We take pleasure in announcing that at a recent meeting the following men were elected to the Board: J. F. Malley, '02; J. A. Turner, '03; C. W. Bronson, '03; and Franklin Carter, Jr., '03, assistant business manager.

COMMENT.

THE RIGHT TO PRIVACY.

Probably no branch of the law can show a greater development during the last century than the law of privacy. From a strict adherence to the rule that a court of equity will not grant an injunction except where property rights are affected, courts of equity have in the last few years expressly recognized "the right to be alone," independently of any property considerations.

At common law no remedy existed for a violation of one's privacy, no damages being predicable of mere mental disquietude.

The right of privacy in the enjoyment of real property has never been questioned. Of other kinds of property, the right was first recognized in the case of private letters, and was based upon a property interest in them. Afterwards the court enjoined the unauthorized use of a name, and finally a wrong to one's personality. Originally a court of equity would not interfere where an action for damages could not be brought, *Southey* v. *Sherwood,* 2 Mer. 437. (1817). In the case of *Gee* v. *Pritchard,* 2 Swanst. 402, a step in departure from the strict property qualifications was taken. Relief was held obtainable to restrain the violation of a personal legal right which could be cognizable as property. The same theory was advanced in *Prince Albert* v. *Strange,* 1 Mac. & G. 25. (1849), where Lord Cottenham repudiated the notion that an injunction could not be granted unless an action would lie. All that was necessary to found the jurisdiction of the court was held to be a direct clear interference with a right clearly connected with property. Finally in the case of *Pollard* v. *Photographic Company,* 40 Ch. D. 354 (1889), the court entirely receded from the old idea that a violation of property rights was necessary to the granting of relief. It was held that the right to grant an injunction does not depend in any way upon the existence of property, "nor is it," said the court, "worth while to consider carefully the grounds upon which the old

court of chancery used to interfere by injunction. But it is quite clear, that independently of any question as to the right at law, the court of chancery always had an original and independent jurisdiction to prevent what the court considered and treated as a wrong, whether arising from a violation of an unquestioned right, or from breach of contract or confidence."

In the United States the right to privacy was recognized in the case of *Schuyler* v. *Curtis,* 147 N. Y. 434, but was held to be a purely personal right which dies with the person, and this decision has been followed by others. In *Marks* v. *Jaffa,* 6 Misc. Rep. 290, the court declares that individuals shall be secure in their "right to be alone."

The right to privacy may, however, be waived by the individual. A statesman, author, artist or inventor who asks for and desires public recognition may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract, or violation of confidence in the method by which it was obtained, he has a right to reproduce it, whether in a newspaper article, or book; *Corliss* v. *E. W. Walker Co.,* 64 Fed. Rep. 280. In the same case it is held that an injunction will not be granted to restrain the publication of the life of an inventor, whether he be a public or private character, on the ground that the freedom of the press is a constitutional right.

The latest decision on this subject is that in *Roberson* v. *Rochester Folding Box Company,* 71 N. Y. Supp. 876. In this case, the defendant without authority published and circulated lithographic prints of plaintiff with advertisements of their business thereon, whereby plaintiff was made the subject of scoffs and jeers, causing her humiliation and sickness. The court, keeping pace with the trend of modern judication granted the relief sought, upon the ground that the plaintiff's personal comfort had been interfered with without her consent and to her injury.

It seems clear from a study of these decisions, that courts of equity are rapidly assuming the position of Lord Cottenham, who, in *Wallworth* v. *Holt,* 4 Mylne & C. 619, said: "I think it is the duty of this court to adopt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no remedy. If it were necessary to go much further than it is, in opposition to

some highly-sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I would not shrink from the responsibility of doing so."

Cruel and Unusual Punishments.

The death penalty for centuries has been the universal punishment for many crimes. In the medieval period even the most trivial breaches of the law were attoned for by the death of the culprit. The advance of civilization, however, has been marked by the decline of capital punishment, until in the majority of jurisdictions it is imposed only in cases of treason and murder.

Notwithstanding the great abhorence for capital punishment, the legislatures of many states, incited by the prevalence of certain crimes or the particularly distressing details of some one crime, in their respective states, have recently passed statutes imposing the death penalty for crimes not usually punished with so great severity. Notably, the Illinois statute, making kidnapping punishable by death.

In view of this spirit of the legislatures, the case of *Territory* v. *Ketchum,* 65 Pac. (N. Mex.) 169, becomes of more than passing interest, since it raises the question of the limit to legislative discretion in determining the severity of punishment of crime.

In this case the appellant was convicted of train robbery and sentenced to death, in accordance with the provisions of Section 1151 of the Compiled Laws of New Mexico. The single question presented to the Supreme Court, was whether the death penalty, as applied to this offense, is a "cruel and unusual punishment," within the prohibition of the eighth amendment to the Constitution of the United States. The court decides that the section of the Compiled Laws in question is not within the constitutional provision.

When the enormity of the crime is considered, the decision does not impress one as unjust nor the punishment disproportionate. But in arriving at this conclusion the court states that the discretion of legislatures in determining the adequacy of punishment for crime is unlimited.

Is this true, as a principle of law? If so, to apply it in an extreme case, the legislatures may impose the death penalty forever a misdemeanor.

If there is any limitation upon this power of legislatures, it must be imposed by the eighth amendment of the Constitution of the United States or similar provisions in the state constitutions.

That this provision applies to punishments of a barbarous character, such as burning at the stake and stretching on the rack, is beyond doubt (*Wilkerson* v. *Utah,* 99 U. S. 130). That the death penalty, in a proper case, if the mode of infliction is humane, is not prohibited by this provision is equally well established. *(In re Kemmler,* 136 U. S. 436).

But when it is sought to invoke the aid of this constitutional provision, to prevent the infliction of punishment, excessive and disproportionate to the crime committed, the law is not so well defined.

This point has not been passed upon by the United States Supreme Court. In the state courts, however, where the precise question has arisen, the decisions have been uniform, that the provision against "cruel and unusual punishments" is applicable to the mode of punishment and not to the decree. *(Aldridge* v. *Com.,* 2 Va. Cas. 447; *Com.* v. *Hutchings,* 5 Gray 482; *Com.* v. *Murphy,* 165 Mass. 66; *People* v. *Morris,* 80 Mich. 634).

Such eminent authorities as Judge Cooley and Mr. Tiedeman declare the question an open one. While a review of the authorities would thus seem to confirm the decision of the Supreme Court of New Mexico, nevertheless, some idea of the probable decision of the question, should it ever be presented to the Supreme Court of the United States, may be obtained from the dissenting opinion of Justice Field in *O'Neil* v. *Vermont,* 144 U. S. 323, which was concurred in by Justices Harlan and Brewer. Justice Field, after speaking of the application of the eighth amendment to the punishments involving torture, said, "The inhibition is directed not only against punishments of the character mentioned, but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offense charged."