him by the driver and handed it back, *Hitt v. Commonwealth,* 131 Va. 752, 109 S. E. 597; that one who, while riding with a friend, puts the latter's liquor in his pocket, *Locke v. Ft. Smith,* 155 Ark. 158, 244 S. W. 11; that defendant who was a guest in an automobile neither had possession of the liquor nor encouraged its transportation, *Richardson v. State,* 89 Tex. Cr. 17, 228 S. W. 1094; and that the defendant who was a guest in the car drank some of the liquor and after arrest attempted to strike the bottle of liquor seized from the officer's hands, *Walling v. State,* 94 Tex. Cr. 147, 250 S. W. 167. Perhaps the only conclusion to be drawn from the cases is that, due to the recent origin of the problem, the courts have failed to settle upon any of the essential elements necessary to constitute the offense of transportation and that each case is adjudged according to its particular facts. See also Vol. XII No. 1. SAINT LOUIS LAW REVIEW, p. 72. T. S. '27.

INTERNAL REVENUE—GIFT TAX HELD NOT UNCONSTITUTIONAL.—Plaintiff made gifts to his wife and children in 1924 prior to the passage of the statute creating the "gift tax." Defendant collected the tax, and the plaintiff sues to recover the amount paid. *Held,* that the tax is constitutional as an excise tax, and that it is not in contravention to the provision of the United States Constitution prohibiting the laying of direct taxes except as in proportion to the population. And Congress may pass retroactive legislation where that intention is clearly expressed. *Anderson v. McNeir,* 16 F. (2d) 970 (1927).

The constitutionality of the gift tax has not so far been decided by the United States Supreme Court, and there are but few cases on this proposition. When the principal case came up in the district court, it was decided that the tax was unconstitutional. *McNeir v. Anderson,* 10 F. (2d) 813. It was there held first, that there was no historical precedent for a levy on gifts made *inter vivos*; secondly, that it was a tax on property solely on the basis of general ownership, hence direct and void for want of apportionment. It follows the test laid down in *Pollock v. Farmers' Loan and Trust Co.,* 157 U. S. 429, 601, that any tax upon the general ownership of property is direct. It was then argued that the right to give is an incident of ownership which gives value to property, and to tax that which gives value to property is a tax on the property itself, and direct.

On the other side of the question are *Anderson v. McNeir, supra,* and *Blodgett v. Holden,* 11 F. (2d) 180, which hold that the tax is constitutional. The reasons for such decisions are logical as well as expedient. It is argued that historically, a tax on an incident of ownership, is not direct except as to that part of the *Pollock* case rendered ineffective by the Sixteenth Amendment; and that it should be good on the same ground as the inheritance tax is, as there should be no difference in this respect between gifts *inter vivos,* and those *causa mortis.* See 74 Pa. Law Rev. 836. This tax was held not to be a tax on an incident of ownership, but on the act of transfer itself; *i.e.,* not on the right to give. The owner of the property must take active steps before he is taxed. The burden is borne by the donor, as the donee is divested of no part of the gift.

While it has not been finally decided as yet, it is believed that the gift tax will be upheld. If for no other reason, the fact that it is ancillary to the system of federal estate taxation is a strong argument in its favor. And it may be that the words of Mr. Justice Holmes will be remembered, "a page of history is worth more than a volume of logic." C. H. L. '28.

JUDGES—REQUIREMENT THAT COUNTY JUDGES SHALL BE LEARNED IN THE LAW.—Petitioner, incumbent, sought to restrain his successful opponent from assuming the duties of county judge because he was not a licensed attorney. The Tenn. Statute, acts 1893 C. 51, required that county judges should be learned in the law. *Held,* that the statutory requirement was intended as a direction

to the voters and that a majority of the ballots settled the question as to whether or not the successful candidate was learned in the law, *Heard v. Moore,* (Tenn. 1926) 290 S. W. 15.

This doctrine was accepted in toto by the same court in *Morrison v. Grower,* 288 S. W. 731, rendered a week after the case under discussion. The *Heard Case* squarely follows, and quotes at length, *Little v. State,* 75 Tex. 620, where a similar statute was given a like construction. This decision seems to be based on existing custom rather than sound statutory construction. At the time the case arose, 1890, the majority of county judges in Texas were laymen, as the income derived therefrom was not sufficiently lucrative to call men from the profession, these circumstances are given great weight in the decision. A case taking the *contra* view is *Jameson v. Wiggin,* 12 S. D. 16 decided in 1899. The *Little* case, *supra,* was referred to and discussed at length, but the court decided that "learned in the law" meant a licensed attorney. In a recent Minnesota case, *State v. Schmahl,* 125 Minn. 533, the court construed a similar provision to also mean a licensed attorney. The majority of states have legislated on the subject in clear and unambiguous language, consequently, the provisions have not come before the courts for judicial determination. The Missouri statutes are silent on the subject, consequently, the majority of county judges are laymen. W. G. S. '28.

MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE WHILE DEVIATING FROM ROUTE PRESCRIBED BY MASTER.—Hyland directed his servant to drive his service truck from A through B, C, D and E to F. The servant left the route at B, went to X at the request of his companion, and while returning toward D, a point in the route, he injured the plaintiff. *Held,* that the court was not, as a matter of law, justified in holding that the accident occurred while the servant was entirely on his own business and outside the scope of his employment, and that the question was one which should have been submitted to the jury. *Kohlman v. Hyland* (N. D. 1926) 210 N. W. 643.

The question raised in the instant case has troubled the courts since Baron Parke's statement that the master is not liable for acts done by a servant on a frolic of his own, but that if the servant while on the master's business takes a detour to call on a friend, the master is responsible. *Joel v. Morrison,* 6 Carr. & P. 501. Cases seem to agree that when the servant has gone on an independent journey, the master is not liable merely because he intrusted the servant with the vehicle. *Danforth v. Fisher,* 75 N. H. 111, 71 Atl. 535; *Reilly v. Connable,* 214 N. Y. 586, 108 N. E. 853; *Provo v. Conrad* 130 Minn. 412, 153 N. W. 753. Baron Parke's proposition, *supra,* rests on the assumption that the relation of master and servant is suspended at the moment when the substantial deviation commences. American courts, however, differ in their views as to what facts are necessary to constitute such a deviation. The English and some state courts have said that when the deviation occurs, and it appears beyond dispute that the purpose of the deviation had no connection with the duties of the servant, then there is no liability on the part of the master for the injuries caused by the servant. *Hatch v. London,* 15 Times L. R. (C. A.) 246; *McCarthy v. Simmons,* 178 Mass. 378, 59 N. E. 1038; *Stone v. Hill,* 45 Conn. 47, 29 Am. St. Rep. 635. Other courts have held that recovery is not precluded merely because the purpose of the deviation had no connection with the master's business; that the nature of the deviation is a question of degree; and that the question is whether the facts show mere disobedience or complete abandonment of the master's business. *Williams v. Koehler,* 41 App. Div. 426, 58 N. Y. S. 863; *Jones v. Wiegand,* 134 App. Div. 644, 119 N. Y. S. 441; *Chicago Consol. Co. v. McGinnis,* 86 Ill. App. 38. Other courts have held the master liable for