to make a correct diagnosis before instituting treatment in a case. Why should not the law do likewise in order to be in a position to treat these cases legally and with proper intelligence? It is the borderland case especially in which this laboratory will render its greatest service. Well informed judges, as well as physicians, realize that such cases should not be sent to the insane asylum as these institutions are now arranged, and their scientific sense would be violated if they should be sent to prison. What is needed for these cases is an especially constructed institution similar to those for the chronic alcoholics."

Dr. Hickson concluded his address with an argument for special institutions and treatment for those who have become insane within their term of incarceration.

ROBERT H. GAULT.

IS THIS PLAN FOR ABBREVIATING NEW TRIALS FEASIBLE?

One of the most fruitful causes of the miscarriage of justice is error which results in a new trial after proceedings in the appellate court. The delay affects the memory of witnesses and often prevents their presence at a second trial because of death, removal from the jurisdiction, or of undue influence. Often there has been a change in the office of the prosecuting attorney since the first trial, and the second prosecutor does not become so well acquainted with all phases of the case. Is it possible to preserve the right of appeal and yet lessen the dangers of miscarriage of justice due to the situation set forth? It is clear that the right of appeal should be a shield and not a weapon of offense by which the guilty may escape.

After some thought about the matter, the writer advances the following for discussion, believing that justice may be done the accused without endangering the cause of the state.

Under the present practice, a new trial means that the entire case must be re-tried, although the error committed in the first trial may have affected but a small part of the case. To illustrate:

In Kansas, in the prosecution of an agent for embezzlement, the state must prove (1) that the accused (2) being over the age of sixteen (3), converted to his own use, without the consent of (4) B, (5) his principal (6), the amount of money charged (7), belonging to B, the conversion being in (8) the county of the prosecution. Supposing that all of the above were proven to the jury and that the jury found the accused guilty of the offense as charged, but that on appeal, the higher court found that there was but one prejudicial error committed, and that this occurred in certain evidence tending to show (3, above) that the taking was without the consent of B. All the other elements were proven without error, namely, that the accused took the money of B, his principal, within the territorial jurisdiction of the court; also, that he was over the age of sixteen, thus removing him from the jurisdiction of the juvenile court. The sole element affected by the error is the "conversion," revealed by the fact that the taking was without the consent of B. Under the present practice, a new trial compels the introduction of all the evidence to show all the other elements, although these have already been found without error.

Is it possible to remand only so much of the case as concerns the existence of the ultimate facts necessary to reveal the only element affected by the error?

If the second jury finds that the money was taken without the consent of B, as above, why not let that special fact be found by the second

jury, the conclusion of law be made by the trial court, and these, together with the evidence, certified to the appellate court for its action in connection with the facts aleady found? If errors were committed in the second trial of the issue submitted, let these be reviewed but limit the review to these only. If these are settled adversely to the contentions of the accused, then is not justice completely done by judgment upon the facts established?

It may be urged that the proposal is unconstitutional in that the accused is entitled to have his entire case determined by the same jury, not by different juries, but it may be said in answer to this that that which may now be unconstitutional may be made constitutional; consequently the only inquiry should be: Is the proposal feasible?

The following situations occur to the writer:

1. The method will require special verdicts by the jury;

2. It will allow different juries to pass upon the existence of the facts showing the different elements of the offense charged;

3. It may be that the elements of some offenses are so interwoven that it is impossible to separate them without injustice to the accused.

Special verdicts in civil cases are not unknown to the practice of some states, but they should not be confused with "answers to special questions," which are permitted in civil cases in a number of jurisdictions. These latter are often objectionable because of their number. But "special verdicts" are or should be limited to the ultimate facts necessary to enable the court to draw the conclusions of law. The drafting of a "special verdict" in a criminal case is not a matter of great difficulty, and a good trial judge, aided by suggestions from the attorneys in the case, should be able to submit a proper one to the jury. No greater skill is required to draft such verdicts than is now required for the proper conduct of a criminal action.

To permit different juries to find the different ultimate facts as above indicated does not seem objectionable. The truth of one or more having been found after a fair trial, they should be eliminated from the second trial, unless it is found in some cases that there is practical difficulty in separating the elements one from another.

Possibly others may think of more valid objections; if not, why retry the entire case each time?

WILLIAM E. HIGGINS.

INDICATIONS OF A PROGRESSIVE SPIRIT AMONG THE POLICE.

The sentiment against the introduction of politics into the conduct

of police affairs has been on the increase since the meeting of the International Association of Chiefs of Police in St. Louis in 1904. Since that event also the tenure of office of police officers who prove themselves capable and faithful in the conduct of their affairs has shown a tendency toward extension.

It is apparent that chiefs of police are now more given to the study of the many matters which concern the improvement of their respective departments and the public welfare, and that they are becoming deeply interested in the works and opinions of authorities which deal with humane treatment and the betterment of mankind. The inclination to make policing a profession is greater than ever before—the study of timely topics and legal determinations displaying earnest efforts for thorough mental equipment.

Such conventions are productive of wholesome benefits. The tendency is to uplift the standard of the police officer so that he becomes better informed and is more efficiently equipped to meet the conditions of society, that have undergone such wonderful changes within the past few years. The lessons of the instructive meetings since the sessions of 1904 at St. Louis have better prepared the police to cope with the situations incident to the world's progress.

In the Educational Building, where the police exhibit was maintained, the means of preventing and detecting crime were portrayed in a manner creditable to the cities represented and to the country generally. In this exhibit were presented modern inventions for the suppression and detection of crime, statistics bearing upon the assignment of police forces and photographs contrasting the individuals who became subjects for arrest and detention. There were shown also modern methods of measuring criminals and a practical demonstration of the finger-print system, not only by our own but by English police authorities. In all, the public was afforded a complete understanding of the provisions made by the police for making war upon those who are or may become the enemies of society.

In proximity to the scene to which I have referred were various splendid aggregations representing the work in our public schools and educational institutions—the picture of what was being done to make useful men and women of our youth. A little nearer the end of the enormous building there was depicted the prison of today, and elsewhere were practical showings of what we are doing for the dependent classes. The whole affair uncovered the vast resources available for the improvement of humanity, with an insight into the methods for dealing with the frail, incapable, and vicious elements. There, in one chapter, was held

out what one might achieve, and in the other what becomes of those who are disinclined.

The spirit of progress and betterment manifested by the police heads, the efforts made to place themselves and their institutions in the esteem and confidence of the public by illustrating their mode of conduct and accomplishments, at personal expense, was an ambition and work deserving applause by the public. When it is considered that they must encounter the gross charges heaped upon a municipal government, often unjustly; when it is remembered that "they are condemned if they do and condemned if they don't;" when it is realized that they are but human, laboring under constant temptations and are continually exposed to many of the ills and risks that prevail, *the good citizen should be sympathetic with them. He should do more. He should co-operate with them to the end that the police establishment may be exempt from political influence; that officers may be retained in the service during faithful performance of duty; that they may be sufficiently paid for what they do and for the exposure they undergo.* It should not be considered a humiliation to encourage the police. Their very work makes them unpopular, but that would not be the case if the citizens would sustain them, excepting in as far as non-enforcement of the laws and obedience to the regulations are concerned. They will be good men, and efficient officials in proportion to the confidence and backing received at the hands of the respectable element of the population. Pride and ambition can be instilled in the police organization only by a recognition of their laudable work. Merit should be recognized; if not, discouragement and indifference follow.

I venture the assertion that if those interested in a high class of government would stand by the police, meet them half way, and lend them support by appropriate manifestation from time to time, forces would advance to a higher standard. Too much should not be expected by sympathetic persons; suspicion should be cast aside, and theories should not be allowed to prevail against practical experience.

I hope for a closer relationship between those who have the time, education, and means to study, and the police, who as a rule do not get or have not had the best advantages, but who are willing to accept advice from such sources when it is presented in the proper spirit. Among the salutary results of such relationship will ultimately be the complete separation of the entire police force from political influence and the payment of increased salaries. When these ends shall have been attained there will be a check upon police graft.

RICHARD A. SYLVESTER.

SCANDALUM MAGNATUM IN UPPER CANADA

THE HONOURABLE WILLIAM RENWICK RIDDELL, L. H. D., J. U. D., &c.½

The Statute of Westminster the *First, 3, Edw. I,* passed in 1275, provided by *cap. 34* as follows:

"Forasmuch as there have been oftentimes found in the Country Divisors [devisers] of Tales, whereby Discord, or Occasion of Discord, hath many times arisen between the King and his People, or the great Men of this Realm; For the damage that hath and may thereof ensue, it is commanded That from henceforth none be so hardy to tell or publish any false News or Tales, whereby Discord, or Occasion of Discord or Slander may grow between the King and his People or the great Men of the Realm; and he that doth so, shall be taken and kept in Prison until he hath brought him into the Court, which was the first Author of the Tale."

I use the translation given in the Statutes at Large; but in the print of the original, the reading is open "celuy dount le poeple [sic] serra move"—the editor reads "la parole" instead of "le people"—the real reading then would be "him by whom the people shall be stirred up."[1]

This provision for imprisonment is no doubt the origin of the "fireside law" which asserts with confidence that a slanderer may be compelled to disclose his authority.

This statute was much extended more than a century afterwards in 1378, by the statute of Gloucester, 2 *Richard II, St.* 1, *cap. 5,* which provided "that from henceforth none be so hardy to devise, speak or to tell any false News, Lyes, or other such false Things, of Prelates, Lords, and of other aforesaid, whereof Discord or any Slander might rise within the same Realm: and he that doth the same shall incur and have the Pain another Time ordained thereof by the Statute of Westminster the First which will that he be taken and imprisoned till he

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½ Puisne Justice, King's Bench Division, High Court of Justice, Ontario, since 1906. Victoria University. (Mathematical and Nat. Science Prizeman), B. Sc. LL.B. Called to the Bar, with honors and Gold Medal, in 1883; practiced at Cobourg, 1883-1892, and in Toronto, 1892-1906. He has been General Counsel for the Wabash R. R. Co., and Special Counsel for the city of Toronto in civic investigations, etc. Former member of the Senate and Board of Regents, of Victoria University. Since 1894 he has been a member of the Senate of the University of Toronto, and for several years examiner in Roman Constitutional and International Law.

[1] But see the interpretation in *2 Ric. II, St. 1, cap. 5 ad fin.*

have found him of whom the Word was moved" (celluy dont la parole serra moevez). The "other aforesaid" in this enactment are (in addition to "Prelates, Dukes, Earls, Barons,") "other Nobles and Great Men of the Realm, and also * * * the Chancellor, Treasurer, Clerk of the Privy Seal Steward of the King's House, Justices of the one Bench or the other and * * * other Great Officers of the Realm."

Ten years afterwards, in 1388, the Statute passed at Cambridge, *12 Richard II, cap. 11,* provided that in case of any person violating either of these Statutes, "when any such is taken and imprisoned, and cannot find him by which the Speech be moved (celluy dont la parole serra moevez) as before is said, that he be punished by the advice of the Council, notwithstanding the said Statutes."

In 1554, the Statute *1 & 2 Ph. & M.* by *cap. 3* confirmed the first two Statutes and gave Justices of the Peace authority to hear and determine offenses against them. It further provided that "if any Person be convicted or attainted for speaking malitiously of his own Imagination any false seditious and slanderous News, Saying, or Tales of the King or Queen, then he shall for his first Offense be set on the Pillory in some Market-Place near where the Words were spoken and have both his Ears cut off unless he pay to the Queen an hundred Pound within one Month after Judgment given and also shall be three Months imprisoned; and if he shall speak any such slanderous and seditious News or Tales of the Speaking or Report of any other, then he shall be set on the Pillory and have one of his Ears cut off unless he pay an hundred Marks to the Queen's Use within one Month after, and shall be one Month imprisoned; and if he shall do it by Book, Rhime, Ballad, Letter or Writing, he shall have his right Hand stricken off. And if any Person being once convicted of any of the Offenses aforesaid, do afterward offend, he shall be imprisoned during his Life, and forfeit all his Goods and Chattels." This drastic Statute was revived in 1557 by *4 & 5 Ph. & M., cap. 9,* to continue till the end of the next Parliament. In 1558, on the accession of Queen Elizabeth, by Statute, *1 Eliz. cap. 6* "The Penalty mentioned in the Statute of *1 & 2 Ph. & M., cap. 3,* for speaking false slanderous News of the King or Queen, or for committing any of the Offences expressed in the said Act shall be expounded to extend to the Queen that now is, and to the Heirs of her Body."

These Tudor enactments of course came to an end at the death of Queen Elizabeth; but the Plantagenet Statutes continued in force, (at least nominally and in form) in England until repealed by the "Statute Law Revision Act, 1887," with other enactments specially

mentioned "which may be regarded as spent * * * or have by lapse of time or otherwise become unnecessary."

The proceedings under these earlier statutes when they were in force were by writ of *Scandalum Magnatum,* which was both criminal and civil.

There are many cases reported in which this proceeding was adopted rather than a simple action for Slander. For example, in Pasch., *26 Eliz. in the K. B.,* a case is reported by Leonard *(1 Leon. 287)* "One was convicted in the County of Lincoln upon the Statutes of *West. 1, cap. 33 and 2 R. 2 cap. 5 of News,* and the words were That Campian was not executed for treason but for Religion and that he was as honest a man as Cranmer—the Bill was endorsed *Billa Vera* but whether *ista verba prolata fuerunt malitiose, seditiose* or *e contr. ignoramus.* The same Indictment being removed into the King's Bench, the party for the causes aforesaid was discharged." "Campian" was of course Campion, the well-known Jesuit, who had been executed by Elizabeth; that his execution was for religion and that he was as honest a man as Cranmer few will now dispute, but he who said so in 1583 escaped punishment only because the jury could not be sure whether he said so *malitiose et seditiose.*

In the case of an attack upon the character of any of the Ministers of the Crown, it was usual to punish offenders in the Star Chamber; but an action founded upon the Statutes was not infrequently resorted to in former times. The curious may look at the following: *Buller N. P. 4; 4 Co. 13; 12 Co. 133; 10 Co. 75; Cro. Car. 136; Vent. 60; Lord Townsend v. Dr. Hughes, 2 Mod. 150; Wilmot's Notes 255: Cro. Jac. 196, Earl of Lincoln case; 3 Leon. 376 Cro. Eliz. 1, 67; 1 Sid. 293.* The editions of Starkie on Slander and Libel before the 4th, contain a whole chapter on the subject.

Outside of the case in *1 Leon. 287,* I know of only one English case in which a judge is said to have availed himself of the "Statutes of News." In *12 Co. R., p. 134* we find that "in *3 Edw. 2* in the Exchequer, Henry Bray spoke of John Foxley, Baron of the Exchequer; it was resolved that the judgment in an indictment upon the said Statutes, * * * also the party grieved may have an action *de scandalo Magnatum* and recover his damages." The "said Statutes" are *5 R. 2, cap. 6* and *17 R. 2, cap. 8* concerning rumours; and I cannot understand why and how a Statute of Richard II could be resorted to in the reign of his great-grand-father.

The only Baron of the Exchequer who could be referred to was John de Foxle constituted Baron of the Exchequer in *3 Edw. II,* February 28, 1309; and he died in *18 Edw. II,* 1324, fifty-three years

before Richard II came to the throne.[2] The Statute of Westminster the First might be of some avail—that prohibited false tales whereby discord might arise between the King and the great men of the Realm but it did not in terms give an action (cf. the argument of Serj't Maynard in *2 Mod., p. 152*); or the Common Law, as it is supposed that these Statutes are simply in affirmance of the Common Law.

The action became obsolete in England. Odgers in the 5th edition of his work on Libel and Slander (1911) says, p. 74, that no instance of its use is to be found later than 1710. The action never made its way into the North American Colonies or the United States.

Sillars v. Collier (1890) *151 Mass. 50; Hogg v. Dorrah* (1835) *2 Porter (Ala.) 212* in which a member of the Legislature was called a "corrupt old Tory," and his Counsel expressly disclaimed the principles of the law of *Scandalum Magnatum.*

Reeves v. Winn (1887) *97 N. Car. 246,* in which Davis, J., delivering the judgment of the Court, said "in this day and country there is no such thing as *Scandalum Magnatum.*"

Sharff v. Commonwealth (1810) *2 Binney Pa.,* 514 at p. 519, may be glanced at also.

In *State ex inf. Crow, Atty. Genl., v. Shepperd,* in the Supreme Court of Missouri (1903) *76 S. W. Rep. 79* at *p. 83,* Marshall, J., in delivering the judgment of the Court, says: "The offence of Scandalum Magnatum has not existed in this country since the Revolution;" but he gives no instance of its existence in America before the Revolution.

There is no trace of the doctrine in Nova Scotia or New Brunswick, the Provinces which with Upper Canada and Lower Canada formed the Dominion of Canada as first constituted in 1867. Lower Canada had been under the civil law of England only for a period of a few years ending in 1774, and thereafter the French (Canadian) law was that prevailing in civil matters. Nova Scotia and New Brunswick were, however, Common Law Countries. So were Prince Edward Island and British Columbia; and the action was unknown also in these Provinces, which joined the Dominion later than 1867. The newer Provinces—Manitoba, Alberta and Saskatchewan—and the Yukon Territory, derive most of their jurisprudence from the Province of Ontario. The action has never been attempted in any of these divisions of the Dominion.

Upper Canada by the first Act of the first session of its first parliament, in 1792, *32 George III, cap. 1, s. 3,* enacted "that from and after the passing of this Act, in all matters of controversy relative

[2] Foss, Judges of England, vol. 3, p. 254; do., Biog. Dict., Judges of England, p. 280.

to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same," the Poor Law and Bankruptcy Law being excluded.

I find in this Province one and only one attempt to bring into force the action of *Scandalum Magnatum*.

Robert Thorpe was an Irish Barrister who in 1802 received an appointment as Judge of the Supreme Court of Prince Edward Island; in January, 1805, he was appointed to a puisne Judgeship in the Court of King's Bench, Upper Canada.

The Government of the Colony was at that time somewhat autocratic, and not long after his arrival, Mr. Justice Thorpe took sides with the Radical element which desired a democratic administration of public affairs—in fact, like many of his countrymen, he went "agin' the gover'ment." He was even elected to the Commons House of Assembly as a Radical member. Whether Thorpe was honest in the stand he took in Upper Canada may be doubted. In March, 1806, he complained to Lord Castlereagh of the weak government which had made the Assembly strong. Writing to Cooke the same month when Allcock was promoted from the Chief Justiceship of Upper Canada to that of Lower Canada, he hopes that the Home Government will not disgrace him by sending anyone over him, and urges that a Court of Chancery be erected and (impliedly) that he be made the Judge of that Court as well as Chief Justice of the King's Bench. When he hears in July, 1806, that Scott, the Attorney-General, was to be appointed Chief Justice, he cannot contain his wrath; he writes, "He is perfectly unequal to the situation * * * the Province will be universally dissatisfied with him, but * * * would have been perfectly satisfied had I been appointed." In October, 1806, writing to Sir George Shee, he says, "A being has been put over my head who has neither talent, learning, nerve nor manner; and also from being despicable in the mind of the people, can have no weight with juries, and consequently will reduce the Bench to insignificance." Of his brother Judge Powell he was jealous also—he says, "Mr. Justice Powell is not a good lawyer and I have great reason to believe he is not a good subject." It is hard to resist the conclusion that much, if not all, of Thorpe's Radicalism was due to spite and disappointment.

He took the Western Circuit in the fall of 1806, and in October, at the Assizes for the London District at Charlotteville, he began his charge to the Grand Jury thus: "The fifteen years disgraceful administration of this Government calls loudly for your interference;" and he proceeded in like strain. The Grand Jury in their presentment followed the Judge's lead and hoped that "such a change of measures will

take place as may tend to bury in oblivion the remembrance of proceedings heretofore sanctioned by authority and yet no less derogatory to the prerogative of the Crown than invasive of the privileges of the subject." In his reply, Thorpe expressed a very low opinion of the government and said, "When there was neither talent, education, information or even manner in the administration, little could be expected and nothing was produced; but there is an ultimate point of depression as well as exaltation, from whence all human affairs naturally advance or recede. Therefore," he continued, "proportionate to your depression we may expect your progress in prosperity will advance with accelerated velocity." Such language as this could not be expected to please the powers that were, or their supporters; and it was no great wonder that Col. Joseph Ryerson,[3] a sound Tory of the old school, should say, as he did openly, that "such conduct was more like that of a United Irishman than a Judge." This was said of Thorpe in his capacity of a Justice of the King's Bench, and he came within the Statute of Richard II, "Justices of the one Bench or the other," if that Statute could be held to cover Colonial Judges.

He took *qui tam* proceedings by *Scandalum Magnatum* against Ryerson. It is probable that it was not so much to punish Ryerson that these proceedings were taken as to prevent the repetition of charges openly made that the Judge procured such addresses to be made by Grand Juries, so that he might be enabled to pose as the great champion of the rights of the people. The charge was frequently made and repeated, that the presentments were drawn up by Thorpe and his friend Weekes, an Attorney who had been a United Irishman, afterwards a pupil in New York of Aaron Burr, and who became a member of the Bar of Upper Canada. Weeks was killed next year in a duel which he had forced on a brother Barrister.

I extract the following from the Term Book of the King's Bench still in the King's Bench Vaults, at Osgoode Hall, Toronto.

In Trinity Term, *47 George III,* July 8th, 1807, in the Court of King's Bench (praes. Scott, C. J., and Thorpe, J.) p. 107, in the case of *Robert Thorpe v. Joseph Ryerson,* "Time to plead given for one week. On motion of Mr. Sol'r Genl. for Defendant." (The Solicitor

[3] Joseph Ryerson was a United Empire Loyalist and fought in the Revolutionary War as a Cadet and Ensign. He came to Upper Canada in 1799 and settled in Charlotteville, becoming a Colonel of Militia. In 1800 he was made a Justice of the Peace and became Chairman of the Quarter Sessions. He was also, in 1800, appointed High Sheriff for the London District, which office he held for about five years. He, with three of his sons, fought through the War of 1812-1815; he survived till 1854, dying at the age of 93.

Charlotteville was Turkey Point on Lake Erie, now no longer even a village, but from 1801 till 1815 the place of meeting of Assizes and Quarter Sessions of the London District.

General was D'Arcy Boulton, afterwards Attorney-General and Puisne Justice of the King's Bench). On July 17th, the same Judges being present, p. 119, "It is ordered that the argument be gone into *instanter* with the consent of the parties and their counsel." No judgment was given.

In the following term, Michaelmas Term, *48 George III,* November, 1807, Mr. Justice Powell had returned from his trip to Spain, successful in procuring the release of his son from a Spanish-American prison at Omoa; Mr. Justice Thorpe was not present, he having been suspended from his office in October by the Lieutenant-Governor Gore, upon direction of Lord Castlereagh in a dispatch dated June 19th, 1807. Accordingly the Court in Term consisted of Scott, C. J., and Powell, J.

On November 4th, 1807, the third day of Term, p. 23, the case was ordered "to be argued on Friday next." Friday, Nov. 6th, p. 126, it was argued but no judgment given. Monday, Nov. 9th, p. 132, it was ordered "to stand over for a second argument to the first day of Hilary Term next." On that day, Monday, January 4th, 1808, it was "ordered to stand over till Friday;" on Friday, January 8th, p. 149, it was "ordered to stand over;" on Monday, January 11th, p. 150, it was "ordered to stand for second argument on Wednesday next;" on that day, Wednesday, January 13th, p. 153, "the Court will give judgment on Friday next." Friday, January 15th, 1808, p. 154, "Judgment for defendant on Demurrer." Scott, C. J., and Powell, J., constituted the Court during this Term also, Thorpe having been suspended and his place not having been filled.

It looks odd that Thorpe appears to have sat as Judge in his own case; the fact was that though the Court of King's Bench by Statute consisted of the Chief Justice of the Province and two puisne Justices, the Court in Term (Banc) often consisted of only two Judges and not infrequently of only one—a practice held, twenty years later, by the Judicial Committee of the Privy Council in Mr. Justice Willis' case, to be unexceptionable. Of course, Thorpe would not take any part in the decision, if one were to be given: as a fact he did not sit, nor was he present in Court on the final argument.

The Solicitor-General, Counsel for the Defendant, filed a General Demurrer, and his whole contention was that Thorpe being a Colonial Judge was not within the purview of the old Statutes, which were enacted at a time when there were no Colonies or Colonial officers. The Court gave effect to this contention.

The experiment has never been repeated. Whenever any officer of the Government was attacked, a convenient and certain method was

adopted of filing an information for libel—more than one editor was laid by the heels in this way, and at least one ordered to stand in the pillory as well. Still, as late as the early '80s, when I was a student-at-law, our text-book on the Common Law represented the action as in existence.

Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man.

It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor, the Sierra Leone Company, organized for the benefit of free blacks on the west coast of Africa. Neither Director nor Manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all implored to let the unfortunate blacks alone. Perhaps his worst offense was making public that while a poor old black settler, Kizil, could not get his pay for work and labor done long before for the Company, Macaulay (then lately Secretary and always Director) received fifty guineas for importing ten tons of rice into England from the West Coast of Africa; and while £14.5.4 was spent "for clothing African boys at school," £107.12.0 went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H. R. H., the Duke of Gloucester, was president, Lords Lansdowne, Selkirk, Grenville, Calthorpe, Gambier and Teignmouth were vice-presidents, members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution, and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge.

Thorpe's pamphlet went through at least three editions: my own copy (of the third edition) is dated 1815.

Perhaps one moral of this story is that judges should keep out of politics.