

Bearing in mind that the act complained of by the editor consists in the judge supplementing, modifying, or altering, if you will, a point of practice of the law and not one of its principles—which will weaken the arguments derived from the citations given below against extending the prerogative of the judge, and strengthen those in its favor—let us note some of these dicta pro and con.

"*Judicis est jus dicere, non jus dare.*" "It is the province of the statesman, not of the lawyer, to discuss, and of the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only: the written from the statutes; the unwritten law from the decisions of his predecessors and of the existing courts, or from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; it is not, however, the duty of a judge to speculate on what may be most in his opinion for the advantage of the community." (*Egerton v. Brownlow*, 4 House of Lords cases, cited in *Broom on Common Law*.)

"The judge ought to be the most obedient servant of the law, for this slavery is of more value than liberty. If the law appears to him to be defective, he must first begin by causing it to be carried out, and then proceed to bring his own observations before the head of the judiciary so as to obtain from the legislator a salutary reform. Unhappy the judges who take upon themselves to correct the law; it is not permitted to them to do better than it does, so long as it remains unchanged." (Guyot, *Verbo Judge*.)

On the other hand, in support of the judge's extended prerogative, we find the following newer opinions:

"Although the judge is assumed to take the law from the legislative authority, yet, as the existing law never at any time contains provisions for all cases, the judge may be obliged to invent or create principles applicable to the case. This is called by Bentham and the English jurists judge-made and judiciary law." (*Encyclopædia Britannica*, *verbo Judge*.)

"Any judge permitted to make rules he (Austin) considers to be tacitly empowered to make laws." "That judges in England can and do make law, no one can deny." "Is there any rule of law which binds him (the judge) to the decision of the case in a particular way? If there is, he must apply it whatever he or others may think of the propriety of it. But if there is not, he must still give a decision; and he will naturally decide against that party whose conduct has been unusual, or unreasonable, or dishonest, or negligent." (*Elements of Law*, Markby.)

"Nothing which is pernicious to utility can be right. The principle of utility, in the negative form in which I have stated it, is embodied under the name of the *argumentum ab inconvenienti* in one of the fundamental maxims of our law; and there are few principles more frequently referred to and relied upon by jurists than this. The maxim, as given by Coke, is: *Argumentum ab inconvenienti plurimum valet in lege*; and he adds: "The law, that is, the perfection of reason, cannot suffer anything that is inconvenient"; and, therefore, he says: "*Nihil quod est*