COMMENT.

By the provisions of the Civil Service Law the President, with the assistance of the Civil Service Commissioners, is required to prepare suitable rules for carrying the law into effect. Whether these rules when so promulgated become a part of the law itself and consequently enforceable by the courts, or whether they remain merely rules of the Executive to his subordinates expressing his wishes as to their conduct and so enforceable only by him, may be a matter of doubt. At any rate, three of the United States Circuit Courts have, within a few weeks of each other, come to different conclusions.

On precisely the same statement of facts Judge Jackson in West Virginia adopts one view in *Priddie* v. *Thompson*, 82 Fed. 186, and Judge Baker in Indiana adopts the other in *Taylor* v. *Kercheval*, 82 Fed. 497. By Act of May 21, 1896, office deputy marshals may be appointed by the marshal after recommendation of the deputy to the Attorney-General and approval thereof by him. Nothing is said about the deputy's tenure of office or the marshal's power of removal. By rule of the President office deputy marshals were brought under the classified civil service. Both Priddie and Taylor were sought to be removed by the successors of the marshals who appointed them and both applied for injunctions, claiming the benefit of the Civil Service Law and a rule of the President forbidding dismissal except for just cause other than political or religious opinions.

Judge Jackson, relying on High, Inj., 2d ed., sec. 1315, and *Guilloth* v. *Poincy*, 6 So. Rep. (La.) 507, held that it was Congress' intention in passing the Civil Service Act to restrain the exercise of the power of removal by the appointing officer, otherwise it was mere *brutum fulmen;* that the rules of the President, when announced, become as much the law of the land, as the Act itself; that therefore Priddie had a right to enjoy the office during good behavior, *i. e.*, he had a vested interest therein; and that consequently there must be some protecting remedy, namely, injunction, the only remedy which is applicable. Judge Baker, after showing that the jurisdiction of equity courts covers only matters of property and the maintenance of civil rights, and never matters of an executive or political nature, states what seems to us to be the true principle—that in no sense has an office holder any property right in his office, otherwise he could never be removed. The marshal's power of removal is incident to his power of appointment (*Parsons* v. *U. S.*, 167 U. S. 324), and no court can interfere with his action, as it is necessarily an act of discretion. Nor can any rule of the President or the Commission, as

neither have legislative powers either originally or by delegation, change the law. Only in the sense that acts done under them are upheld may they have the force of law; any transgression will render the transgressor liable only to the executive power, not to the law and the courts (*U. S.* v. *Eaton*, 144 U. S. 677). In *Carr* v. *Gordon*, 82 Fed. 373, Judge Jenkins of Illinois came to the same conclusion as Judge Baker, where the facts were that the Postmaster of Chicago had transferred the superintendent of a sub-station, who was under the Civil Service Law, to a lower position in the delivery department at a lower salary, without preferring any charges against him or giving any opportunity for defense.

Within the last few years an evil has arisen which threatens to increase to such an extent as to almost overwhelm the treasuries of some of the smaller States. This is the employment of expert witnesses, notably physicians, to give opinion-evidence, and the payment of exorbitant prices therefor. In the majority of large murder trials, which seem to have furnished the market for such evidence, the accused is unable financially to employ counsel, who are thereupon supplied at the expense of the State. These counsel generally demand the employment of expert witnesses, whom it also devolves upon the State to pay. This custom has greatly increased the expenses of the States. Therefore, any method tending to decrease such expenditures will be welcomed. The Supreme Court of Illinois, following the lead of Alabama, in the case of *ex parte Dement*, 53 Ala. 389, and several other States, has decided in *Dixon* v. *People*, 48 N. E. Rep. 108, that a physician, subpœnaed as an expert witness only, without knowledge of the particular facts of the case, may be compelled to testify without extra compensation beyond that allowed to witnesses by statute. A physician was here asked a hypothetical question, and refused to answer without additional compensation; whereupon he was fined for contempt, and his appeal from such judgment was not sustained. The case differs from *Wright* v. *People*, 112 Ill. 540, where the witness had visited a patient professionally, and had voluntarily given part of the testimony desired.

In England, fees paid to witnesses are regulated by the profession or calling of such witness; but such a rule has never prevailed in this country. Three grounds are here given, however, why extra compensation should be paid. The first, that the time of an expert witness is more valuable than that of an ordinary one, has of late years been repeatedly denied. Another reason put forward is that the skill and knowledge of an expert are his own property, and cannot be taken without due compensation. But it is here decided that such skill and knowledge are property only when applied in effecting some cure; not when answering a question put upon trial, unless they require special preparation or work. The third reason is one depending

entirely on statute. The fact that States of such eminence as Illinois and Alabama have arrived at this decision may, if followed by the courts of other States, as it seems it should be, offer a means of escape to the State from exorbitant witness fees of experts, by subpœnaing and compelling them to testify at the ordinary fee.

A new court rule recently announced by Judge Grosscup of the United States Circuit Court (Chicago), which we quote from the *Albany Law Journal*, will heartily commend itself to the profession. The rule, which is directed against that class of so-called "poor person" litigants, who bring personal-injury suits and escape paying or securing costs by making a "poor person" affidavit, is as follows: "Hereafter the plaintiff filing such affidavit and his counsel of record will sign a stipulation to the effect that no agreement has been entered into between them guaranteeing the counsel a division of the judgment, and that no such assignment shall be made to the final disposition of the suit either here or in the higher courts, if appealed. The stipulation shall further provide that when judgment is finally obtained, and the money is paid into court, it shall remain in the hands of the clerk, and be disposed of under the order of the court. First, the costs shall be paid. Then the attorney shall receive for his service a fee determined in size by the judgment of the court. The rest shall go in cash to the plaintiff."

Generally such litigation is purely speculative on the part of the plaintiff's attorney. The plaintiff is largely under the lawyer's power while entering into the agreement with him, as the best class of lawyers will not touch such cases. In one case which has fallen under our notice the injured party was to have 50 per cent of the amount recovered. But when the lawyer found that the corporation was willing to settle for a much larger amount than he had anticipated, he made a new agreement giving his victim only 25 per cent. On the discovery of the facts by another attorney, who was later interested in the case, the first lawyer would have been disbarred had he not refunded all but a reasonable compensation for his services. Such a rule by taking the plaintiff under the court's protection, will do much to discourage the really remarkable activity of these "ambulance chasers," as they are commonly known in New York.