Vol. V Oct 15 1891 No. 3

said: "Such a rule could not be tolerated, and is without foundation in the law. . . . In general, the waiver of any legal right at the request of another party is a sufficient consideration for a promise." It is satisfactory to notice that the attempt to narrow the meaning of the term 'detriment" has been so decidedly overruled.

THE RIGHT TO PRIVACY. — In the article by Messrs. Warren and Brandeis on the Right to Privacy, published in this REVIEW last December, after a sketch of the many fictions and fewer open extensions by which the courts have met the modern demand for protection to the more ideal and intangible interests of the individual, the authors say:

"If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

"The right of one who has remained a private individual to prevent his public portraiture presents the simplest case for such extension."

In Judge O'Brien's decision given last month, in the case of *Schuyler* v. *Curtis*, *Donlevy and others*, this hinted prophecy has its fulfilment. Mrs. George Schuyler, though largely interested in private charities, had never in any way entered public life. On her death, some zealots known as the "Woman's Memorial Fund Association" undertook to commemorate her good deeds by a statue of her, to be designated "The Typical Philanthropist," and placed in Chicago in '93 as a companion piece to a bust of the well-known agitator, Susan B. Anthony, to be called "The Typical Reformer." The action to prevent the intended celebration was brought by Mrs. Schuyler's nephew, in behalf of all her nearest relatives.

Judge O'Brien grants the injunction strictly on the ground that Mrs. Schuyler had never acted in other than a private character, and that such a person has rights which are lost by any one voluntarily entering public life. That no reported decision has hitherto gone so far in protecting the right to privacy Judge O'Brien freely recognizes; but he feels that the tendency to extend the law in the direction of affording the most complete redress for injury to individual rights makes the new step an easy one.

To believers in the practical utility of an increased scientific study of the general theories of law it will be interesting to notice that Judge O'Brien quotes at marked length from the article of Messrs. Warren and Brandeis, which he calls "an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer," and which seems to be almost the basis of his decision that the right to which recent cases have been more and more, under various names, giving protection is the right to privacy.[1]

REVERSAL OF DECISION IN WATUPPA POND CASES. — It is interesting to note that the decision in the Watuppa Pond cases has been reversed on a rehearing. These cases, which were decided by the Supreme Court of Massachusetts in 1888, reported in 147 Mass. 548, are of great interest. The point decided — by a bare majority of four to three — was that the Commonwealth has the absolute right to the waters of our great ponds, free from any duties to the riparian owners on the streams forming the outlet; that it may grant to a city the right to take the water, and the lower riparian owners can claim no compensation for the consequent injury to them. For interesting articles on both sides of the question, see 2 Harvard Law Review, 195 and 316.

[1] See 4 Harv. L. R. 193.

In view of the importance and difficulty of the question, it is a disappointment to find that on the rehearing the court expressly refuses to reconsider its decision, and bases the reversal solely on the fact, which is now made to appear for the first time, that the plaintiffs' predecessors acquired title to these ponds by a grant prior to the date when the Colonial Ordinance of 1647, on which the title of the Commonwealth to the great ponds is based, became law. The Ordinance could, of course, have no effect on the existing private ownership, and therefore the Commonwealth never acquired title to these particular ponds, and its grantee, the City of Fall River, is enjoined from taking the water.

The general principle laid down by the former decision, as stated above, remains, however, the law of Massachusetts.

BOTH graduates and present members of the school will doubtless be interested to hear that the degree of LL.D. has recently been conferred upon Prof. James B. Thayer by the Iowa State University.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMINISTRATORS — PERSONAL LIABILITY. — An administrator recovered a judgment and, after appeal was barred, waived his advantage and allowed the same to be taken. The appellate court reversed the judgment, and refused a new trial, on the ground that the proof showed no cause of action. *Held*, that he was not obliged to insist on the technicality, and was not personally liable to the estate for the amount of the judgment. *McGuire* v. *Rogers*, 21 Atl. Rep. 723 (Md.).

The reasoning of the court is that an administrator is not obliged to insist upon or set up a legal right when justice does not require it. In accordance with this principle it is generally held that an administrator may waive the Statute of Limitations. The present case is interesting as indicating that the right to waive will be extended to other defences concerning which the law is as yet unsettled. See Williams on Executors, 7th edition, p. 1801; Woerner's Law of Administration, pp. 841, 843; 15 Mass. 8, note.

AGENCY — FELLOW-SERVANTS — SEPARATE DEPARTMENTS. — One who is employed by a railroad company, under a foreman, to make repairs in its repair-shops and on cars standing in its yards is not a fellow-servant of a switchman who, under orders of the yard-master, directs the movement of cars in the yard. *Pool* v. *Southern Pac. R. Co.*, 26 Pac. Rep. 654 (Utah).

AGENCY — ORAL AGREEMENT TO EXCHANGE — PART PERFORMANCE — STATUTE OF FRAUDS. — In an action for specific performance, the evidence showed that defendant placed the property in the hands of an agent to sell or exchange, and by his efforts met plaintiff, and agreed orally to exchange with him. Plaintiff left a deed with the agent, but defendant refused to accept it. *Held*,

Vol VII Number 3 November, 1893

THE RIGHT TO PRIVACY. — The recent decision of Judge Colt, sitting in the Circuit Court for the District of Massachusetts, in the case of *Corliss et al.* v. *Walker Co. et al.*, is especially interesting in relation to what is beginning to be known as the law of privacy. The suit was brought by the widow and children of George H. Corliss, the well-known inventor, to enjoin the defendants from publishing and selling a biography of Mr. Corliss, and from printing and selling his picture with the book. The bill did not allege that the publication contained anything scandalous, libellous, or false, nor that it affected any right of property. Relief was prayed for simply upon the ground that the publication was an injury to the feelings of the plaintiffs, and made against their express prohibition.

The injunction in regard to the publication was denied; but it was granted in regard to the printing and circulation of the portrait. It appears that the defendants obtained from the plaintiffs a copy of a portrait of Mr. Corliss upon certain conditions, with which they did not comply. The granting of the injunction as to the portrait therefore is based upon the ground that it would be a violation of confidence, or a breach of trust, in the defendants, to print and sell it. In dealing with the question of the biography, the court referred to the argument of the plaintiff's counsel that Mr. Corliss was a private character, and that the publication of his life was an invasion of the right of privacy. Judge Colt declared that he could not assent to the proposition that Mr. Corliss was a private character. He was an inventor of reputation, and a public man in the same sense as an author or an artist is a public man. It is hardly probable that anybody would dispute the soundness of this part of the court's argument, and upon this ground the decision is doubtless right. But the decision goes still farther: it declares that it is immaterial whether Mr. Corliss is to be regarded as a private or a public character. For this position Judge Colt relies upon the constitutional privilege of freedom of speech and of the press. "Under our laws," he says, "one can speak and publish what he desires, provided he commit no offence against public morals or private reputation." It will be observed that Judge Colt does not recognize the right to privacy as distinct from the law of slander and libel on the one hand, and that of property and contract on the other. On this point the opinion would seem to differ from that in the late case of *Schuyler* v. *Curtis et al.*, 24 N. Y. Suppl. 509, in which the court enjoined the defendants from erecting a statue of Mrs. Schuyler, on the ground that such an act would be an unwarrantable invasion of the right to privacy. The opinion in the Corliss case refers to *Schuyler* v. *Curtis*, and says it is not in point, because in that case the right of publication was not in issue. It is difficult to see upon what principle this observation is true, nor is it easy to comprehend in what essential respect the making and erection of a statue in the likeness of a man differs from the publication of his biography, so far as the point under discussion is concerned.

The whole subject of privacy is new, and these two cases are perhaps the only authorities that bear directly upon it. Like all new problems in law, it has been brought up by new conditions of life. The newspaper, the telegraph, and the instantaneous photograph have made it infinitely easier to destroy the privacy of individuals, and to expose the victims of morbid curiosity to a degree of inconvenience and pain that was not dreamed of a few years ago. The question is bound to come up more and more frequently in the courts, and it is believed that the desire of everybody will be that the law may carry forward the tendency of the decision in *Schuyler* v. *Curtis* rather than adopt the suggestion in *Corliss* v. *Walker* that the distinction between public and private character is unimportant.

The attention of those who are interested in the matter is directed to the able article by Messrs. Warren and Brandeis, entitled, "The Right to Privacy," in 4 HARVARD LAW REVIEW, p. 193. It is, so far as is known, the only scientific discussion of the subject, and it contains an interesting plea for the protection of "the right to be let alone," as Judge Cooley calls privacy, and also a collection of the few authorities that throw any light upon the subject.

CHARLES INGALLS GIDDINGS, a former editor of this REVIEW, was drowned in Lake Winnipiseogee, N. H., Aug. 17, 1893. He had taken several poor boys from Boston to New Hampshire for a vacation, and lost his life in an heroic effort to save one of the lads who had fallen overboard from a steamer. Mr. Giddings received the Harvard A. B. degree in 1887, and graduated at the Law School *cum laude* in 1890. In addition to the editorial work done during his course, he contributed to the REVIEW for January, 1892, an article on "Restrictions upon the Use of Land" (5 H. L. R. 274). Mr. Giddings is understood to have made an excellent beginning in legal practice. Some idea of his professional standing may be gathered from the fact that he was selected to furnish for the American and English Encyclopædia of Law an article on the important and difficult topic, *Ultra Vires*. Of his character we need only say that those who knew him well, regard his death as a fitting climax to a pure and unselfish life.

RECENT CASES.

AGENCY — BROKERS — RELATIONS OF THEIR CUSTOMERS TO THEM. — A customer and a broker buying and selling stocks upon margins stand in the relation of pledgor and pledgee, and the fact that the broker has an implied right of repledging stocks does not change the relation. *Skipp et al.* v. *Stoddard*, 26 Atl. Rep. 874 (Conn.).

This case shows the common doctrine. See *Markham* v. *Jaudon*, 41 N. Y. 235, which is perhaps the leading case on the subject; and also Jones on Pledges, § 495. The case of *Covell* v. *Loud*, 135 Mass. 41, is *contra*, the court treating the dealing between the parties as an executory agreement, with power in broker to sell without notice on default by customer.

CONSTITUTIONAL LAW — GEARY ACT — CHINESE EXCLUSION. — An Act of Congress, after continuing the laws then in force for the exclusion of Chinese from the United States, provides for the removal of Chinese not lawfully within this country, requiring that all Chinese laborers entitled to remain in the United States shall obtain certificates of residence from persons authorized by the Act to give them, under penalty of removal on failure to do so within one year. On an appeal from the Circuit Court which raised the question of the constitutionality of the Act, the court *held*, that the Act was constitutional. That inasmuch as Chinese laborers cannot under the naturalization laws become citizens, they remain subject to the power of Congress to order their expulsion. That the order of deportation is not a punishment, "but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation has determined that his continuing to reside here shall depend," consequently that part of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and punishments has no application. *Fong Yue Ting* v. *United States*, 13 Sup. Ct. Rep. 1016. Fuller, C. J., and Field and Brewer, JJ., *dissenting*.

This instruction was rejected by the lower court, and on exceptions to this ruling, the upper court said, "The proposition embodied in this instruction doubtless finds support in some of the earlier decisions of this court, involving what was known as the doctrine of comparative negligence; but by more recent decisions that doctrine has been greatly modified, if not wholly repudiated."

This statement is unfortunately weakened, since the court rests its decision on another ground, — that the instruction asked for was quite unnecessary, as the law had already been laid down with sufficient accuracy and fulness. It is, therefore, somewhat hard to decide the exact weight of the case, or to conjecture what results will flow from it. At all events, it shows a tendency in the right direction.

CONVERSION BY BAILEE. — *Doolittle* v. *Shaw*, 60 N. W. R. 621 (Iowa), was one of the familiar cases of violation of a bailment for hire by driving the horse hired beyond the place designated. The distinction taken by the court was that, as the injury to the horse was occasioned by no gross negligence or wilfnl abuse, no conversion took place, and that such had been the doctrine of *all* the cases.

It is submitted that this rests upon a misapprehension of the action of conversion, the gist of which lies in the interference with the plaintiff's possession or right to it, amounting to a complete denial for an appreciable time. The court is right in saying that not every intermeddling is a conversion, nor indeed every intermeddling contrary to the terms of the bailment. There must be some act which can be interpreted as a total deprivation of the plaintiff's possession or right to it, not consented to by him. In a bailment for a specific purpose the bailor consents to lose possession of the chattel under the conditions of the contract; but the general right to its possession subject to that exception clearly remains unimpaired, and any act interrupting wholly the right to possession except within those limits is as much a conversion as if there had been no bailment at all. Doubtless this application of conversion usually comes up when there has been some abuse of the chattel, as it is not ordinarily injured without that; but the conversion rests on grounds quite other than that of negligence or abuse. *Wentworth* v. *McDuffie*, 48 N. H 402. It is altogether too strong, then, to say that this Iowa case follows the doctrine of "all the cases." But the action for conversion, being as it is a means of forcing title upon the converter against his will, it is most desirable that some way of limiting it should be worked out for use in cases where in justice the plaintiff is not entitled to elect title into the defendant. Such a case as this is a step away from a technical rule which enables a bailor to throw the peril of accident upon his bailee, and as such, a step in the right direction.

DEVELOPMENT OF THE LAW OF PRIVACY. — One or two bits of news in the law of privacy may be given. The well-known English case of *Prince Albert* v. *Strange* has been followed in *W. S. Gilbert* v. *The Star Newspaper*, 11 *The Times* Law Reports, 4, where Mr. Gilbert got an injunction against the disclosure of the "gags" and the plot of "His Excellency" before the public performance of that comedy. An article, "The Right to Privacy," by Mr. Herbert Spencer Hadley, appeared in the October number

of the Northwestern Law Review (vol. iii. p. 1). Mr. Hadley is not inclined to admit the existence of a right to privacy. "When an individual walks along the streets in the sight of all," according to Mr. Hadley, "he has waived his right to the privacy of his personality;" and if a newspaper reporter sketches him and publishes the sketch accompanied by a "description of the peculiarities of his appearance, walk, habits, and manners," — why, Mr. Hadley is sorry for the individual if it is distasteful. Mr. Hadley also makes the point that the right to privacy stretches equity jurisdiction beyond its proper limits. But it is not clearly set forth how it does so to a greater degree than any case of first impression does. And, finally, *Monson* v. *Tussaud* (10 *The Times* Law Reports, 199, 227, noticed 7 HARVARD LAW REVIEW, 492), the most important recent English case on the subject, is not mentioned, though decided and commented upon more than six months before the publication of this article.

Corliss v. *Walker*, 57 Fed. Rep. 434, came up a second time on Nov. 19, 1894, on a motion to dissolve the injunction restraining the use by the defendants of a picture of the late Mr. Corliss. Colt, J., decided that the injunction must be dissolved, Mr. Corliss being a public character, and his personal appearance therefore in a sense public property. On the rights of a private person the language is explicit. Colt, J., says that, "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk."

The other branch of the case still stands for the proposition that one may write and publish about either public or private persons; but, Mr. Corliss being held to be a public man, the remarks about private persons may be fairly said to be *obiter*, and the point open for the consideration which some gross case of invasion of privacy may soon require for it.

Mr. Hadley's article is well worth reading as the first attempt to make a careful presentation of the reasons against the right to privacy. And the new cases are interesting as showing that the law on the subject is in no danger of becoming obsolete, but rather serves a real and useful purpose to an increasing number of complainants.

WHAT IS THE REASON FOR OUR LAW OF CONFESSION? — The case of *State* v. *Harrison*, 20 S. E. Rep. 175 (N. C.), raises an interesting question as to the admissibility of confessions obtained by promise of favor. The defendant, an ignorant and superstitious woman, was convicted of the murder of her husband. The court admitted in evidence a confession obtained from her under the following circumstances. A detective disguised himself and, pretending to possess magical powers, so worked on her superstition that she believed him. He told her, "If you will tell me all about it, I can give you something so you can't be caught." Whereupon she confessed that she was the one who had committed the murder. The court above held this evidence admissible, on the ground that the promise was not one that would be likely to induce the defendant to tell an untruth. If she were really guilty, it would be a strong inducement to her to tell the truth; but if she were not, there would be no incentive to tell a lie and say she was guilty.

vol. 7 1893-94

March 1894 Vol. 7 No. 7

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

P. 425

JUDICIAL LEGISLATION. — *Trustees* v. *Jennings*, 18 S. E. (S. C.) 257, is a curious case. In *Trustees* v. *McCully*, 11 Rich. Law, 424 (1858), the South Carolina court held that evidence of adverse possession of land for twenty years would justify the jury in presuming a good title by lost deed; and this in the face of a statute of 1805, which perpetually exempted the land in question from the operation of the statute of limitations. The court in 1858 therefore practically re-enacted the statute which the Legislature in 1805 had specifically repealed. In the principal case, the right to disregard the presumption, left to the jury by *Trustees* v. *McCully*, is finally denied, and it is substantially held that the only facts admissible to rebut the presumption are those which would go to disprove adverse possession. The last distinction is gone between the statute of limitations, repealed by the Legislature, and the presumption enacted in its place by the court. "Although the statute . . . could not be pleaded in bar," say the latter, "yet . . . the Legislature did not interdict the defence of the presumption."

RIGHT TO PRIVACY AGAIN. — *Marks* v. *Jaffa* (N. Y. Law Jour., Jan. 6, 1894), like other cases of its kind, furnishes in the action of the defendant most satisfactory evidence of the justice of the rule of law which gives men "the right to be let alone." The defendant, editor of a newspaper called "Der Wachter," started to publish portraits of the plaintiff, once an actor, now a law student, and of an actor called "Mogulesko," and invited his readers to give by vote their opinions as to which of the two was the more popular. Now it is a perversion of the law of truth in libel to say that it applies to such a case. It is not a case of libel but of invasion of privacy, of unwarrantable and impertinent disregard for the feelings of a person who has in no way offered himself for such criticism. McAdam, J., granted the injunction applied for, saying that the plaintiff's right was "too clear . . . to require further discussion." It is pleasant for the REVIEW to notice that, as in other cases on the subject, the reasoning of Messrs. Warren and Brandeis' article (4 Har. Law Rev. 193) is adopted by the court.

Vol. VII
Number 8
April 1894

IS THIS LIBEL? — MORE ABOUT PRIVACY. — A tutor tried for the murder of his pupil shot in the back, large amounts of insurance on the life of the man killed in favor of the wife of the tutor, and curious holes in boats which the pupil might have used, recently furnished the materials for a *cause célèbre*, in Scotland, the Ardlamont Case, in which the charge against the defendant, Mr. Alfred John Monson, was found "not proven." Mme Tussaud very naturally put up an effigy of Mr. Monson, and Louis Tussaud at Birmingham did the same. In London he was placed just within the turnstile where one pays 6*d.* to see the Chamber of Horrors, which is reached by descending a staircase, from the room where Mr. Monson keeps company with Pigott, Scott (a mysterious person also concerned in the Ardlamont case), Mrs. Maybrick, and relics and pictures of Napoleon. The Chamber of Horrors contains a representation of the "Scene of the Ardlamont Mystery." At Birmingham, with either more politeness or more caution, he was placed opposite His Grace of Canterbury and Prince Bismark, and between the Royal Family and a group containing the Pope and Cardinals Vaughan and Logue, but in the advertisements his neighborhood was less pleasant; for the public were invited to "see Vaillant, the Anarchist, and Monson, of Ardlamont."

Not satisfied with the experience of the law which he had already had, Mr. Monson sought injunctions preliminary to the trial of libel suits for these indignities, and got them from the Divisional Court, Matthew and Collins, JJ. (10 Times L. R. 199.) On trial of the appeal, however, new evidence pointed toward extraordinary conduct on the part of Mr. Monson, for it appeared that, not content with publishing a pamphlet about his case, and advertising to deliver lectures on the subject, he had probably let a confidential friend offer to the proprietors of Mme Tussaud's to supply them with "the clothing and the gun which Mr. Monson was using at the time of Lieut. Hambrough's death" and "a sitting by Mr. Monson to assist the portrait modeller." (10 Times L. R. 227.) It being the practice of the English courts not to give an injunction against libels, unless in clear cases, action in favor of the plaintiff was after this out of the question. But for these reasons we have the opinions of five judges on the questions raised by the case, Collins and Matthew, JJ., below, and Lord Halsbury and Lopes and Davey, L.JJ., above; and of these last only Davey, L.J., resisted the temptation to go beyond the new evidence which settled the matter and discuss the whole case.

It was attempted more or less successfully to treat the cases as raising purely questions of libel, neither counsel nor court meaning apparently to go beyond this, and as the effigy seems to have been considered not libellous *per se*, the discussion, apart from the new evidence, turned upon the consideration of the innuendoes. If the defendant meant that Mr. Monson had committed a murder (and the jury might well be allowed to give this such a meaning, *Broom* v. *Gosden*, 1 C. B. 728; *Patch* v. *Tribune Association*, 38 Hun, 368), undoubtedly the representation was libellous; but had the plaintiff a case which justified injunction? Collins and Matthew, JJ., and Lord Halsbury thought that he had. Lopes, L.J. dissented from this view, and Davey, L.J., expressed no opinion. Taking into consideration the whole circumstances of the case, one could fairly say that, if this was the innuendo and if it were false, the representation was calculated to bring the plaintiff into hatred, ridicule, and contempt; but it seems that it would be equally fair to say that it is doubtful whether, considering that at the trial any mild innuendo would be op-

posed by a defence of truth, and any direct one, such as this, difficult of proof, there was here a case for the court to undertake the very delicate task of enjoining a libel, and it is perhaps more than doubtful whether if solely this aspect of the case had been before the court, there would have been shown any such willingness to grant the injunction.

But the chief interest of the case is brought into it by the fact that it borders so closely upon the law of Privacy that counsel and court, alike seeking to discuss only the question of libel, let fall again and again expressions which show most clearly that a large part of the plaintiff's real case is that, whatever the circumstances may be, it is outrageous to allow a wax-work figure of a person, who is not a public character, to be exhibited in a place like Tussaud's, without the consent of the person thus pilloried. North, J., in *Pollard* v. *Photographic Co.*, 40 Ch. D. 345, stated the difficulty squarely when he asked counsel, whether one could exhibit and sell copies of a photographic negative taken on the sly. He was answered that there would then be no trust, or confidence, or implied contract, and so no right to stop such a sale; but, as has already been pointed out in the REVIEW, the weakness of courts for hiding judicial legislation under such implications has brought them substantially to a point where the implication is one of law and the contract fictitious. Only in phraseology does this differ from a right of privacy. Whether Mr. Monson's pamphlet, his offers of lecturing, and the like, may not be taken to be a submission of the question to the public, and whether he may deny the public a right to see representations of the scene of the tragedy, and his picture, or effigy, when he is foolish enough thus to drag before it the history of the whole case, are questions which might of course be raised, if his right were squarely considered upon these grounds. But counsel and court slip rather than step into such consideration. "Suppose," says Coleridge, Q. C., "you burnt a man in effigy. I suppose that you could not bring evidence to show that he was in fact a ridiculous person. . . . There is a great distinction between a public and a private man." Later Collins, J., asked him, "You say it is impossible to exhibit a man of bad character without a libel?" "Yes," was the answer, "unless the object is to gratify the public curiosity by the exhibition." And Lord Halsbury launches this well-merited invective against the people who refuse to let others alone. "Is it possible to say that everything which has once been known may be reproduced with impunity in print, or picture, — every incident of a criminal or other trial be produced and its publication justified; and not only trials, but every incident which has actually happened in private life, furnish material for an adventurous exhibitor, dramatized perhaps, and justified, because, in truth, such an incident did really happen?" When counsel and court see the justice of the plaintiff's case in such a light, even if Coleridge, Q. C., says that he treats it as "substantially . . . a case of ordinary libel," outsiders may fairly ask: is this libel? Or is it an inarticulate recognition of the tendency to extend the rights of the person to cover the case of unwarranted and unauthorized representations?

ticket. If it were true that the passenger made his contract with the ticket agent and the ticket was handed over merely as a receipt, then he would perhaps have had a contract right to be carried to his intended destination. But, as was pointed out in 1 HARVARD LAW REVIEW, 17, the ticket agent has no authority to make contracts, — his duty is merely to sell tickets. The ticket is the contract, and by its terms the passenger is bound; and in a case like that under discussion, while he doubtless has a right of action against the company for selling him the wrong contract, he has no action for being put off the train at the terminus provided by that contract.

Courts have fallen into error, it would appear, from failure to distinguish between the case of a ticket which is, on its face, not good for the journey intended by the passenger, and that of a ticket which is apparently good for the intended journey, and declared to be so by the ticket agent, although by the regulations of the company it is in fact not good. In the latter case the contract is ambiguous, and the passenger, under the circumstances, surely has a right to insist on the interpretation given by the company's agent; but that is no reason why he is not bound by the ticket in the former case, where the interpretation of the contract is perfectly clear. (See Hutchinson on Carriers, § 580, *j*.)

The analogy between railroad tickets and bills and notes has often been remarked, and is treated of at length in the article in the HARVARD LAW REVIEW referred to above. A ticket is not a consensual but a formal contract; and although assignable in the absence of words of limitation, it is, like other negotiable instruments, not assignable in part. The second of the two recent cases is of note in this connection. In *Curlander* v. *Pullman Palace Car Co.*, a case decided in the Superior Court of Baltimore, and reported in 28 Chicago Legal News, 68, the novel question was raised as to the right of a purchaser of a sleeping car section, who leaves the train before reaching his destination, to transfer the use of the section to another passenger for the rest of the journey. The court held that he had that right. This decision can apparently be supported only on the ground that a sleeping car ticket is radically different from a railroad ticket; that it is not a formal contract of transportation, but rather evidence of the purchase of certain space in the sleeping car for the specified journey. The existence of so marked a distinction between the two sorts of ticket may well be doubted.

THE RIGHT TO PRIVACY — THE SCHUYLER INJUNCTION. — The case of *Schuyler* v. *Curtis*, before noticed in its earliest stage in 5 HARVARD LAW REVIEW, 148, has been finally adjudicated by the Court of Appeals of New York in favor of the defendant. The bill was for an injunction to prevent the defendants from completing a statue of a deceased lady of whom the plaintiff was the nephew and step-son, and from displaying it first at the World's Fair under the title of "The Typical Philanthropist," and then in the rooms of the Ladies' Art Association in New York. Mr. Justice Peckham in dismissing the bill took especial care to say that the decision could not be taken as a denial of the right to privacy, or of that altogether independent right which the next of kin of a deceased person might have in the privacy of that person's past life, and he put the decision upon the ground that in the case in question there were no circumstances which gave the plaintiff good reason to pray for an injunction. The reasoning was that the deceased could not have shrunk from the anticipation of a publicity after her death, however much she might have done so had it been attempted during her life, and that consequently no evidence of her desire to avoid publicity could be relevant to the plaintiff's case. Further and in general the statue was not to be used in any way which could give a "sane and reasonable person" any complaint on his own account, though he were her nearest relative.

Reduced to its formal parts the decision would therefore seem to be a denial only of equitable jurisdiction, and not of the plaintiff's legal right. It may be fairly said that the court admitted that a tort was proposed by the defendant, but found no sufficient reason for giving the extraordinary remedy of a court of equity, and left the plaintiff to his remedy at law. The case is quite new in its particular features, since the injunctions previously granted, *e. g.* against the reproduction of photographs, publication of letters, and the like, were all cases where the defendant proposed to give a publicity for his own profit, regardless of whether it was calculated to do honor to the plaintiff or not. Moreover, this was a case where equitable jurisdiction cannot be said to flow necessarily from the facts, as in the case of a proposed tort to land, but is rather analogous to a bill for the recovery of a chattel in specie, depending upon its particular circumstances for equitable jurisdiction. In the exercise of its discretion in cases of this sort, a court has such latitude that it is impossible, or at least presumptuous, to say it has come to a wrong decision unless that be obviously absurd and unreasonable. So in this case the decision of the court must be held to be justified even by those who might disagree with the result, had it been their place to decide the case, for there is surely nothing preposterous or absurd in saying that here the plaintiff's loss could be sufficiently compensated by money damages.

But the reasoning of the court, with all respect to the learned judge who delivered the opinion, is not altogether satisfactory. Since the question before them was not to be governed by the decisions of the lower courts, and their position was not that of reviewing the decision of an independent tribunal, *e. g.* the verdict of a jury, there was no occasion to hold that no "sane and reasonable person" could uphold the decision of those lower courts, and it was a statement which their very unanimity in combination with the vigorous dissent in the Court of Appeals itself ought to have effectually disproved.

Further, the line of reasoning by which the plaintiff's evidence of the deceased's dislike of publicity was excluded as irrelevant to his own proof of damages can be assented to with difficulty. It is surely a mistaken view of the ordinary facts of human feeling to say that a naturally retiring person can tolerate the anticipation of a publicity after his death from which he would shrink painfully during his life. Surely a person to whom privacy is of any value whatever must contemplate a future publicity with almost as much chagrin as a present one. Could the learned judge, for example, bear for an instant the thought of a public representation or description of his courtship after his death? Now if this is so, the knowledge of how great annoyance would have been caused to the deceased, had she had knowledge of the defendant's proposition, was a very material element in the plaintiff's damages, for surely it is a source of pain to every normal person to know that that is con-

templated which would have caused suffering to any one dear to him, who is now dead. Indeed, it is unnecessary to give proofs of that feeling, they are so obvious.

Finally, the case seems a good instance of the ill effects of the loose system of pleading used in New York. It is doubtful whether the decision would have been received by the press in general, as it has been, as a denial of the right to privacy, were the jurisdictions of law and equity distinguished, and certainly it would have been more easily limited to its proper scope. As has been intimated, it cannot fairly be complained of, however much some of the reasoning of the opinion may seem to need further exegesis to gain acceptance.

RECENT CASES.

AGENCY — LIABILITY OF SERVANT TO THIRD PERSONS. — The agents of a corporation charged with the duty of erecting on its grounds structures for the accommodation of the public negligently permitted a defective structure to be erected. *Held*, that they were guilty merely of nonfeasance, and therefore were not liable to persons injured by reason of such defects. *Van Antwerp* v. *Linton et al.*, 35 N. Y. Supp. 318.

There is no doubt that when an agent is guilty merely of nonfeasance he is responsible therefor to his principal alone. *Lane* v. *Cotton*, 12 Mod. 472; *Felton* v. *Swan*, 62 Miss. 415. It is when we attempt to draw the line between nonfeasance and misfeasance that the question becomes a puzzling one. The court here follows previous decisions in New York, as well as the weight of authority in other jurisdictions, in limiting the definition of misfeasance to the violation of a duty imposed upon the agent independently of his employment. *Burns* v. *Pethcal*, 75 Hun, 437; *Delancy* v. *Rochereau*, 44 Am. Rep. 456. By the terms of this definition, nonfeasance only can be attributed to the defendants; and there would seem to be no good distinction between the negligent performance and the negligent omission of performance of a duty imposed by an employer, when in both cases injury results to third persons. The authorities are not wanting, however, which declare the first to be misfeasance, and the second nonfeasance. *Osborne* v. *Morgan*, 130 Mass. 102.

BILLS AND NOTES — ANOMALOUS INDORSER — GUARANTOR — STATUTE OF FRAUDS. — Defendant indorsed in blank a note after delivery and while in the hands of payee. Parol evidence showed that he intended to assume the liability of guarantor. *Held*, such act authorizes the payee to write over the signature the contract of guaranty in full, and this constitutes a sufficient memorandum in writing to satisfy the Statute of Frauds. *Peterson* v. *Russell*, 64 N. W. Rep. 555 (Minn.).

This is the first time the point in question has come up for decision in Minnesota. The authorities are divided. In *accord*, see *Kealing* v. *Vansickle*, 74 Ind. 529; *Beckwith* v. *Angell*, 6 Conn. 315; *Stowell* v. *Raymond*, 83 Ill. 120. *Chaddock* v. *Vanness*, 35 N. J. Law, 517, cited by the court as authority, is not in point. The New Jersey decisions are *contra* to the principal case. See *Hayden* v. *Weldon*, 42 N. J. Law, 128. For further authorities holding that a blank indorsement of a note in the hands of the payee does not satisfy the Statute of Frauds, and that payee has no authority to fill in the contract of guaranty, see *Temple* v. *Baker*, 125 Pa. St. 634; *Culbertson* v. *Smith*, 52 Md. 628. For the three doctrines applied where the anomalous indorsement is made before delivery to payee, see 7 HARVARD LAW REVIEW, 373.

CARRIERS — SLEEPING CARS — RIGHT TO TRANSFER USE OF SECTION FOR PART OF JOURNEY. — *Held*, that a purchaser of a sleeping car section, who leaves the train before reaching his destination, may transfer the use of the section to another passenger for the rest of the journey. *Curlander* v. *Pullman Palace Car Co.* (Baltimore Superior Court). See NOTES.

CARRIERS — WRONG TICKET — EJECTION FROM TRAIN. — *Held*, that where a passenger requests and pays for a ticket to A. and by a mistake of the ticket agent is given a ticket to B. only, with which he enters the train without noticing the error, he has a right to ride to A. on making proper explanations to the conductor; and can recover from the company for ejection by the conductor at B. *Evansville & T. H. R. R. Co.* v. *Cates*, 41 N. E. Rep. 712 (Ind.). See NOTES.

CHOSE IN ACTION — ASSIGNMENT — NOTICE TO DEBTOR — PRIORI prior assignee of a chose in action will be protected, though he has given the assignment either to the subsequent assignee or the obligor. *Fortun* 41 N. E. Rep. 572 (N. Y.).

This doctrine is well settled in New York. *Fairbanks* v. *Sargent*, 1(and is in accord with the weight of American authority. *Putnam* v. *Stor* 205; *Kennedy* v. *Parke*, 17 N. J. Eq. 415; *Meier* v. *Hess*, 32 Pac. Rep The English doctrine is that the first assignee giving notice is protected, 1 rule in *Dearle* v. *Hall*, 3 Russ. 1. The Federal courts and a few of the have adopted this rule. *Methven* v. *Staten Island Light Co.*, 66 Fed. Re *Buskirk* v. *Hartford Fire Ins. Co.*, 14 Conn. 140; *Murdock* v. *Finney*, 21 M

CONFLICT OF LAWS — FOREIGN CONTRACTS — PUBLIC POLICY. — shipped on an English vessel from Germany to Philadelphia; the contr Germany, exempted the ship owner from liability for the negligence of ma and provided that disputes should be settled according to the law of the The plaintiff's goods were damaged at Philadelphia through the neglig crew. *Held*, although such contracts are valid in Germany and in Engla considered against public policy here, and will not be enforced. *The G* Fed Rep. 472.

If this contract had been made in America, most of our courts would l unenforceable. 2 Parsons on Contracts, 8th ed., 259. Nor will the c nation respect the laws of another when such a course is against public po lake, Private Internat. Law, § 215. It may be doubted, however, whethe like this, made abroad, offends against American interests; public policy 1 that we preserve a high standard of care in our community by forbidding to sell their vigilance, but if such an act is done in a German community tion of German, not of American policy, and there would seem to be no refusing to give effect to the foreign law. *Forepaugh* v. *Delaware, &c. R.* Pa. St. 217. The doctrine of the principal case appears, however, to adopted by the Federal courts. *Lewisohn* v. *National Steamship Co.*, 56 602. See Hutchinson on Carriers, §§ 140–144 *a*.

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — WAIVER OF TWEI — The defendant by his consent was tried for a felony by a jury of eleve upon conviction he moved for a reversal of judgment. *Held*, that in a cas the defendant could not waive his constitutional right to a trial by a full ju men. *Territory* v. *Ortiz*, 42 Pac. Rep. 87 (N. Mex.). See NOTES.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY — STATU TECTION AGAINST PROSECUTION. — *Held*, (1) that the Fifth Amendment to States Constitution does not protect a witness from giving testimony wh tends to reflect upon his character; (2) that an act of Congress, providing t son shall be excused from testifying in proceedings under the Interstate Cor on the ground that it may tend to criminate him, but that no person shall be or subjected to any penalty on account of anything concerning which he ma constitutional, since it affords a protection as broad as the constitutional *Brown* v. *Walker*, 70 Fed. Rep. 46.

The first point is well settled. *U. S.* v. *Smith*, 4 Day's R. 121; 1 Greenl dence, § 454, and cases cited. The second point overrules the decision *James*, 60 Fed. Rep. 257, thus bringing the Federal rule into line with the 1 State decisions upon the same point. *People* v. *Kelly*, 24 N. Y. 74; *People* 107 N. Y. 427; *Wilkins* v. *Malone*, 14 Ind. 153; *State* v. *Quarles*, 13 Ark. 30 v. *Heard*, 14 Ga. 255. See, *contra*, *Cullen* v. *Com.*, 24 Grat. 624; *Counselma cock*, 142 U. S. 597. Compare *Emery's Case*, 107 Mass. 172.

CONSTITUTIONAL LAW — TRIAL BY JURY. — The Constitution of Kansa that "the right of trial by jury shall be inviolate." The petitioner was sum victed under a city ordinance, forbidding that which the State laws mac offence generally, and applies for his discharge on *habeas corpus* under the vision. *Held*, that since an appeal lay from the city court to a court in which jury was secured, the summary proceeding was not in conflict with the Cons the appeal was "clogged by no unreasonable restrictions"; that since in thi appeal was conditioned "for the payment of such fine and costs as shall be i him, if the case shall be determined against the appellant," it was unreas stricted. *Re Jahn*, 41 Pac. Rep. 956 (Kan.).

In regard to the first point, there is a conflict of authority. A previo case, *Emporia* v. *Volmer*, 12 Kan. 622, and cases in several other States, su decision. The authorities are collected in 1 Dill. Mun. Corp. (4th ed.) § 4

Paper, Lewis J. 1983 Brandeis. Prentice-Hall, Inc. Englewood Cliffs, NJ

timely legal topics. It would provide good experience for the students and might contribute to the development of the law. Brandeis was enthusiastic about the idea. He gave his time and money to the project, and in 1889 he, James Barr Ames, and George Nutter (then an associate at Warren & Brandeis) became the *Harvard Law Review*'s first trustees and took charge of the $250 in its bank account.

As with the Association, the *Review* remained a lifelong preoccupation of Brandeis's. As both a lawyer and a justice of the Supreme Court he was very interested in the articles it was publishing. He and Sam contributed some of the first pieces on the basis of cases they had had.[5] He was also quick on later occasions to advise the students and the faculty on how to make their product more relevant. Thus, Brandeis did not hesitate to speak his mind in 1912 when the *Review* asked his advice about an unusual project concerning legal developments during the time of Richard II of England. "There has been no time in the history of our nation," Brandeis told them, "when there is greater need for the progressive lawyer than there is today. The reputation of the profession has suffered mightily from its failure to grapple with twentieth century problems. It is undoubtedly true that we need legal scholars, but the more pressing demand of today is for the enlightened lawyer. His absence is the real cause of the lack of confidence in the Bench and Bar." In this setting, pure historical research seemed to be of little value. "If the *Law Review* is to make any departure from the courses hitherto pursued," Brandeis concluded, "it ought to be in the line rather of prospect than of retrospect; to constructive work rather than archeological research."[6] So much for the era of Richard II. And when he later felt frustrated by the votes of his brethren on the Supreme Court, Brandeis often proposed to Felix Frankfurter and other faculty members that they crank out articles that might lead to a different result in the future. But none of these comments or suggestions was as important—or as celebrated—as the article Sam and Louis wrote for the *Review* in 1890.

In December 1890 the *Harvard Law Review* published an article by Louis D. Brandeis and Samuel D. Warren, Jr., entitled "The Right to Privacy." In essence, the article argued that, except in limited situations, people should be given legal protection against invasions of privacy by other citizens. It was no small matter in the authors' view. Of course, idle gossip had probably been a problem from the first days of civilized society. But now there were new inventions and practices to enlarge the capacity of prying eyes. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life," Louis and Sam wrote; "and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " The authors were especially concerned with the gossip trade that had recently mushroomed in the newspaper industry. "Gossip is no longer the resource of the idle and of the vicious," they observed, "but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle." The columns were not the worst of it, however. Photographs were being taken of people and circulated in

the press. It was simply not right. It was time to provide some legal remedy for those whose privacy had been invaded. After all, people had, as Judge Thomas Cooley, the eminent scholar, had observed, a right "to be let alone."[7]

Sam and Louis thought that the common law provided an answer to the problem. They noted that the law already offered some protection against mental distress. For instance, a person's private letters could not be made available to the public under normal circumstances. Why not extend that principle to cover situations when the matter at hand involved "idle gossip" or photographs that exposed a person's private actions to public scrutiny? "The principle which protects personal writings and any other productions of the intellect or of the emotions is the right to privacy," the authors concluded, "and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise."[8]

The article had certain shortcomings. Although they vehemently protested the excesses of a scandalous press, Sam and Louis offered virtually no evidence to support their claim; and later scholars found in fact that the press of that day, and particularly the Boston press, was quite respectable. Moreover, although the authors acknowledged that the press should be able to print items of public interest, they did not explore the inevitable conflict between the right to privacy and the right to a free press. They did not speculate on what would happen, for example, if a newspaper printed information about a person that it believed to be of public interest but that the person felt was of only private interest.[9]

None of these defects seemed to matter much to readers. The reaction to the article was nothing short of incredible. Lawyers read it, magazines reviewed it, and courts relied on it—all to the seeming end of creating a new right to privacy. Twenty-six years after its publication, Dean Roscoe Pound of the Harvard Law School observed that the article "did nothing less than add a chapter to our law."[10] Subsequent scholars were just as impressed. One commentator referred to it as "the outstanding example of the influence of legal periodicals upon the American law."[11] Another writer said that the article was "perhaps the most influential law journal piece ever published."[12] In some sense all of this praise was justified. After all, concerns for privacy in part motivated the American Revolution; and there could be no doubt that protection of privacy was a central concern of the populace.

Amid all the fanfare produced by the privacy article, there was a natural curiosity as to what motivated Brandeis and Warren to write the piece. Most scholars agreed that it was Warren's displeasure at seeing the Boston press report on his family's activities. One Brandeis biographer called particular attention to the *Saturday Evening Gazette,* which, it was said, described the Warren family activities in "lurid detail."[13] Other scholars accepted this description and added that the breaking point came when the press covered the wedding of Sam Warren's daughter.[14] One eminent legal scholar was particularly touched by the irony of the situation. "All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren," Dean William Prosser wrote. "One is tempted to surmise that she must have been a very beautiful girl. Resembling, perhaps, that fabulous creature, the daughter of a Mr. Very, a confectioner in Regent Street, who was so wondrous fair that her presence in the shop caused three or four hundred people to assemble every day in the street before the window to look at her, so that her father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance." Yes, it was a wonderful image for the woman who inspired a new legal right of privacy. "This was the face that launched a thousand lawsuits," Prosser concluded.[15]

Actually, it is very doubtful that Warren's daughter launched any lawsuits. Warren was not married until 1883, and in 1890—when the privacy article was published—his daughter was only six years old. Nor were there any newspaper articles discussing the Warrens' social life in "lurid detail." Even by standards prevailing then, the coverage of the Warrens' social life was minimal and quite tame. The *Saturday Evening Gazette*—the periodical most often cited by historians of the Brandeis and Warren privacy article—was anything but a scandal sheet. Most of that weekly paper was devoted to news, political analysis, and art and literary reviews. Even its competitors recognized the *Gazette* as a first-class operation. The *Boston Herald* called the *Gazette* "the queen of society newspapers. It is printed for a special class of patrons, and it is admirably edited." The *Boston Post* said the paper was "almost indispensable to every household."[16]

The *Gazette* did report on social events. But its columns were not exactly sensational. One social column, for example, reported that "in some of the finest houses in Newport, there is a great deal of misery." Another column reported that "Miss Grant . . . popped corn and ate baked apples with the second Comptroller and Congressman Ned Burnett the other afternoon in their bachelor quarters." As for Sam Warren, he received virtually no attention from the *Gazette.* Between 1883 and 1890 his name appeared in the *Gazette* only twice—once because he, along with Brandeis and others, wanted to announce publicly that they were joining the Mugwumps; the other time in June 1890, when Katherine H. Clarke was married and it was reported that "Mr. and Mrs. Samuel D. Warren, the former a cousin of the bride, gave a breakfast for the bridal party. . . ."[17] Not quite the drama that historians seek.

Nevertheless, it does seem clear that Warren was upset with the Boston press and that he did ask Brandeis to help him write the article.[18] Given his very sensitive nature, there are any number of matters that could have disturbed Warren. For one thing, the *Gazette* was not very fond of his father-in-law. Sam had married Mabel Bayard, the daughter of Senator Thomas Francis Bayard. He had been a presidential candidate in 1884, and, after Grover Cleveland's election, Bayard was appointed secretary of state. The *Gazette* did not think much of Bayard's performance in that position. As he was about to leave office, the *Gazette* was especially colorful in its criticisms. "Happily he has but a few days more in which to strut about like a pompous turkey-cock with wings drooping in defiance at the smaller denizens of the political farmyard while his angry gobble-gobble strikes terror into their private souls," the *Gazette* observed. "Secretary Bayard will go into private life unwept, unhonored, and unsung, and it is to be sincerely hoped that he may be kept there for good and all."[19]

Criticism like that might have been enough to rile Sam Warren. If so, there would have been a certain irony in Brandeis's coming to the rescue of Mabel War-

ren's father. For Mabel did not really care for Louis.[20] It was one of those quirks of fate that Brandeis would run into periodically. He was not terribly popular with the wives of some men to whom he was extremely close. In later years, for instance, Oliver Wendell Holmes and Felix Frankfurter were among Brandeis's closest associates; and yet neither Fanny Holmes nor Marion Frankfurter was very fond of him.[21] But Brandeis apparently took the matter in stride, and it does not seem to have affected his relationships with the men. And it obviously did not deter him from helping Sam develop a new right to privacy.

Brandeis had a certain ambivalence toward the piece, however. Like Warren, he hoped "to make people see that invasions of privacy are not necessarily borne—and then make them ashamed of the pleasure they take in subjecting themelves to such invasions." But he was not convinced that the article was well done. When he first got back the page proofs he did not feel that the article was "as good as I thought it was." And more than that, there were other subjects of greater interest to him. "Lots of things which are worth doing have occurred to me as I sit calmly here," he wrote his fiancée shortly after the privacy article was published. "And among others to write an article on 'The Duty of Publicity'—a sort of companion piece to the last one that would really interest me more." It all reflected Brandeis's growing belief that corruption in government could be minimized if the public knew more about the activities of public officials. "If the broad light of day could be let in upon men's actions," he observed, "it would purify them as the sun disinfects."[22] In time Congress would pass laws incorporating that philosophy.[23] Long before then—indeed, even as he suggested the "publicity" article—Brandeis was trying to practice what he hoped to preach.

It all happened quite by accident. In 1890 a group of men were trying to obtain the public charter for the subway in Boston. It was believed that they were not relying solely on the merits of their case. There was talk that they were instead relying on their power to grease the pockets of the State legislators. As a Mugwump and a member of the Citizens Association, Brandeis was, to say the least, offended by this corruption—if indeed it existed. He therefore offered to help George Fred Williams, who was fighting the takeover of the subway charter. Williams was more than happy to accept the offer of assistance. He asked Brandeis to find out which legislators could be bribed.

Brandeis turned to his client and friend William D. Ellis. He was a member of the Liquor Dealers Association, and Brandeis had heard that the Association had a great deal of contact with the legislature; and, more importantly, Brandeis had heard that they were not above doing a little bribing of their own. When Ellis came to his office, Brandeis pulled out the list of legislators from his roll-top desk. Which of these men can be bought, he asked Ellis. In a calm, deliberate manner, Ellis began checking off names. Brandeis was aghast. "Ellis, do you realize what you are doing?" he asked.[24] Ellis told him it was a necessary way of life, but Brandeis would accept none of that. What kind of example is that to set for your fourteen-year-old son, the young lawyer demanded. And not only that, he continued, but the corruption was not paying off. The legislature was still adopting laws that were intolerable to the Liquor Dealers Association.

Ellis was moved by his attorney's talk. Later he brought in some of his colagues to hear the sermon. After discussing it among themselves, they came back Brandeis in the fall of 1890 and asked him to represent them in forthcoming gislative proceedings. The men were especially concerned because the legislare was to consider two important matters: the anti-bar law, which prohibited e sale of a drink except with a meal, and the twenty-five-foot law, which allowed ny property owner within twenty-five feet of a proposed saloon to object to its ght to sell liquor.

Brandeis accepted the Liquor Dealers as a client on two conditions. First, he anted it understood that the Association was not to spend any money without is prior approval. Second, he wanted Ellis appointed as chairman of their executive committee. The men agreed, and Brandeis began preparations for the hearing.

For Brandeis, it was not only a question of ending corruption. By this time he had begun to appreciate the importance of the community's controlling its own affairs. To be sure, men had weaknesses and could succumb to temptation. By the same token, one could not assume the worst and strip people of the right to control their lives. Yet that was precisely the posture taken by the legislature with respect to liquor dealers. The legislators had created a licensing board to determine who could or could not become a liquor dealer; and then they removed virtually all discretion in the matter by imposing incredibly stringent rules on the sale of liquor. It was no wonder that the law was openly defied, or that the liquor dealers felt compelled to resort to sordid means of persuasion with legislators. It was time to face up to reality and give the community more power over its own affairs.

On February 27, 1890, Brandeis appeared before the Joint Committee on Liquor Law. He decided to be blunt with the committee. "If the drinking of liquor were a wrong, there would be nothing for you to do, Mr. Chairman, but to report to the Legislature a bill for the prevention by punishment of that wrong, as you punish embezzlement, or crimes of any other nature," Brandeis said; "but the use of liquor is not a wrong. It is the abuse and not the use which is wrong, and, consequently, you must not allow yourself to be carried away by your emotions; you must not be misled by your indignation at the misery which liquor has produced. Remember the weaknesses of men and endeavor to protect them, but do not forget that even the weak are strong enough to resist too severe restrictions." But above all, he added, the legislators had to adapt the law to the realities of human experience. "Take the community in which you live," he advised them; "do not imagine one very different from your own where men will not drink because you say they shall not." Considerable damage had already resulted because the legislators had imposed laws that almost invited defiance and corruption. It seemed inevitable to Brandeis. "You can make politicians of shoemakers or of farmers," he observed; "you can make politicians of any class of people or of those in any occupation if you harass them, if you make it impossible for them to live unless they control, unless they have secured power to determine when, and how, and where they may live. You can remove liquor dealers from politics by a very simple device—*make the liquor laws reasonable.*"[25] The legislators were im-

Paper, Lewis J. 1983 Brandeis. Prentice-Hall, Inc. Englewood Cliffs, NJ

addition, he felt that the government had treated him unfairly—and Brandeis, for one, shared that view.

Casey did not fit the mold of a drug dealer. He was an established attorney in Seattle and, with silver hair and a medium build, he cut an impressive figure. Much of his law practice involved the representation of drug addicts. Because of that his face was a familiar one in the Kings County Jail. Rumor had it that he could also be a helpful friend to the "boys" behind bars. A discreet inquiry, a quick payment, and the necessary fix would be provided. The rumors were so pervasive even the jailers heard them. They also noticed that the "boys" often looked a little tipsy after a visit from Casey. So the jailers decided to find out for themselves. George Cicero, a convicted felon and drug addict, was approached by federal narcotic officers. Would he help them catch Casey? Cicero was then in jail on a forgery charge, and any cooperation from him might be beneficial when the authorities decided his fate. The narcotic agents apparently also involved the sister-in-law of Roy Nelson, another "resident" of the King County Jail. It was agreed that both Cicero and Nelson would summon Casey to the jail, give him money, and ask for morphine.

Casey soon made his appearance, talked to Cicero and Nelson, took their money, and promised satisfaction. All the transactions and conversations were observed by the federal agents, who placed themselves near the attorney "cages" where prisoners talked to counsel. Later that afternoon, Mrs. Nelson went to Casey's law office. There, in the presence of Casey and an oriental man she did not know, Mrs. Nelson was given some towels that were to be delivered to her brother-in-law. Instead, Mrs. Nelson took them to the narcotic agents, who determined upon soaking them that they contained morphine. Casey denied most of these facts at his trial, but the jury believed otherwise.

To most of the justices it was an open-and-shut case. The evidence was credible, it was substantial, and it showed beyond a reasonable doubt that Casey had been engaged in illegal drug trafficking. Holmes was asked to write the majority opinion. The assignment from Taft could not have been accidental. Brandeis was proposing to dissent, and the chief justice was pleased to see the two "liberals" on opposite sides of the fence.

As the years rolled on, Taft became more and more irritated by Brandeis's dissents. Although they were not that frequent, they usually came on important cases. And, to make matters worse, Brandeis always seemed to be able to drag Holmes along with him. The chief justice knew that the two justices rode to and from Court together, that they frequently discussed Court cases, and that Brandeis would sometimes pressure the old Yankee to join him in dissent or to write his own. The senior justice appeared to be under the spell of the former "people's attorney," and it rankled the chief justice. Holmes was "so completely under the control of Brother Brandeis," Taft observed at one point, "that it gives Brandeis two votes instead of one."[1]

So when Holmes voted with the majority in conference on the Casey matter, Taft, no doubt, was delighted. To Holmes the record clearly demonstrated that Casey was guilty as charged. Brandeis did not disagree with that conclusion, but he was troubled by the government's role in the affair. The narcotic agents had

not merely stationed themselves to observe a crime that Casey committed on his own initiative; they—representatives of the United States government—had instigated the crime themselves. They had planned it, they had engineered it, and they had supervised it. To Brandeis, the government's participation was morally offensive, and he wrote a strong dissent.

The dissent was circulated to the brethren, and Brandeis surely hoped that his favorite colleague would see the light. But Holmes held firm. And he sent a memo to the justices explaining why he could not join the dissent. "I have much sympathy with my Brother Brandeis' feelings about this case," Holmes said, "but I doubt if we are warranted in going farther than to suggest a possibility that the grounds for uneasiness may perhaps be considered by another (i.e., the pardoning) power." Holmes emphasized that, when all was said and done, the narcotic agents had done nothing more than to make a "simple request" of assistance from Cicero, "the stool pigeon." "I am not persuaded," he concluded, "that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger."[2]

Although Holmes's memo revealed no wavering on his part, Taft wanted to make sure there would be no slippage. He dashed off a note of support after receiving the memo. "I concur strongly," the chief justice told Holmes, "but I don't think you need soften your difference with B. in this case. The idea that a full-grown man and a lawyer of much practice with addicts would be led into a crime like this without being a criminal all the time is absurd."[3] And so the decision was announced by Holmes in April 1928, and Brandeis dissented, as did Justices McReynolds, Butler, and Sanford.

However much satisfaction Taft took from the split between Holmes and Brandeis, it was to be short-lived. Indeed, even while he read the opinion in *Casey,* Holmes—much to the consternation of the chief justice—was indicating his willingness to join a Brandeis dissent in another matter raising issues similar to those in *Casey*.

Spies. Their use in almost any form was inexcusable, but especially when they worked for the government. It was important, of course, to protect individual privacy from the prying eyes and ears of other citizens. Warren and Brandeis had written their *Harvard Law Review* article almost forty years earlier to explain how the law could serve this noble goal. They never addressed the issue of government spying. After all, a person had a right to expect that his government would not resort to such sordid practices. At least, that's what Brandeis thought.

Unfortunately, there were many people—including some high government officials—who believed otherwise. Domestic espionage was a tool frequently used by the government, first to uncover secret agents working for the enemy during the war, then to expose communists, socialists, and other radicals whose views seemed to un-American. And then there was Prohibition. Secret listening devices were essential—or at least some people claimed they were essential—to identifying bootleggers and tax dodgers.

Brandeis did not care if domestic espionage was effective. It was unethical, and the government had no business relying on it. In late 1920, as Attorney Gen-

not merely stationed themselves to observe a crime that Casey committed on his own initiative; they—representatives of the United States government—had instigated the crime themselves. They had planned it, they had engineered it, and they had supervised it. To Brandeis, the government's participation was morally offensive, and he wrote a strong dissent.

The dissent was circulated to the brethren, and Brandeis surely hoped that his favorite colleague would see the light. But Holmes held firm. And he sent a memo to the justices explaining why he could not join the dissent. "I have much sympathy with my Brother Brandeis' feelings about this case," Holmes said, "but I doubt if we are warranted in going farther than to suggest a possibility that the grounds for uneasiness may perhaps be considered by another (i.e., the pardoning) power." Holmes emphasized that, when all was said and done, the narcotic agents had done nothing more than to make a "simple request" of assistance from Cicero, "the stool pigeon." "I am not persuaded," he concluded, "that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger."[2]

Although Holmes's memo revealed no wavering on his part, Taft wanted to make sure there would be no slippage. He dashed off a note of support after receiving the memo. "I concur strongly," the chief justice told Holmes, "but I don't think you need soften your difference with B. in this case. The idea that a full-grown man and a lawyer of much practice with addicts would be led into a crime like this without being a criminal all the time is absurd."[3] And so the decision was announced by Holmes in April 1928, and Brandeis dissented, as did Justices McReynolds, Butler, and Sanford.

However much satisfaction Taft took from the split between Holmes and Brandeis, it was to be short-lived. Indeed, even while he read the opinion in *Casey,* Holmes—much to the consternation of the chief justice—was indicating his willingness to join a Brandeis dissent in another matter raising issues similar to those in *Casey*.

Spies. Their use in almost any form was inexcusable, but especially when they worked for the government. It was important, of course, to protect individual privacy from the prying eyes and ears of other citizens. Warren and Brandeis had written their *Harvard Law Review* article almost forty years earlier to explain how the law could serve this noble goal. They never addressed the issue of government spying. After all, a person had a right to expect that his government would not resort to such sordid practices. At least, that's what Brandeis thought.

Unfortunately, there were many people—including some high government officials—who believed otherwise. Domestic espionage was a tool frequently used by the government, first to uncover secret agents working for the enemy during the war, then to expose communists, socialists, and other radicals whose views seemed to un-American. And then there was Prohibition. Secret listening devices were essential—or at least some people claimed they were essential—to identifying bootleggers and tax dodgers.

Brandeis did not care if domestic espionage was effective. It was unethical, and the government had no business relying on it. In late 1920, as Attorney Gen-

eral Palmer's raids on suspected communists dominated the national news, he urged Felix Frankfurter to have *The New Republic* (of which he was a contributing editor) explore the whole question of spying. And if there was any doubt about the slant to take, the justice briefly outlined his views. "The fundamental objection to espionage," he told the Harvard professor, "is (1) that espionage demoralizes every human being who participates in or uses the results of espionage; (2) that it takes sweetness & confidence out of life; (3) that it takes away the special manly qualities of honor & generosity which were marked in Americans."[4] In due course a series of articles appeared in the magazine.

Brandeis found some additional satisfaction on the legislative front. He was constantly after Frankfurter to talk with Senator Burton Wheeler and other legislators about terminating the government's spy program. One means to achieve this goal was the appropriations process in Congress. It was simple. All they had to do was deny the relevant agencies the money to engage in spying. Again, determination and patience were the keys. "It may take a generation to rid our country of this pest," Brandeis wrote to Frankfurter in the summer of 1926, "but I think it probably can be done, if the effort is persistent and we are prepared for action when, in the course of time, 'the day' comes. The temper of the public at some time in conjunction with some conspicuous occurrence will afford an opportunity & we should be prepared to take advantage of it."[5] Six months later the Senate rejected a $500,000 appropriations request for "undercover" work in the enforcement of Prohibition. Brandeis passed the good news along to Frankfurter and said that *The New Republic* "should not fail to take this occasion for an attack on the spy system."[6]

Brandeis did not rely on Frankfurther alone to criticize domestic espionage. When the *Olmstead* case came along, he had his own chance.

Roy (Big Boy) Olmstead seemed to have a good thing. He and his cohorts—more than fifty of them—ran a very profitable liquor-smuggling business out of Seattle. It was no small operation. They rarely did less than $200,000 worth of business a month and probably grossed about $2 million a year. They had a ranch near Seattle, two seagoing vessels (for trips to British Columbia), an office with a central switchboard, operators, bookkeepers, delivery men, dispatchers, and even their own attorney.

They were, however, victims of their own success. The federal narcotics agents could not help but notice their activities, and once again the "undercover" men decided to step in. They placed wiretaps on the telephones of the men's offices and homes, and for five months the agents listened to every conversation—personal and otherwise—made over those phones. Their notes of the conversations occupied 775 typed pages and confirmed that Olmstead was indeed running a very successful smuggling operation. With evidence in hand, the agents arrested Olmstead and more than seventy other individuals.

In upholding Olmstead's conviction, the federal court ignored a Washington state law that prohibited wiretapping. When the Supreme Court later reviewed Olmstead's *cert.* petition, they also agreed that the state law question would not be addressed. The only issue would be a constitutional one: did the

wiretapping violate the individual's right to privacy as protected by the Fourth and Fifth Amendments to the Constitution? The Fourth Amendment states that the government cannot conduct "unreasonable searches"—those not sanctioned by a search warrant or other order indicating court approval. The Fifth Amendment says that a person cannot be deprived of his liberty without "due process" or compelled to be a witness against himself in a criminal case. Since the narcotics agents wiretapped the phones without court approval, Olmstead argued that the activity violated his Fourth and Fifth Amendment rights and that, therefore, the government should not have been allowed to use any evidence it had obtained through the eavesdropping.

Brandeis recognized the significance of the case, and he began working on his opinion long before the oral argument. He was not sure whether he would be in the majority, so he styled his drafts only as a "memorandum." There was no doubt, though, where he would come out in the case.

He of course knew that the Court had decided to address only the constitutional points. But he could not ignore the fact that the narcotics agents had violated a state law when they wiretapped Olmstead's phone. To the justice, that was unpardonable and had to be condemned. It was much more important than the constitutional issues, and he hoped the Court could resolve the case without reaching those constitutional questions. On February 8, 1928, he expressed his view on a piece of yellow lined paper. "To declare that the end justifies the means would bring terrible retribution," he wrote. "Crime is contagious. In a government of laws, the Government must observe the law scrupulously. It teaches the whole people by its example. If it becomes itself a law-breaker, it destroys respect for the law. It invites every man to become a law unto himself. It invites anarchy."

Henry Friendly, the justice's clerk, reviewed the draft memorandum. Friendly recognized the force of the state law argument. But he told the justice that the constitutional point was more critical. Even the government conceded that it would lose if the Fourth and Fifth Amendments applied to wiretapping. Moreover, it would not do to rely on individual states to determine the acceptability of wiretapping. It would mean a lack of uniformity in the laws. And there could be occasions when, under proper procedures, the federal government would be justified in wiretapping but would be unable to because of state restrictions.

After listening to his clerk, Brandeis decided to rearrange the memorandum. A new section was added discussing the constitutional aspects of the case. Here Brandeis relied heavily on arguments he and Sam had made in their privacy article. Some passages were lifted from the article and, with some minor editing, inserted into the memorandum. "The makers of the Constitution," Brandeis wrote, "appreciated that to civilized man, the most valuable of rights is the right to be let alone. They did not limit its guarantees of personal security and liberty against danger to the enjoyment of things material. Happily, the law recognizes that only a part of the pain, pleasure and profit of life lies there. The law gives protection to beliefs, thoughts, emotions and sensations." This protection, furthermore, was needed even when the government was well intentioned. "Experience has taught," Brandeis continued, "that the danger of invasion by the Government of these rights of the individual is greatest where its purposes are benevolent.

Men born to freedom are alert to resent the arbitrary invasion of their liberty by evil-minded rulers. It is in the insidious encroachments by the well meaning—by those of zeal without understanding—that the greatest danger lurks."

In preparing this passage, Brandeis recognized that the literal language of the Fourth Amendment—the principal constitutional provision in question—mentions only material things. The amendment refers to the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." But the Constitution's reach could not be confined to the literal language. The Court had already held on numerous occasions that constitutional provisions had to be interpreted in light of new developments. That notion was especially important in defining a person's right to privacy, because science had now produced new methods to pry into personal affairs. "Discovery and invention," Brandeis wrote in the middle of February, "have made it possible for the Government to obtain by means far more effective than stretching upon the rack disclosure of 'what is whispered in the closet.' Through television, radium and photography, ways may soon be developed by which the Government can, without removing papers from secret drawers, reproduce them in court and by which it can lay before the jury the most intimate occurrences of the home."[7]

Brandeis gave this draft, like the previous ones, to Friendly. The young lawyer scrutinized the material carefully. The reference to television troubled him. Television had no relevance to government spying. The clerk voiced his concerns to Brandeis. "Mr. Justice," said Friendly, "television really isn't appropriate here. Television doesn't work in a way so that you can take it and beam it across a street into an apartment or building and see what somebody is doing." Brandeis looked at his youthful critic. "That's exactly how it works," said the justice. Friendly persisted. The justice simply did not appreciate the mechanics of this new invention. Would the justice at least let him secure some materials from the Library of Congress so that the justice could see that he was right? "Well," said Brandeis, "you can get those materials, but you'll see you're wrong." When the opinion was printed in its final form, however, the reference to television was omitted.[8]

Meanwhile, the oral arguments were held, and in late February the justices voted to uphold Olmstead's conviction. The only issue discussed concerned the constitutional points. And on that issue, at least six justices felt comfortable upholding Olmstead's conviction.

At Friendly's suggestion, Brandeis's memorandum—which was now labeled a dissent—started off with the constitutional argument. The second part addressed the doctrine of "unclean hands"—the argument that the government could not ask the Court's assistance in convicting Olmstead when its own conduct in the case was tarnished by unlawful wiretapping. Shortly after the oral arguments, Brandeis was sufficiently satisfied with the opinion to send it to Holmes for his review. Holmes was with the majority on the first vote, and Brandeis again hoped that the logic of his dissent could persuade him otherwise.

Responding a few days later, the senior justice said that he still could not accept the constitutional argument. Holmes had great respect for Brandeis, but on occasion the junior justice seemed to forget that he was a judge and not an advocate. His long and forceful opinions sometimes revealed the drive of an attorney

seeking reforms, not a judge deciding a case on the basis of existing law. Holmes saw evidence of that attitude in Brandeis's *Olmstead* dissent. "I fear," he told Brandeis, "that your early stated zeal for privacy carries you too far." He added, however, that he "wobbled" on the "unclean hands" doctrine. Brandeis saw a glimmer of light. Although Holmes had tolerated the government's entrapment of Thomas J. Casey, he might draw the line narrowly and condemn government activities that involved more than a "simple request" of a convicted felon. Perhaps some of the other justices in the *Olmstead* majority could also be persuaded that the government's unlawful wiretapping required a reversal of Olmstead's conviction. It was worth a try. After all, it might not take that much to change the result.

Toward the end of March, Brandeis circulated the portion of his opinion dealing with the "unclean hands" point. In a cover note he explained that several of the brethren had stated that they had not considered the argument and that he thought it might be useful for them to see his views on it.

Justice Stone, for one, was impressed. He agreed with Brandeis's constitutional argument. He also sensed that Brandeis was probably right on the second ground as well. "It seems to me," he told his colleague, ". . . offensive to public policy and morals for the federal government to secure convictions through sending its agents into a State who there violate the State law. . . ."[9] Despite this attitude, Stone was not yet prepared to commit himself to joining Brandeis's dissent, but he promised to think about it.

Taft was not as charitable. He was preparing the majority opinion, and he did not like these new "attacks," as he saw them, especially since the conference had originally voted to consider only the constitutional question. "Where we make a limitation we ought to stick to it," he told Justice Sanford, "and I think anyone would have done so but the lawless member of our Court."[10] But he had to admit that the entire Brandeis opinion—which was circulated in May—was powerful. "It is rather trying," the chief justice wrote his brother, "to have to be held up as immoral by one who is full of tricks all the time. . . . But he can become full of eloquent denunciation without great effort."[11]

Taft was most disturbed, however, by the opinion eventually penned by Holmes. The senior justice had finally agreed to dissent, but only because wiretapping violated state law. As in other cases, Brandeis had urged his colleague to write his own opinion and, as in other cases, Holmes succumbed to the pressure. "It is desirable that criminals should be detected, and to that end that all available evidence should be used," Holmes wrote. "It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Wiretapping, the justice concluded, was "dirty business" and the courts should not "allow such iniquities to succeed."[12]

Stone—after further conversations with Brandeis—decided to support the dissent on both the constitutional and statutory grounds. Justice Butler, on the other hand, decided to dissent on only the constitutional grounds. Still, when the decision was finally announced in June 1928, there were only four dissents and Olmstead's conviction was left to stand.

Brandeis—who at first wanted to rely primarily on the statutory argument—later seemed most upset by the Court majority's narrow view of privacy in the constitutional scheme. "I suppose," he told Frankfurter, "that some reviewer of the wiretapping decision will discern that in favor of property the Constitution is liberally construed—in favor of liberty, strictly."[13]

They wanted to impeach Earl Warren. At least that's what the bumper stickers on the cars said. As the chief justice of the United States Supreme Court between 1954 and 1969, Warren engineered many decisions expanding the constitutional rights accorded to individual citizens. Many people thought that Warren and his Court went too far, that they were coddling criminals, that, as a practical matter, they were only giving wrongdoers more freedom to victimize innocent people. And one decision that fell into that category was *Katz* v. *United States,* a case in which the Court overruled *Olmstead* and held that government wiretaps had to meet the procedural requirements of the Fourth Amendment, including the need for prior judicial approval.[14] Although the decision was criticized in some quarters, Justice Brandeis no doubt would have been pleased by it, especially since this new Court majority relied heavily on his *Olmstead* dissent. There was perhaps no greater satisfaction than to be vindicated by subsequent events.

Although he missed it in *Katz,* Brandeis knew all about that kind of pleasure. He had experienced it when the Zionist Organization of America asked him to return to the fold.