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Dicta Editorial Board

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DICTA

Vol. VI NOVEMBER, 1928 No. 1

SO THE PEOPLE MAY KNOW

THIS issue deals a valiant blow to the doctrine of *stare decisis*. It was felt that the old Record had evolved from the modest pamphlet which it was at the beginning of its career into a magazine of substance. It is not only an important instrumentality in developing a feeling of group unity among our membership, and in affording a medium for the record of our activities: it is now the vehicle for the presentation of divergent views concerning the substance of the law.

What steps should be taken to realize an ideal of greater usefulness? One of the first suggestions was to change the type. That employed in the old Record was diminutive and therefore difficult to read. Doubtless the new type will not only add to the ease of reading: by the elimination of the double column page, it will add much to the dignity and attractiveness of the material presented.

Having cast the die as it were, the matter of further changes followed naturally, and the additional physical changes which you now behold, such as the larger size, the different weight and texture of the paper, and the new cover scheme, were adopted with the belief that they will all add to the attractiveness of the magazine.

Not satisfied with this attack on the established order, your relentless President, your talented Executive Committee, and your humble Editorial Board, decided that, even if the best of Boccaccio's stories were contained within, yet as long as the name "The Record" remained, there would be a tone of formality which might discourage the potential reader. In other words, we felt that "The Record" conjured up no very enticing suggestion of readable material. Usually records are pretty dry reading, and we find very few lawyers who peruse them as a form of mental relaxation. And there were also those who felt that as a name, "The Record" was not a gem of originality. It certainly possessed no elusive charm, no

vague and endearing individuality that captivated by its very sound. In brief, "The Record" meant merely a record—and this magazine aspires to be something more.

But it was difficult to find anything more suitable. However, your Editorial Board launched into the unknown sea, and enlisted the co-operation of the members of the association in suggesting names. This co-operation was cheerfully given—too cheerfully in several instances, for your Board was compelled to adopt a stern and repressive attitude. Then the struggle began. Judge Butler refused to deliberate at all until assured that we would not consider "The Vampire", in view of the relationship of our periodical to the late lamented "Jealous Mistress". And Albert Gould, your distinguished secretary, refused to consider any name which he could not pronounce. Another problem was met: each committee member who had suggested a name felt impelled to defend it to the death. After arduous research and debate, there emerged from the list of possible names, battered but victorious, the title which now greets you. Behold: "Dicta"!

For the benefit of those new to our ranks and, therefore, not yet enthroned upon the heights of knowledge whereon we elders sit, and as a further display of our own erudition, your Board takes pleasure in explaining what "Dicta" means.

According to Mr. Bouvier's Law Dictionary, "Dicta" refers to "Opinions expressed by a Court but which, not being necessarily involved in the case, lack the force of an adjudication". Our own impression, gathered from the eloquent statements made by many of our most prominent members in open court, is that "Dicta" refers to the alleged heart and soul of each decision cited by an adversary. On the other hand, many contend that the word implies a device worked out by a learned court, whereby he so obscures his actual decision that it requires a high degree of legal scholarship to ferret it out, and thus prevents the practice of the law from being made so easy that it ceases to be an art.

As will readily be seen, any of these concepts render it an appropriate name for our medium, and it has, in addition, the virtue of originality. In a more serious vein, we wish to say that we have given the matter of these changes, both of size, make-up and name, careful consideration. Your Execu-

tive Committee, your Editorial Board, and especially your President, Mr. Toll, have worked long and earnestly over the matter in a sincere attempt to give to the Association a more effective medium.

In the matter of format, we acknowledge our indebtedness for more than one feature to a noteworthy example of the printer's craft, the Foreign Affairs quarterly.

Your Board realizes that such physical changes, however beneficial, cannot alone achieve the goal of usefulness to which "Dicta" must and does aspire; that the subject matter and the content must also keep step if they are to merit the attention of the members of the Association. It will be the ambition of the Board to make "Dicta" as readable a magazine as possible. No article or thesis, be it ever so worthy or ennobling, can achieve much unless it is read; bearing this in mind, we may occasionally include some matters of lighter tone; nor will "Dicta" disdain battle, blood and sudden death. It will adhere to the ideal of old Voltaire that, although it disagrees with every word presented by a contributor, yet it will defend to the death his right to state his views.

In conclusion, your Board wishes to solicit the aid and co-operation of every member of the Bar in the task of making "Dicta" of the utmost service to the Association and to the profession. By suggestions, by criticisms, by the submission of articles, our members can render great service. "Dicta" is their magazine. They have a right to expect that it will serve their desires; but this can only be done if those desires are made known.

THE REHABILITATION OF THE ASSOCIATION LIBRARY

UNDER date of October 11th, the Library Committee consisting of Frazer Arnold, Judge Charles C. Sackmann, and Paul P. Prosser, Chairman, formulated a statement of purpose concerning the library of the Denver Bar Association, and sent it, together with a detailed letter, to our librarian. We believe that their action is so significant that it should be brought to the attention of the members of the association. The statement of purpose is as follows:

"I. It is the Association's plan that its Library shall contain only:

1. Books and pamphlets which are the property of the association, each in its particular place upon a shelf, and each covered by a card index of books and a card index of authors.

2. The necessary records requisite for prompt reference to books in the Library and for prompt return of books borrowed from it.

3. Suitable furnishings.

II. The Association plans to keep this Library open (except on holidays) from 9 A.M. to 12:30 P.M. every Saturday and from 9 A.M. to 5 P.M. on all other week days. It is contemplated that at no time during the hours indicated shall the Library be left for more than 10 minutes without an attendant. During these hours the Association desires to afford every reasonable facility for each of its members and for each Judge who uses its Library.

III. The Association further plans to keep a record of every book and every pamphlet which is removed from the Library, even for temporary reference; usually to take a receipt from the borrower or his agent; and to lend books and pamphlets only for use in the Court House Building.

IV. The Association also proposes to keep its members advised concerning every new library acquisition of general interest, other than regular additions to the Reporter Series and other sets."

The Committee in its letter goes thoroughly into the heart of the library problem and definitely settles various questions which have been somewhat cloudy in the past. In furtherance of their determination to make the library more useful to the Association, they also lay down a most definite and constructive program under a set time schedule. This program may be summarized in some seven items as follows:

1. By November 1st, to arrange for full time attendance in the library at all times when it is unlocked and to establish a thorough system for checking in and out all borrowed books and pamphlets.
2. By November 10th, to segregate all of the Association's books and other effects from property belonging to others.
3. By November 20th, to eliminate, or prepare for storage elsewhere, all unessential property of the Association—such as miscellaneous pamphlets, papers or other articles no longer of value.
4. By December 1st, to formulate, with the librarian's assistance, a plan for rearrangement of books, and for securing adequate space—which may involve installing additional shelves.
5. By December 10th, to act upon the said plan for rearrangement and for securing additional space, and to arrange the books in a somewhat more systematic and uniform manner.
6. By December 20th, to complete an inventory to determine whether any volumes are missing from any sets of books in the library.
7. By February 1st, to complete card indexes covering all books and pamphlets, both by author and title and to adopt such other records as may be necessary to make the system conform, in a general way, to that of the Supreme Court library.

The Committee proposes that the librarian shall mail to the editor-in-chief of Dicta by the 15th of each month, a list of every new set and volume acquired by the library since the 15th of the preceding month.

From the foregoing matter, it will be seen that the Library Committee is assuming the responsibilities of its office in a most gratifying and constructive manner, and there is no doubt that their efforts will result in a rehabilitation of our library

which will render it increasingly valuable to our members. It is doubtful if the members of the Association really appreciate the potential usefulness of the library. For example, complete sets of briefs covering all cases decided in recent years by the Colorado Supreme Court are available there; these in themselves constitute a golden field of concentrated research upon the vexed points of law adjudicated in each case.

It will be the policy and pleasure of Dicta to cooperate fully with the Library Committee in their most valuable work and to endeavor to make the resources of our library more familiar to our members, so that it may succeed in serving more fully the ends for which it was founded and for which it is maintained.

THE OCTOBER MEETING

MR. Justice Adams of the Colorado Supreme Court was the speaker at the regular monthly meeting of the Denver Bar Association on Monday, October 8. His subject, "Obiter Dicta Hitherto Suppressed", was prophetic of the re-christening of the "Record" in its handsome new garb.

The speaker believed that only in the law does the doctrine of *stare decisis* continue to be entertained, and that its presence there largely constitutes a hindrance to enlightenment. The executive committee of this association, and the editors of "Dicta", have expressed their approval of this thought in the creation of a new form and title for our publication. They sincerely hope that the new journal will justify the opinion of Mr. Justice Adams that "Obiter dicta, though sometimes rejected, are often the corner stones of new principles".

Nineteen of the recently admitted members of the Colorado Bar were present at the luncheon, and Mr. Irving Hale, Jr., who obtained the highest record in the examinations spoke in their behalf.

The following new members were elected without dissent:

William R. Means, John G. Reid, James W. Creamer.

A TAX TITLE QUIETED

By Ira L. Quiat of the Denver Bar

WHEN an abstract showing title based on an unadjudicated treasurer's deed is presented to the lawyer he promptly turns it down. Courts have gone to remarkable extremes to set aside such titles. The strictest rules of construction have been adopted, and nearly any defect or omission suffices to defeat a tax title.

In the early days when lots were cheap and plentiful, one could insist on a good "fee" title. However, "fee" lots are now becoming more scarce. Occasionally a client insists on certain tax title lots and the lawyer is requested to make the title marketable. The usual method employed is a suit to quiet title. A great many of such suits are brought annually and a large percentage of quiet title actions are defective and would not withstand an assault in court. This is true in other forms of action where substituted service has been attempted. Unless the lawyer has made a careful study of our laws and decisions he is apt to overlook some small essential requirement. A valid treasurer's deed cuts off all claims of every person (excepting minors and persons under legal disability) existing prior to or at the time of the issuance of the treasurer's deed, and substitutes a new title in place thereof. There is an exception to this rule not necessary to mention here. The purpose of the quiet title proceedings is really to obtain a determination that the treasurer's deed is valid, and a properly conducted quiet title proceeding renders the title good and marketable, regardless whether the treasurer's deed was valid or not. This principle of law is elementary.

The lawyer's first duty is to determine what persons and parties ought to be made defendants. Every person who might have any claim to the property from any source whatsoever, had no treasurer's deed been issued, should be made a defendant.

Having decided on the known defendants, the lawyer should make a search and investigation to learn the whereabouts of each of such defendants. In a great many instances no information can be gained concerning some of the defend-

ants. It is not known whether they are alive. If any defendant has passed into the realm where no real estate titles perplex a lawyer, then the heirs, devisees or persons who may have succeeded to his interest in the real estate must be made parties to the suit, so that the actual owners of the interest may have their day in court. A search should be made through the records of the estates in the county where the real property is situated to discover if any estate for the respective defendant has been probated. The courts require of the plaintiff and of his attorney reasonable diligence to discover the identity of the unknown persons.

The known defendants are determined from the abstract examination and subsequent investigation, but unless personal service can be obtained on each defendant there will be no affirmative showing in the record as to whether the defendant was alive and the uncertainty of whether the successors of the defendant have any claim unadjudicated will cause a lawyer to hesitate before he approves the suit. It therefore becomes imperative to bring in the unknown parties, that is, those who may have succeeded to the interest of the known defendant if the known defendant has died.

In so far as tax titles are concerned another class of parties should be made defendants and that is those who may have acquired some interest by way of conveyance, mortgage or otherwise, from a defendant claiming through the fee title. Our Supreme Court held that our former Recording Act and the notice thereof did not apply to persons claiming through different chains, that is, that a person claiming under a patent chain of title could convey, mortgage or otherwise affect his fee interest and that no document need be recorded so far as the owner of the tax title chain was concerned.

We attempted in the 1927 Real Estate Act to correct this condition and we believe we have effectively done so. As to instruments executed prior to the amendment, the courts will probably hold that the notice under the Recording Act is a present condition, and all instruments must be of record. However, to be safe, the holders of unrecorded instruments affecting the title should also be made unknown defendants.

The question naturally arises, how shall the unknown defendants be properly brought into the cause. Under Section

50 of the Code as amended in 1923, it is sufficient to describe them in the title or caption as "all unknown persons who claim any interest in and to the subject matter of this action".

As to the known defendants, upon whom personal service will be secured, it is sufficient to allege in the complaint the fact of ownership, possession and that the defendants claim some right, title or interest adverse to the plaintiff and that such claims are invalid but such allegations are not sufficient as to unknown parties.

Section 50 of the Code as amended requires the plaintiff to describe the interest of the unknown persons and how derived so far as the plaintiff's knowledge may extend. This is a jurisdictional requirement. What is sufficient compliance with this requirement? Some lawyers insert a paragraph in the complaint and allege that the unknown persons claim some interest through, by or under some of the known defendants. It is very doubtful if such general allegation is sufficient. The object in such suit is to remove any question affecting the marketability of a title. The lawyers should set forth that if the certain defendant, naming him, is dead, then his heirs, legatees, assignees, etc. claim some right, title and interest in and to the property because the known defendant in his lifetime claimed some right, title and interest in and to the property, having been named grantee in a certain deed giving the date, book and page thereof (or describing the interest of the known defendant whatever it may be). This is a technical requirement and should be fully complied with. Our courts have construed actions in which substituted service was attempted very strictly.

There are a great number of complicated questions that will arise as to the manner of handling different conditions in the title.

An unreleased trust deed appears in the chain of title, in which the private trustee is designated. It is not known whether the trustee is dead or some other disability has occurred vesting the trust in the sheriff or other officer of Arapahoe County (the trust deed having been executed before the creation of the City and County of Denver.) The private trustee will be named as a defendant but the successor in trust must also be named as a defendant. Which officer should be

named, the one in Arapahoe County or the one in the City and County of Denver? Examining the statutes one finds that the only powers delegated to the Sheriff of the City and County of Denver in such case was the power of releasing the trust deed. It is best, therefore, to make both officers party defendants.

The next question arises how to bar the beneficiary. No knowledge or information can be gained concerning the beneficiary. He may be dead or he may have transferred the security. In addition to allegations concerning the heirs, etc. of the beneficiary, it is advisable to insert an allegation that the present holder of the note is unknown; that the original beneficiary may have transferred the note or security or that through some other means to the plaintiff unknown some other person may now be the owner or holder of the security and because thereof claim some right, title and interest in and to the property.

A similar situation is presented in regard to outstanding unredeemed tax certificates. Not only should the record holder of the tax certificate be named but the fact should be set forth that there may be some other person unknown to plaintiff who holds the tax certificate by assignment or otherwise. In addition to making the holder of the tax certificate a party defendant, the Treasurer of the county should be a party so that the court may direct the treasurer to cancel the outstanding certificate.

The writer generally after he has fully described the various possible claims of the unknown parties incorporates in his complaint a paragraph setting forth that there may be other parties unknown to the plaintiff who claim some right, title and interest to the property through sources and origins, because of facts which are to the plaintiff unknown.

A problem occurs as to corporations whose corporate existence has expired. Where is the title? Naturally in the last and surviving board of directors or trustees of the corporation, but who are they? On examination of the records of the office of the Secretary of State if it is found that a year or two before the corporation was dissolved, in the last annual report three parties were named as the board of directors. But were they the directors at the time of dissolution? Or, no annual report

was ever filed and no information can be obtained. The safest way is to name such persons who might have been the last board of directors and in the complaint set forth the facts fully and allege that the actual board of directors are unknown, and to describe the source and origin of their claims.

The complaint has been duly filed. The sheriff has served some of the parties and has made the usual "non est" return as to the other defendants. Under rule 14A, promulgated by our Supreme Court prior to the passage of the 1927 Summons Act, the Sheriff is required to set forth the efforts he has made to obtain service and the reasons for his failure, showing that his efforts were bona fide. The lawyer should see that the return of the sheriff complies with this requirement. It is proper at this stage to call attention to the fact that if one of the defendants is a domestic corporation the usual return is not sufficient. Section 46 of the Code amended in the 1927 Summons Law requires the Sheriff to make a special affidavit.

The summons is then returned to the attorney. The whereabouts of some of the non-resident defendants is known. In such case it is advisable for the purpose of the record to have personal service by the Sheriff of the state where such defendants may reside. However, neither the attorney nor the plaintiff, after a careful investigation, have been able to learn anything concerning some of the defendants. Under the old practice the attorney prepared an affidavit stating that such defendants were non-residents. The plaintiff signed the affidavit without actually knowing whether the facts therein stated were true or not. In order to eliminate this evil there was incorporated in the 1927 Summons Act the provision authorizing service by publication when the defendant's whereabouts is to the plaintiff unknown and he cannot be found in the county where the action is pending. The constitutionality of this provision has been sustained in other states. The affidavit for publication should set forth in detail the efforts made by the plaintiff and his attorney to discover the residence or address of those defendants whose address is unknown.

It is advisable in the order for publication to incorporate an express finding that the efforts of the sheriff to obtain service upon the defendants were bona fide and the court is satisfied with such efforts to comply with the requirements of rule

14A. The old code provision required an order by the clerk. There was always a question as to the constitutionality of such order by the clerk, most courts having sustained such provision, but there is authority to the contrary. Under rule 14A an additional order was required by the Court. In the 1927 Summons Act the provision in reference to the order for publication was changed so that the order was made by the court. This new amendment supersedes rule 14A in so far as an order by the clerk is required and no order by the clerk is now necessary. There should be incorporated in the order of publication an order for publication against the unknown defendants and if there is one or more domestic corporations who are defendants, and no personal service was had upon them, the order of court should direct service by publication against such domestic corporation.

Most of the technical requirements have been discussed. The publication is made and the proper time has elapsed for the decree to be entered. After the entry of the decree (no writ of error having been taken) all of the defendants who were personally served are effectually shut out and the plaintiff's title is absolute and perfect. However, as to the parties against whom personal service was not had, including the unknown persons, a year's period of grace is given and if no action is taken within that year to set aside the decree and proper service, though by publication has been had, all such parties are effectually and permanently barred. The title should not be questioned and ought to be accepted and approved by all lawyers. There are certain lawyers who will never pass such quiet title action, but they do not hesitate to accept a fee from a client to undertake such action. The logic thereof is hard to understand.

The 1927 Real Estate Act contains two provisions intended to aid such titles. Section 39 of the Act provides a limitation of seven years in which any action may be brought to question the decree upon any ground whatsoever and Section 44 adopts a liberal rule of construction in favor of such decree.

There are probably a great many points which could and should have been mentioned in this article, but are not here treated owing to the short time allowed to the writer to prepare this article.

ECONOMIC SURPLUS AND THE LAW

By Harold H. Healy of the Denver Bar

(A paper presented to the Law Club)

I HAVE often amused myself by some theorizing as to the influence of economic surplus and its attempted distribution or re-distribution by lawyers, juries and judges in the administration of the law. Even leaving out of consideration the more patent legislative attempts by way of graduated income and inheritance tax laws and the like, I find that the subject still remains one of delightful and intangible vastness.

Law has been defined as a rule of human conduct, a rule of action. 36 C. J. 957. Or as Judge Burke puts it in 71 Colo. 495, 208. Pac. 465-466 (Travellers Insurance Company vs. Industrial Commission), "A law is a rule of action prescribed by authority." Yet the operation of that law must to some degree rest upon facts, and, in turn, facts may rest upon legal fictions, which are defined by Judge Denison in 74 Colo. 95, 219 Pac. 222-224, as "The assumption for the purposes of justice of a fact that does not or may not exist."

So much for the citation of authority. With these neatly and accurately cited (even if they be not apropos) I may be relieved from further citation or further accuracy throughout the length and breadth of what follows.

If law is a rule of human conduct, and legal fictions, which may be inventions from non-existent facts, may control the rule, and if necessity is the mother of invention, then we may look in turn to the human necessities, as well as to human nature, to play their inevitable part in controlling conduct and inventing new rules or new adaptations of the older rules of law. Moreover, if, as we all know, law is an exact science, we know equally well that such science is swayed by human elements, and what is more human than to compare one person's financial worth with another's lack of it.

Human necessities become such largely by comparisons, and by standards referable to the existence of economic surplus owned by oneself or some one else. And those who have it, in getting and trying to hold on, very naturally look at law and government very much differently than those whose eco-

nomic surplus is featured chiefly by its absence. Political lines between conservatives or reactionaries and liberals, socialists or radicals are thereby drawn. Legal theories and principles are no less so affected.

This tendency is apparent from the beginnings of our common law, even when religion is supposed to have had so much greater influence upon human conduct than at present. And it was almost as though two distinct parties existed. In real property, the clergy and landed nobility evolved and foisted upon us entailed estates, uses, family trusts, restraints on alienation, perpetuities—and the forces opposed, who aimed to make economic surplus, represented by land, freely distributable (alienable was the word) evolved and foisted upon us equally involved rules against perpetuities, against restraints on alienation, unreasonable trusts for accumulation, and methods for barring entails and other future contingent interests. Even the last stronghold (not controlled by statute) appears about to go. The contingent remainder now, by the modern rule in equity, is to be considered as freely alienable as the vested remainder. (See Knutson vs. Hederstedt (Kans.) 264 Pac. 43.)

Modern times with present day business and economic conditions also show the ever present desire to distribute some one else's economic surplus with a fitting reluctance to part with one's own. And changing conditions as to diffusion of wealth or goods, or surplus (which after all is largely relative) results in much changed law—just as the luxury of twenty or forty years ago has become common property and common necessity now. At least if not common property, the same thing is commonly owned.

Among the present day tendencies which occur to me as distinctively changing, or as having changed, from the economic point of view, or diffusion of ownership are the following: automobiles, telephones, oil and gas, aviation, prohibition, big business combinations (the European cartel, and the American trust or holding company) the widespread investment field for corporate and other securities, and various blue and mottled skies, better business bureaus, foreign corporations (covering the country with Maine or Delaware or other favorably disposed state corporations) installment and credit

buying, insurance and old age pensions, woman's economic independence, divorce and alimony, the apathy of the voting class in public and corporate elections, advertising, etc., etc.

This completes the paper. What follows as I have said, amounts to a series of contemplative speculations on the law as it was, is now and ever shall and may be—or the glory of the common law.

An important factor has been the effect of the automobile. In the early days of the industry, only the wealthier members of the community owned, enjoyed or operated them. The horse, the buggy, the livery stable remained for the economically common people—but not so the rule of agency appropriate to the common diffused ownership of the horse and buggy. "A frolic of one's own" with a horse and buggy whereby the owner was only liable for acts of the driver actually in the scope of his employment, was a very different thing where such frolics were done with property belonging only to the wealthy. And the family purpose doctrine was evolved. "Came the Ford" cinematically speaking, and to that extent distributed economic surplus in its own characteristic, care free, and happy way. To hold to the family purpose doctrine against a Ford owner might be to take away from him who already hath not. And now the courts are showing a tendency to back away from that doctrine, and to revert to earlier and more logical rules of Agency—and to deny liability, where the person to whom the machine was loaned was a *competent* driver. Where the driver is of known incompetence, in control of a machine, the earlier rules of agency would still hold the owner liable. (As illustrating this see note, 36 A.L.R. 1141.) The cases and the conflict apparent appear in A.L.R. notes from 5 A.L.R. 226 to 50 A.L.R. 1512. Colorado with a fine disregard for economics and, perhaps, a finer regard for precedent, holds with the family purpose doctrine. (See Boyd vs. Close 257 Pac. 1079, 1081.) And even if the cases nominally retain the family purpose doctrine, courts may and do find that the facts of a particular case do not warrant the application of the rule, or else add other principles upon which recovery may be sustained—and thereby weaken the rule or show the tendency already contended for.

The law of airplane collisions may well follow the law of automobiles. Although my own prognostication is that it will not—not only because of the influence of admiralty law rules relating to collision, but that "family purpose" (there being few travelers in the air except in airplanes, or possibly parachutes), will not find its way in aviation law.

Another tendency in modern business is the widespread use of interstate corporations. The doctrine was evolved that if a foreign corporation had not qualified to do business, it could not invoke the aid or protection of the local courts. That appears to me to be an economic surplus problem. And I also feel that now that companies are largely increasing their activities, by merger and otherwise, and their diffused stock ownership is becoming more widespread, by individual and investment trust buying, whereby the economic surplus is disappearing, that the tendency is and will be to regard such transactions wherever possible as interstate commerce, and so under the protection of the Federal Constitution. Or else if not that, to hold that the business in question is a mere isolated transaction, and not such as to constitute doing business in the state—which appears to be illustrated by the Oregon case of Rushford Lumber Co. vs. Dolan 260 Pac. 224, where there was a sale of lumber in interstate commerce, then on refusal, a storage, then a removal, then a resale to the defendant in the case, under such circumstances that other earlier decisions might have held that the foreign corporation was doing business in the State of Oregon, and hence not entitled to recover judgment in the courts of that state. Perhaps the law of quasi contracts may be developed to allow a recovery in the future in such cases, as an unjust enrichment, or equity may intervene in some way. And I seize upon the law of quasi contract to support my thesis. Particularly those cases which allow a recovery for goods which have changed hands by reason of reliance upon an unsigned contract, in spite of the defense of the Statute of Frauds, because of the otherwise unjust enrichment. And isn't it reasonable to speculate or conjecture that the application of the Statute of Frauds is going to be modified by the predominate use of telephones in transacting business.

Then we have the railroads which have been good eco-

nomic surplus distributors. After "stop, look, and listen" as a defense for railroads in the earlier days, the railroads, by a series of odious comparisons, became so economically superior, that it became the acceptable thing to solve a problem in economic surplus, by the rule of last clear chance, by the aid of which the old defense of contributory negligence could be shunted, and thereby permit the surplus to be painlessly transferred to the party who was economically in the right. And that too in jurisdictions which had abandoned the rule of comparative negligence. I don't recall many cases where last clear chance has amounted to very much where an automobile collision between two cars in the same price class was involved. Now, since the war, we have had a lot of fancy propaganda that railroads are running branch lines, and certain passenger and freight business at a loss, due to apparent competition with trucks, busses and family overland trips. And I seem to notice latterly that "stop, look, and listen" is staging quite a comeback, and is approximating a good deal more its English and railroad meaning. A member of this bar I believe, won a case recently before the Circuit Court of Appeals for the Eighth Circuit (Kutchma vs. A. T. & S. F. Ry. Co. 23 Fed. (2nd) 183) on the proposition that "stop, look, and listen" has a meaning all its own. And the Colorado cases lately do not seem to be quite so willing, ready and able to see that the railroad had the last clear chance to avoid a collision with one in a position of danger who had eyes and ears; but saw and listened not.

We have all of us recently seen some examples of stockholders being considered in corporate reorganizations after the friendly receivership route. Apparently railroad stockholdings potentially may be so widely diffused that even a railroad stockholder is to be given a chance to retain something of his own.

Insurance companies are still good legitimate prey. So that differences in economic status justify a different rule than might be applied to ordinary contracts. The stock of insurance companies is not very widely held. Their loans and investments are widely diffused, but the loans are owned by the company, and even in that they are competing with other businesses of investment. Even a mutual policy holder doesn't

have very much in common with the company's surplus, in a personal way; but only in the "classic sense". Consequently the contract or policy is to be construed most strongly against the insurer. (Jennings vs. Brotherhood etc. 44 Colo. 68; and as to uncertainties, Western Assur. Co. vs. Bronstein 77 Colo. 408. Many other Colo. cases to the same effect.)

Any agent or broker is considered as the agent of the insurer and not of the insured, especially where it is sought to bring home notice to the insurer (general rules of agency here may be somewhat strained). And warranties are not what they used to be. They are representations, now for the most part, and if false are not to avoid the contract unless clearly shown that if the falsehood had been known, the company would not possibly have issued the policy. Short term incontestable clauses, as after one year, should mean incontestable for any cause, as a statute or period of limitation (See notes, 6 A.L.R. 452, and 13 A.L.R. 674). And even fraud which might ordinarily go to the vitiating of most contracts or other relationships sinks in the limbo of the non-contestable. And all very proper. "The business of the insurer is to insure."

So too workmen's compensation may mean a good deal that would surprise you on questions of injury in the course of employment, master and servant and other like matters.

Oil companies may be in a much better case. At one cent a share they have offered so much opportunity for speculative and dreamed of profits, that with some people they have become almost as much of a family necessity as wall paper. And so when recently one company was sued as a trespasser for drilling a dry hole and thereby damaging what might otherwise have had a speculative value the company was excused, even under conditions of some economic disparity. For both plaintiff and defendant may have had the same speculative surplus.

Other suppositions readily come to mind—the discretion of the chancellor in equity cases for specific performance, which is only exercised to maintain so far as possible an even economic balance; economic general prosperity, chain stores, sale on consignment, monopoly and the rules relating to price fixing, and so on, and so on.

Now assuming that there is any basis at all for the conclusions I have been trying to reach—and I don't need to assure you that there isn't—it might appear from the start of the common law down through the ages, that when some new economic force, combination or business system and condition begins to be felt that the person with the economic surplus gets the first break and imposes a rule of law designed to hold his own property—so with entails, restraints, uses, perpetuities, ultra vires as a corporate defense, lack of warranty and the like. Then comes the urge of the dividers and the pendulum reverses itself. And as the industry grows older and more settled, and the law of supply and demand evens up what was once surplus, the pendulum comes back to center, and legal rules come more nearly to logical principles. Consciously and unconsciously judges as well as juries consider economic surplus in deciding cases and making law.

Thus more and more the analysis of the economic status of a client as compared with that of the client of opposing counsel becomes part of a lawyer's task, particularly where new law is involved. In addition, such analysis may be of great service in the pleasant duty of fixing fees.

Although we most of us remember from law school days, a feeling that the number of legal principles is after all very small, yet we have built up a legal system in the practice of law that has become amazingly cumbersome and complex by simply gathering up thousands and increasing thousands of cases together and attempting to attach them to classifications adopted years ago; or even more confusing by making new doctrines that might appear to fit one particular case, without any classification. In spite of the truth that a single case or a number of cases will not prove a principle alone.

Judges, too, exalt cases, and convenient group citation of cases by means of encyclopediae and corpora juris, as though the case were the thing, rather than the principle, and overlook the real consideration of the real spirit of the common law, based upon comprehensive knowledge of the whole social and economic structure—constantly functioning and changing as it is—and illuminated by history and experience and human psychology, which should be our guide if we are to hold fast to that which is good.

In the old days, when judges and lawyers grew up in the simpler social and economic environment it was much easier to evolve rules of human conduct compatible with existing conditions. And the carefully written text-book or a decision based upon logical reasoning was the guide to the legal decision. Now, without that careful study, in the modern spirit of haste, a mass of decisions are piled and cited together in one of the commercial publications. And we let it go at that, a mechanical problem in mass production, without considering new economic facts. And the best, or rather the most conspicuous lawyer tends to be a mere mechanic. No wonder that when a case is finally decided the judge prefers to base his decision on a conflict in the evidence in the court below wherefore it should be affirmed; or by saying something like this: "Plaintiff in error claims that the judgment below should be reversed for three reasons. At least one of those grounds is good. The case will therefore be reversed for a new trial in accordance with this opinion". Or to pick a case at random (and not the most typical of the citation method) look at Model Land & Irrig. Co. vs. Baca Irrig. Ditch Co. 262 Pac. 517, 518, wherein the Court says:

> "The rule of public policy which prevents the running of such statutes against the state, 37C. J. p. 710, Sec. 28, or against the public or a considerable portion of the public, Davidow vs. Griswold 137 Pac. 619, would clearly warrant the court in raising the bar of its own motion and that procedure in a proper case has been upheld 46 Cal. App. 287, 89 Pac. 346."

I quote that without any disrespect, without any view as to whether the authorities cited are right or wrong, pat or irrelevant, and with no bias as to logic in reasoning, but merely to partially illustrate, and not a very good illustration either, a tendency to put a proposition, and base a decision upon some citation contained in Corpus Juris or some case cited therein, rather than from reasoning based on the facts of the case, or the general economic structure. And we all know that in the average encyclopedic work many unrelated subjects are grouped together i.e., leaseholds of dwellings are grouped with leaseholds of railroads; a contract to marry is grouped with

a speculative contract to purchase stocks, and their differences considered as relatively minor. Or again to illustrate: There are two lines of old cases involving the validity of contracts not to compete—often considered in square conflict. But when the facts are examined in accordance with their economic significance, the cases holding the contract invalid are those involving employees' promises not to compete with their employers after the term of employment (according to contemporary guild regulations then in force—if not according to distribution of economic surplus). The cases holding the promises valid, are cases of promises by those selling a business, and promising not to compete with the purchasers: also sound. Still I notice in the late New York Appellate Division case of Ward Baking Co. vs. Tolley Cake Corporation 275 N. Y. Supp. 75, with two justices dissenting the majority of the Court upheld an injunction against a former employee restraining him from competing with his former employer upon a promise made by him not to compete for ten years within one hundred miles of New York City. Unless this may be justified by reason of the change in the economic system caused by national advertising it is contended that this decision is wrong under my previously announced theory, and should be reversed by the Court of Appeals.

Hence it would seem that there may well be evolved a new grouping of legal principles, or a re-classification of present titles under which the subject of law has hitherto been divided, and under which our daily search into the minutiae of the law is conducted. And when, as and if that is done, if a scientific consideration and evaluation of the inter-relation of economic factors and legal principles be made, then the theory of economic surplus may be given its proper place. In such case that great contribution to the administration of justice, and human government, which is the *spirit of the common law,* may replace blind adherence to mass production of mere decisions. Through such a restatement whether by the American Law Institute or otherwise, the problem of the lawyer may be simplified, and dignified beyond that of a mechanic to that of student, thinker, and guide, and his way made clear by the light of modern, seeing and comprehending reason, instead of by unprecedented volume of precedented decision.

THE NEW SEAL

ENSCONCED upon the cover of this magazine appears a suggested seal for the Denver Bar Association. Product of the minds of President Toll and of the other members of the Executive Committee, and of the skillful fingers of Mr. Harold Ware Hull of Denver, it is submitted to the judgment of the members of the Association, whose suggestions will be welcome, and whose comments will doubtless be entertaining.

The need of a seal is clear, but it is in a tentative mood that the Administration offers this proposal for consideration.

This exhibit is a darkling child, new plucked from the crypts of the unknown—imperfect and, it may be, fugitive. It will not be crystallized into permanence until it has been tested by time.

As the background of the shield, the observant may detect the theme of the flag of Denver. In the foreground are symbolized the learning and the spirit of the legal profession. The torch is, of course, the constant emblem of the ideals which each generation aspires to maintain and to deliver undimmed into the hands of its successors.

This seal will not appeal to all alike, and, as we have subtly insinuated above, suggestions for its betterment will be welcome. It is unhallowed by tradition, and the Administration will not be hampered by the doctrine of *stare decisis* in the consideration of proposals for modification or substitution. Few suggestions were received, and it is believed that this joint effort combines the best of them.

The chief fact is this: we have a concrete result—something which can at least be used *pro tempore,* something susceptible of study and comparison, something, in short, to shoot at. It may not be a permanent seal, but at least—something is better than nothing.

CHRISTENING

THE announcement that The Record was about to appear in new plumage, and that it was considering the adoption of a new name, elicited many suggestions—facetious and otherwise.

Among the more frivolous suggestions were these:

Bar Railings
The Legal Cafeteria
Fee Simple
Denbar
The Bar Fly
Tomechromes
The Bar Cry
The Jurisprude
The Air Loom
The Straddlevarious
Sunset and Evening Star
The Inns (and Outs) of Court

Among the names which were more seriously suggested were:

The Annotator
The Bar Vane
Portia
The Legal Compass
The Periscope
The Denver Nautilus
The Denver Legal Ledger
The Denver Bar Association Journal
The Colorado Legal Monthly
Sky Line Justice
The Denver Law Journal
The Denver Bar Association Report
Denver Legal Light
The Vox Bar
The Brief Bag
Brief Case Secrets
Certiorarities
The Fellowship
Pandects
Bar Relief
Writ of Errors
The Affidavit
The Subpoena
The Supersedeas
Denver Legal Flights
The Mittimus

And also the following suggestions were made:

The Law Torch
Annotated Notations
Denver Bar-o-gram
The Forum
Denver Legal Journal
Denver Bar News
In Testimony Whereof
Denver Bar Notes
Quid Pro Quo
The Bill of Discovery
The Tortfeasor
The Sheriff
The Bill of Particulars
The Easement
The Attachment Bond
The Appeal
Admissions Against Interest
Comes Now

Not to mention the following:

Legal Miscellany
Denver Law
The Denver Bar
The Denver Jealous Mistress
Legalight
The Appearance
The Bailiwick
The Warrant

The Denver Lawyer
The Transcript
The Writ
The Arraignment
The Domboc
Legal Lore
Trial and Error
The Hue and Cry
The Deposition
Rehearings
The New Era

The fact should be mentioned that not all of the suggestions were in English. Witness:

Amicus Curiae
Nisi Prius
The Jurat
Lex Domicilii
Lis Pendens
Ipse Dixit
Casus Fortuitus
(i.e. The Inevitable Accident)
Res Ipsa Loquitur
Camera Stellata
(i.e. The Star Chamber)
The Fi. Fa.
The Lex Scripta
Quoad Hoc
Tabula Justitiae
Stare Decisis
The Sci. Fa.

The Editorial Board considered each name which was suggested. Perhaps those which received the most serious consideration were:

The Bar-ometer
The Barrister
The Brief Case
The Caveat
Caveat Emptor
Dicta
Exhibit A
The Judgment
Legal Tender
Lex
The Mirror
Obiter Dicta
The Scroll
Service by Publication
Torch and Scales
The Torch

From all of the names which were suggested, the Editorial Board finally certified four to the Executive Committee:

The Caveat
Legal Tender
Obiter Dicta
Dicta

From these four the Executive Committee selected:

DICTA

A great deal of consideration was given to the matter by the Editorial Board, and it was carefully weighed by the Executive Committee before the decision was reached to change from the old name and to adopt the new one.

Dicta was not among the formal suggestions. Like Topsy, it just growed. During the deliberations of the Editorial

Board, Obiter Dicta was casually suggested, and this was shortened to Dicta by common consent.

This name may not be perfect, but a careful examination of the entire list submitted will doubtless satisfy the critics—if any—that the selection might have been worse.

In any event, this name has certain merits:

1. It is distinctive.
2. It is brief.
3. It looks well in print.
4. It is distinctive.
5. It is apt.
6. It can be pronounced—by everyone.
7. It is slightly amusing—to attorneys.
8. It is distinctive.

CHOATE'S PROVING A NEGATIVE

"A vessel insured was prohibited from going north of the Okhotsh Sea. Within a year, the duration of the policy, she was burned north of the sea proper, but south of some of the sea's gulfs. Defendant set up no loss within the policy. On the way to the court house Choate said to his associates, as they were for plaintiff: 'Why should we prove we were not north of that sea; why not let them prove we were?' The mate was put on to prove the burning within the year and state the loss. No cross-examination followed and the plaintiff rested. The defendant was dumbfounded; had no witnesses ready; expected plaintiff would consume two days in proving he was within the terms of the policy. The case lasted an hour and Choate won."—*Reed's Conduct of Litigation,* 150.

INVENTION

"It took 4,000 years of Pagan and 15 centuries of Christian civilization to produce a two-pronged fork, and another century to bring it into use."—*Thos. B. Reed.*

COLORADO SUPREME COURT DECISIONS

(EDITORS NOTE.—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

APPEAL AND ERROR.—No. 12,123—*Kahnt, Plaintiff in Error, vs. Caldwell, Defendant in Error.—Decided September 17, 1928.*

Facts.—Court below rendered opinion and ordered Attorney for plaintiff below to prepare a decree on the opinion, instead of doing so he filed a motion to amend the findings.

Held.—Opinion of Court below constituted no final decree; therefore, there was no judgment to affirm or reverse.

Writ of Error Dismissed.

APPEAL AND ERROR—CONDEMNATION PROCEEDINGS. — No. 11,982.—*Miller, Plaintiff in Error, vs. City and County of Denver, Defendant in Error.—Decided September 24, 1928.*

Facts.—The City and County of Denver brought condemnation proceedings. Miller filed answer, attacking sufficiency of petition and validity of the proceeding. Court appointed Commissioners in Condemnation.

Held.—Order determining that Condemnation proceeding will lie and appointing commissioners is not a final order. writ of error will not lie thereto until after the final determination of the proceeding and entry of final decree; a writ of error can then be sued out.

Writ Dismissed.

CIVIL SERVICE-INITIATIVE AND REFERENDUM.—No. 12,213.—*Miller vs. Armstrong, as Secretary of State.—Decided September 29, 1928.*

Facts.—A petition to initiate a repeal of Section Thirteen of Article Twelve of Colorado Constitution, known as the Civil Service Amendment, was protested. The Secretary of

State sustained the protest and the District Court upon review affirmed the Secretary's action.

Held.—Action of the District Court was right. The petition was not in the form prescribed by law, nor were there sufficient legal signatures on the petition to entitle it to go on the ballot.

Judgment Affirmed.

CRIMINAL LAW — STEALING STOCK. — No. 12,120. — *Dave Camp, Plaintiff in Error, vs. The People of the State of Colorado, Defendant in Error.—Decided September 24, 1924.*

Facts.—An information filed by the district attorney, charged C. with receiving 42 stolen sheep from one Muniz during the month of December, 1926, knowing that they had been stolen. By his own confession, Muniz stole the sheep, and was the principal witness for the people. He testified on direct examination that the 42 sheep had all been delivered to C. during the month of December, and that he had never at any other time sold any other sheep to C. C. offered in evidence checks purporting to have been endorsed by Muniz in February, 1926, and also offered testimony to prove purchase of sheep from Muniz at that time. These offers were rejected by the trial court, and C.'s attempt to cross-examine Muniz on these points were stopped by the trial court.

Held.—The denial of this right to cross-examine was error. It was important for C. to shake the credibility of Muniz, without whose testimony the people's case must have failed.

Judgment Reversed.

DEATH BY WRONGFUL ACT—HIGHWAYS—INSTRUCTIONS.—No. 11,768.—*Lewis, Plaintiff in Error, vs. Lanier, et al, Defendant in Error.—Decided May 14, 1928.*

Facts.—Lewis, Plaintiff, sued defendants for damages for death of her husband caused by barricading highway, and failing to properly illuminate the barricade at night whereby an automobile in which the plaintiff's husband was riding was overturned causing his death.

Held.—1. Instructions to jury were erroneous in that they commingle the question of negligence of the defendants with the question of negligence of those approaching in an automobile and failed to point out the difference between the effect on the plaintiff's right to recover for negligence on the part of the driver of the automobile, and negligence on the part of the guest.

2. Contract between the State of Colorado and the defendants providing how the defendants were to put up warning devices upon closing the highway was incompetent as this was an action based on negligence and not upon contract.

Judgment Reversed.

FRAUDULENT CONVEYANCE.—No. 11,966.—*James vs. Myers. —Decided October 1, 1928.*

Facts.—This was an action by James, a judgment creditor, to set aside a deed of conveyance of real estate made to Heaney by the judgment debtor, Myers, on the ground that the same was made with the intent to delay, hinder and defraud their creditors, including the plaintiff.

Held.—It was essential for the plaintiff under the issue to show among other things not only the alleged fraudulence in the defendant, the grantor, but also knowledge thereof or participation therein by their grantee, Mrs. Heaney. The evidence being conflicting, this Court will not disturb the findings of the lower Court made thereon, which was in favor of the defendant.

Judgment Affirmed.

LANDLORD AND TENANT.—No. 11,729. — *Second Industrial Bank, Plaintiff in Error, vs. A. L. Morrison and May Morrison, Defendants in Error.—Decided September 24, 1928.*

Facts.—One J. B. Hurt owned a house and M. and M. were in possession under him. About June 1, 1925, the Bank notified M. that it had purchased the property and requested M. to pay $25.00 a month rent, which M. refused to do. Two weeks later M. moved out. This action was begun in Justice Court to collect $12.50 rent. Defeated there, plaintiff appealed to County Court where defendant was again victorious.

Held.—Under the facts as found below, M. and M. are under no liability under either an expressed or implied contract.

Judgment Affirmed.

MISTAKE—REFORMATION OF DEED.—No. 11,944.—*Clarence W. Hoback, Plaintiff in Error, vs. Mollie Rink, Defendant in Error.*

Facts.—Action to reform a warranty deed from plaintiff to defendant by inserting a reservation of oil rights on the ground of mutual mistake. The oral evidence was contradictory as to the intention of the parties. The plaintiff introduced letters from defendant to show the intention. Judgment in lower court for defendant.

Held.—A review of the testimony shows that there was a conflict of oral testimony, and the documentary proof is not such clear, precise and indubitable evidence of the mistake as would require the trial court to disregard the oral testimony or justify the interference by the appellate court with the findings of the trial court.

Judgment Affirmed.

REPLEVIN—FRAUD.—No. 12,096.—*Albin, Plaintiff in Error, vs. Davies, Defendant in Error.—Decided September 24, 1928.*

Facts.—Albin brought Replevin against Davies and was defeated.

Held.—Assuming that evidence produced by Davies established fraud, such fraud would not defeat Albin's action, provided he is a bona fide holder of the note and mortgage. If Davies has been defrauded, she should seek redress from the one who committed the fraud, and is not entitled to be made whole at the expense of one who in no manner was responsible for her loss.

Judgment Reversed.

SCHOOL DISTRICTS—CONTRACTS WITH TEACHERS.—No. 11,949.—*Ryan, Plaintiff in Error, vs. School District, No. 26, Defendant in Error.—Decided September 17, 1928.*

Facts.—Plaintiff and his wife claimed pay for teaching

after the expiration of their contract, and also claimed that as the plaintiff and his wife were elected teachers for three consecutive years the employment continued without further election or appointment "stable and continuous" during efficiency and good behavior.

Held.—Act of 1921, Colorado Laws, Sections 8,444 and 8,445, with reference to teachers who have been elected or appointed for three consecutive years only applies to First-Class School Districts. Defendant in error was the third class school district; hence, statute has no application. Plaintiff and his wife were not entitled to compensation for teaching after the contract expired because the so-called extra services were rendered after the plaintiff and his wife were informed by an officer of the School District that the district would not pay for such services. Under such circumstances the law will not imply a promise to pay.

Judgment Affirmed. ———

WATERS AND WATER RIGHTS.—No. 11,959.—*The Pioneer Ditch Company, Plaintiffs in Error, vs. The Florida Canal Enlargement Company, Defendant in Error.—Decided September 17, 1928.*

Facts.—Court below referred case to a Referee. Referee filed his report and Court set a day in the future for objections to the report findings and decree. No objections were filed by plaintiffs in error. Court entered decree reserving certain matters for determination. Plaintiff in error filed its petition objecting to any changes in the findings and proposed decree.

Held.—Court below was right in refusing to reopen questions theretofore decided, without any objection or exception on the part of plaintiff in error, and in limiting the hearing to the question, expressly reserved for consideration, namely; whether or not the defendant in error was entitled to a conditional award in excess of that already decreed by the Court.

Judgment Affirmed.