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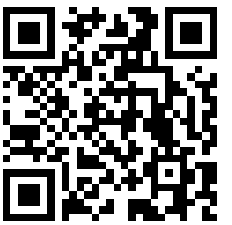

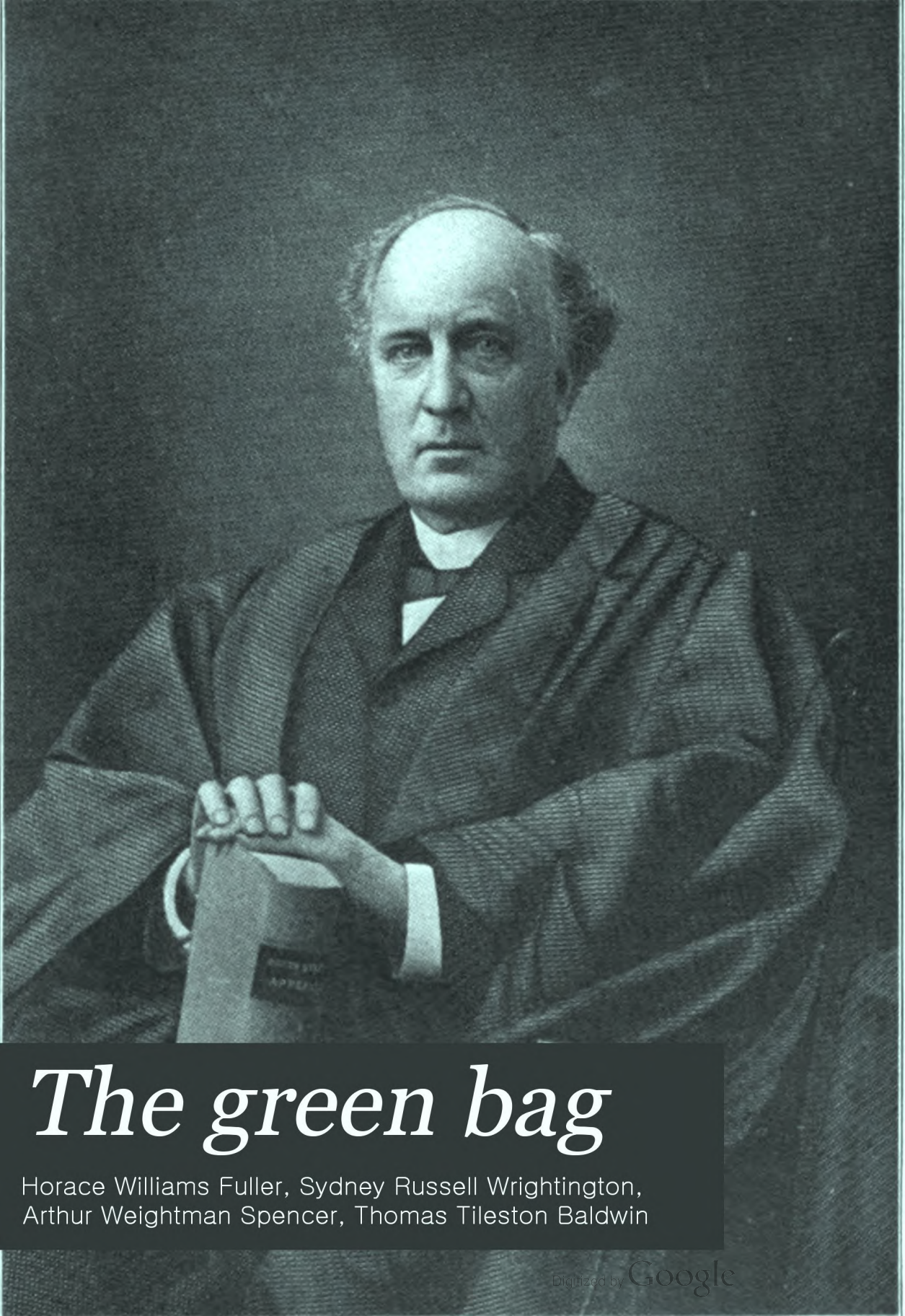

The green bag

Horace Williams Fuller, Sydney Russell Wrightington,
Arthur Weightman Spencer, Thomas Tileston Baldwin

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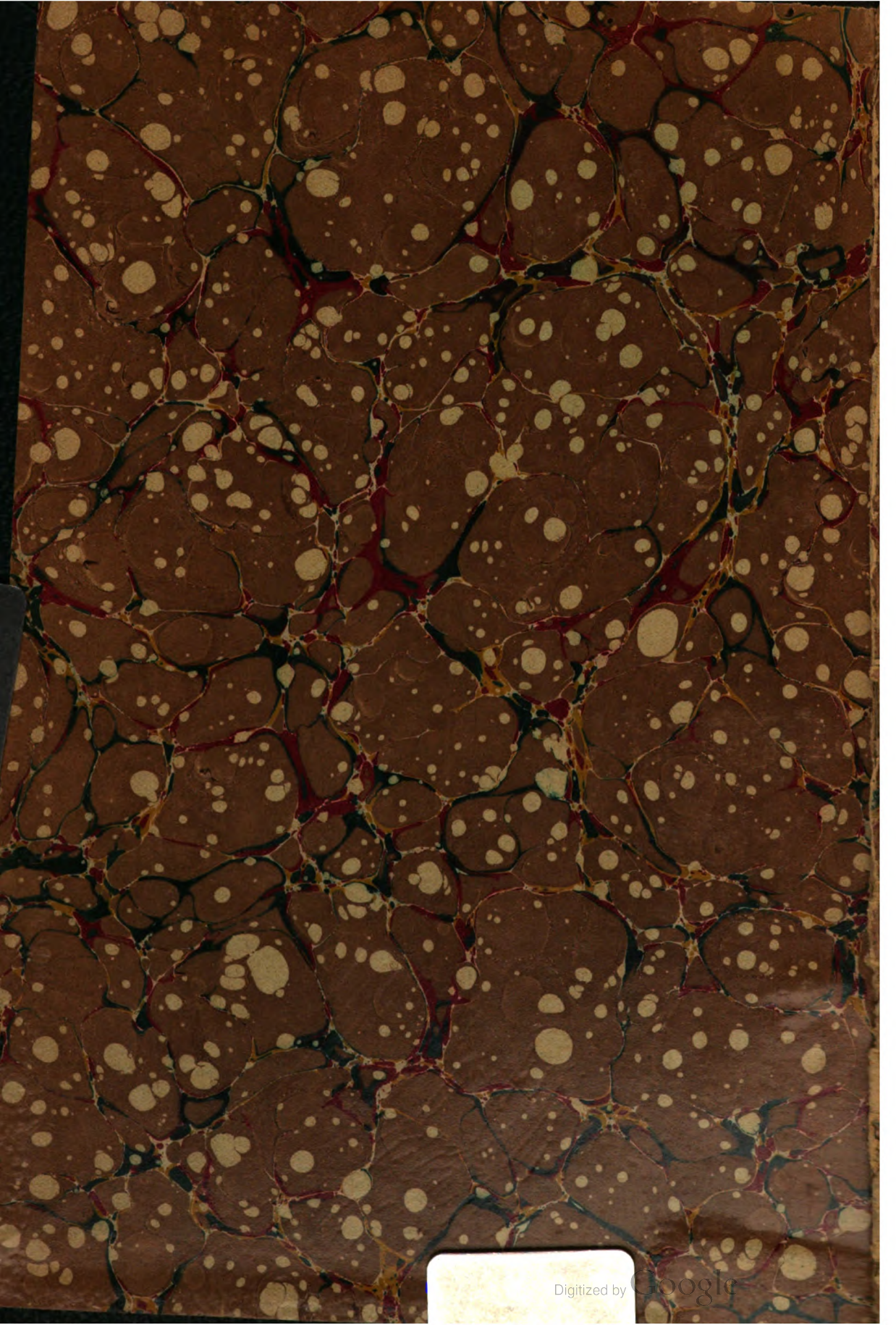
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THE GREEN BAG

AN ENTERTAINING
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VOLUME XXIV
COVERING THE YEAR 1912

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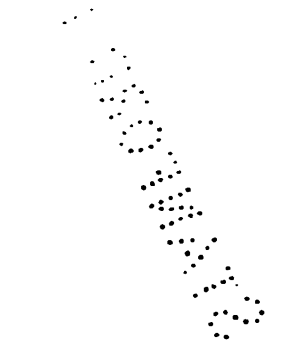

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JOHN HENRY WIGMORE

DEAN OF THE NORTHWESTERN UNIVERSITY COLLEGE OF LAW

From a painting by Arvid Nyholm, recently presented to the law school
(*See page* 48)

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The Green Bag

Volume XXIV January, 1912 Number 1

John Henry Wigmore

By Albert Kocourek[1]

PRESIDENT LOWELL of Harvard, at his installation in 1908, in presenting the subject of this sketch for the doctor's degree in law, as "author of a monumental treatise on the law of evidence, a jurist in a day when lawyers are many and jurists are rare," touched upon a thought of more than ordinary importance. We all understand that a lawyer is one learned in the application of the law,—that he has to do with legal dogma and its traditional interpretation; but what then is a jurist? Prevailing newspaper usage, by the same process of overstatement which adds color to otherwise dull events, has made the office of the judge synonymous with the learning of the jurist. This euphemistic corruption has not, however, been assimilated by our spoken language, and for the ordinary man the term jurist stands isolated and unused.

The reason for this is not far to seek, and it has a characteristic relation to our system of law. Without pausing to enter into an historical statement of origins, we may roughly distinguish the jurist as one who is learned in the form of the law or the history of legal institutions. Thus, Austin was a jurist, while Blackstone was a lawyer, unless his knowledge of the civil law brought him within the circle of jurists according to Continental usage. Austin understood and treated, in his remarkable book, the abstract nature of law and its various organic parts; while Blackstone gave an institutional account of English laws. Again, Maine was a jurist, while Maitland was essentially a legal historian, although a very eminent one. Maine treated legal institutions from an abstract and philosophical foundation; while Maitland principally confined his efforts to concrete instances of a local legal development. It is not contended, of course, that the lines can be sharply drawn: but that is a matter of little importance, since the Anglo-American system has produced so few names entitled to be classed among the jurists, that little if any confusion can result.

Dr. Wigmore is at once a lawyer and a jurist. But beyond this he is one of the most striking and remarkable of

[1]Albert Kocourek was born in 1875 at Louisville, Ky. He specialized in philosophy and metaphysics at Lake Forest University, and graduated in the Law Department of the University of Michigan. He is lecturer on Analytical Jurisprudence in Northwestern University; lecturer on the History of Legal Institutions in The John Marshall Law School, at Chicago; a member of the International Association of Philosophy of Law and Economics (Berlin); and a practitioner at the Chicago bar.

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living men. In the same line of creative effort, a comparable genius is found in Josef Kohler, Professor of Law at the University of Berlin. Both men are encyclopedias of strange learning; both possess unusual and unexpected linguistic and artistic accomplishments; and both are great dynamic forces in the development of law in their respective countries. In dealing with personalities of this kind who tower over the ordinary standards of capacity and accomplishment, it is difficult to find an avenue that will lead to any internal meaning. Such men are felt rather than understood.

Objective particulars are in themselves sterile, but yet the conventional approach may be useful.

Briefly, then, Mr. Wigmore was born in 1863 at San Francisco. Both his academic and his legal training were had at Harvard. He was at the Boston bar for two years after leaving the university. Later he became Professor of Anglo-American Law at Fukuzawa University at Tokyo, and still later a member of the bar in Illinois. Among his labors in Japan, aside from his professorial duties, was a treatise on Japanese land tenures, and a revision of the Civil Code under authority of the Japanese government. For more than ten years last past, he has been Dean of Northwestern University School of Law. His great philosophical masterpiece on Evidence appeared in 1904–5, and is, of course, well known to the entire legal profession.

So much and more may be found in any Who's Who, but dates, names, and places tell nothing of the man. It is possible to set down similar arid facts concerning his extensive professional and executive labors, his valuable contributions to law reviews, his researches into legal history, his multiplied other activities, and yet we should entirely miss the distinguishing factors of this uncommon personality. But why uncommon, and why a personality?

A man who can read in a half-dozen Continental languages on some obscurity in mediæval legal history until the clock calls him to a directors' meeting of the Legal Aid Society; who can write a fugue and then pass to a lecture on Torts; who can preside over a faculty meeting and then bury himself in the *Leges Barbarorum;* who can plan a budget and then find satisfaction in the Laocoon; who can smooth over a difficulty for a Freshman, and then at once become absorbed in the Seleucidæ; who can exhaust a proposition of current law while receiving a dozen callers; who can investigate an Etruscan antiquity after analyzing the Workmen's Compensation Act; — we say that a man who does these unusual things by way of daily routine is an uncommon person. Of course this is only a characterization, but it is typical of the diversified activity and learning of the man.

Here is a man who has mastered a surprising bulk of the arts, sciences, histories and philosophies, and seems not ever to have forgotten anything. What exaggeration of physiological function will account for such abnormal capacity? By what superior endowment of mind has be been able to make his own so great a field of knowledge? We are driven either to the notion of the Superman, or the assumption that he has been able to live a mortal life without taking time either for sleep or food. Equally remarkable is the fact that Mr. Wigmore, while never living through a moment that can be called idle, never appears to be busy. His mental organization is not the small, noisy kind. It is an immense dynamo

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which, while generating enormous power, appears to be at rest.

But now, why a personality? So much in justice can be said on this point that brevity must and will amply suffice. Mr. Wigmore with the historian's vision of the mutability of legal institutions, and of the persistence of well-defined cycles of development in social affairs, has recognized that our legal system is in a transitional stage of evolution, the embryotic course of which is mirrored in the legal history of Rome, and in other legal systems. He has sought to make provision for the problems now before us and still to be encountered by placing before the profession the necessary instruments of learning to probe out the difficulties.

Mr. Wigmore was chairman of the learned committee which produced that valuable contribution to historico-legal knowledge, the Select Essays in Anglo-American Legal History. He is chairman of the Continental Legal History series. He was chairman of the Criminal Law series. He is chairman of the Modern Philosophy of Law series. These staggering undertakings (which were authorized by, and are under the patronage of The Association of American Law Schools) have only to be casually examined to produce the belief that the impulse behind these monuments of distinguished scholarship is no ordinary force. It may be said without disparagement to the able men associated with Mr. Wigmore in these various matters, that the bulk of the labor of the committees was his, as was also the moving idea. Mr. Wigmore has done other things involving extraordinary effort and capacity — he is doing something of the kind always — but his initiative in making accessible to the American legal profession the great masterpieces of Continental legal science, history, and philosophy, may be set down, perhaps, as his greatest achievement, the importance of which will be better recognized a century hence than now.

The unsatisfactory and wholly unscientific conditions surrounding our treatment of criminals have long been deprecated, but it remained for Mr. Wigmore to attack the disease at its root. He was the founder and first president of the American Institute of Criminal Law and Criminology which is bringing to bear enlightened, that is to say, scientific methods in the administration of criminal law. This organization now meets with the American Bar Association and publishes a journal which compares very favorably with anything on the European continent in the same field.

Passing by Mr. Wigmore's important activities in the various bar associations and in other organizations, let us speak a word of something less known — the Gary Library. The stamp of Mr. Wigmore's ripe scholarship is visible in this great mass of legal materials. There are legal libraries with more books, and excelling, perhaps, in this or that field, but on the scientific side of the law this is the most valuable collection in this country. The judgment, learning, and effort evident in this undertaking of making a great library eloquently proclaim capacities and abilities of the most enlarged type.

Measured by what he has accomplished, by his influence on the form and substance of the law, and by what may be reasonably expected of his efforts, Wigmore is more than a personality, — he is an institution. That in a vague way this is widely appreciated in the hurry and combat of our social life, that in the same indistinct fashion Mr. Wigmore is regarded as a man of extraordinary learning and a master in several

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departments of the law, is all well enough; but it is our reproach that so great a personality, a man so immeasurably valuable, should, perhaps, be better understood and better appreciated in the academic cloisters of Germany, France, and Italy, than in our own country.

He has labored constantly and consistently for a jurisprudence of results. He has battled against form for its own sake. He is a Sabinian rather than a Proculian, but a Sabinian with sociological rather than verbal allowances. He is giving a much-needed impulse to juristic analysis as the necessary foundation for needed reforms in restating our burdensome *corpus juris*. He is in the foreground fighting for enlightened methods in the law of crimes and the punishment of criminals. He has used his influence, and successfully, too, against the perpetual programs for short-cuts in the law that lead away from legal advancement while seeking the straight line that exists nowhere out of mathematics. His deep knowledge of legal institutions has not turned him away from the paths of a sound legal progression. But he is not a juridical revolutionist. He holds neither to the moral immobility of society of a Buckle nor to the social plasticity of a Montesquieu. He recognizes, as only the historian can, that society may not detach itself from the past. For him life is a stream, and the present is not an isolated point in time. He is insistent that we shall know as much as we can about it before we begin to build dams and locks.

If ever we are to have an epoch of scientific jurisprudence in this country, Mr. Wigmore will be regarded by the writer of its history as one of its founders. This much can be predicted with confidence, even though this full life should now be cut off; but Mr. Wigmore is still a young man in years, in heart and mind, and from one who has always scattered with an open hand his wealth of intellect for the benefit of others, much may be expected. Like Kohler, Wigmore is not only a giant of activity, but he is a producer of great activity. He has a faculty of originating valuable ideas and creating the conditions to bring them to a full realization. He will be regarded as the father of our scientific jurisprudence not by the measure of lineal feet of his literary production, but rather by the powerful influence which he is exerting for scientific methods in the administration of justice, in ways less known to the general public, but more effective than the mere written word.

Coming now to consider this rare character in the purely personal aspect, that is to say, stripped of his universal learning and his unusual achievement, we again encounter the difficulty of approach. We may begin by quoting from a memorial to President Taft in which Mr. Wigmore was proposed as successor to the late Mr. Chief-Justice Fuller: "To know John H. Wigmore is to become a Wigmore enthusiast." He reminds one in many ways of Rudolf Stammler, who at the age of twenty-six became Dean of the Juridical Faculty of the Halle-Wittenberg University. It was said of Stammler, and the same exactly applies to Wigmore: "There are plenty of people who take life so very earnestly. But they often extend their earnestness to every department of life. Not so Stammler; he is one of the sunniest natures imaginable, full of delightful humor, a child among children, and with a remarkable talent for friendship and good-fellowship."

In truth, Mr. Wigmore in person might be mistaken for a modern cul-

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tured German of the university type without the usual ponderosity of the German, but rather with the charm of manner of the French. His mind, however, is that of the classic Greek. His physical presence gives the impression of a frail body and a spiritual mind, but yet he is a reservoir of nervous energy. If he is an intellectual idealist, he is also an intense realist in action. It would naturally be thought that one who lives on Parnassus could never breathe the air of the valley, but Mr. Wigmore can and does descend. He would instantly attract attention even if it could be forgotten that he is one of our greatest legal scholars. He has the simplicity of a child and a manner wholly unassuming. A stranger would be quickly struck by his gracious bearing and his magnetic personality but would never suspect anything beyond an elegant and perhaps well-informed gentleman. Mr. Wigmore does not talk of what he has done. If his natural modesty did not prevent, he is too busy doing other things. He would be the first to proclaim that he is a mere dilettante. When he has anything to say to a mixed audience he speaks not in the language of Greece or Rome, but in a strong, hammering English which leaves no doubt either as to what he said or meant to say. His style is somewhat different and more difficult when he enters the juridical arena. It has here the champagne quality, an untranslatable flavor, brilliance, charm, potency. His legal and his juristic writing remind one very strongly of that great scholar on the bench, Mr. Justice Holmes. (And, by the way, these two men have many things in common aside from literary style.) Mr. Wigmore carries into the classroom that same simplicity, directness, precision, and mental form which are distinctive of him. He is not, of course, nor can he be intimately understood by the undergraduate, but he is idolized. His classes carry out with them into the world the impression of having realized a great privilege of association with a profound thinker and a distinguished man. They are of the army of Wigmore enthusiasts.

To say of Mr. Wigmore that he is unaffected, generous, noble, an untiring worker, a stanch friend, a valuable citizen, a great lawyer, an accomplished jurist, a cultured gentleman, is to employ the stock nouns and adjectives of obituary literature. Such language has the singular quality of missing the point of characterization. Indeed, any lawyer whose name is known beyond his state lines must be most of these things. It should also be remarked that a gracious manner, a sympathetic heart, and a noble mind, do not in Mr. Wigmore tend to destroy his efficiency as the chief executive of a law school, as the directing spirit of the learned enterprises in which he is engaged, or in the production of results in his numerous other legal, juristic, public, charitable and social activities. He can act as well as think. His sympathies for mankind do not have the amorphous structure of gelatine nor are they bottled in water. The softer side of his nature is governed by an ideal motive. He acts on a consistent and organic principle and is not swayed by adventitious sentiment. He insists on progress, and progress means for him understanding and power. Anything which opposes this progress is cast aside. Individuals here mean nothing, and the idea is everything. It is easy to be virtuous. All that one has to do is to do nothing, but nobility and great activity are very rarely found together. The humanitarian element in Wigmore

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is not primarily the expression of inborn feeling; it arises by logical necessity; and it is an indispensable factor in his conception of life. If the occasion requires (and at such times he is both intellectually and morally fearless), the milk of human sympathy can turn into burning acid. He is a dangerous adversary, but he does not contend with individuals; rather he contends for principles. Progress walks on the heads of individuals. The individual dies; the idea lives.

Wigmore lives in two worlds and obeys the laws and conventions of each in its turn. He functions on a higher plane than the average of humanity, and exemplifies the truth of the proposition that such personalities may be chosen instruments of a world-process and still remain human beings. The progress of the world is made by such entities. They are the forces which impel the mass and drive humanity on to its destiny. Wigmore, therefore, is not to be understood alone in relation to his works. He is the embodiment of Idea. He is a force; and it may be repeated (since this is the leading motive of this sketch), he is an institution.

Taxation of "Guaranteed" Stock in Massachusetts

By Sydney R. Wrightington, of the Boston Bar

THE term guaranteed stock is not new. In the early days of corporations it was frequently used to designate what we now call preferred stock, but as corporate forms became fixed the term was disused until recently it was revived to designate a curious kind of security, an illustration of which has been produced by the exigencies of public service financing in Massachusetts. To understand the nature of this instrument a word of explanation will be helpful.

In Massachusetts, as in many other states, the system of double taxation, which taxes stock and bonds, as well as the tangible property they represent, is still compulsory under an ancient judicial interpretation of the state constitution, which forbids the classification of property for purposes of taxation, and other decisions that hold that stock and bonds are property, and must therefore be taxed like all other property. By a curious exception to this rule of interpretation, the stock of domestic corporations may be constitutionally exempt from taxation to avoid double taxation, since the corporation pays a franchise tax.[1] This exemption has been granted by the Legislature.[2] Bonds of domestic corporations, however, are not exempt (except so far as they represent mortgages of Massachusetts real estate). The demands of state and municipal revenue have compelled more and more rigid enforcement of the general law taxing intangible personal property, and the burden of this has fallen most heavily on those who have difficulty in concealing their holdings, namely, the trustees. Although held to the strictest accountability as to the character of their investments, they are being driven from the purchase of bonds to non-taxable stock of Massachusetts corporations, which in

[1] Opinion of the Justices, 195 Mass. 607, 611.
[2] Acts of 1909, Chap. 490, Part III, Sec. 64.

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most cases means the stock of a few public service companies. This artificial demand has inflated prices of such stocks to an artificial level and trustees are obliged to run the risk of an investment which the courts may declare improper if they should shrink in value when tax reform enacts a fair tax on all intangibles. For the present, however, it is resulting in a profitable monopoly of trust investments by those who finance the great public service corporations, and who therefore exert a powerful influence in the councils of both political parties, which so far has been sufficient to prevent tax reform. The artificial price of non-taxable stocks results, however, in an artificial local market, and it is becoming increasingly difficult to sell such stock outside Massachusetts. Further issues of the stock of such public service corporations, moreover, must be issued at prices fixed by state commissions, which will be not far below the current market price, so that the Massachusetts market must finance future developments of transit facilities. Hence, when the new railroad monopoly needed money for big improvements on the Boston & Maine Railroad, which its sponsors had promised in order to secure legislative ratification of their purchase through the device of a holding company, the railroad was obliged to inform the public that to carry out these improvements the savings banks of Massachusetts must furnish the money, and they therefore asked that bonds of the Boston Railroad Holding Company should be made legal investments for savings banks in the expectation that the banks could then be made to invest in these new securities. The savings banks, however, were reluctant to accept this privilege and opposed the legislation with such effect that the railroad changed its plan, and determined to look to the trustees for funds by offering them a non-taxable security. It therefore asked legislation exempting from taxation bonds to be issued by the Holding Company, which bonds should be secured by the stock of the Boston & Maine Railroad Company which is owned by the Holding Company. Before this legislation was put through, however, it was discovered that such an arbitrary exemption would be unconstitutional, and as a last resort the idea of issuing a bond was ostensibly abandoned, and it was proposed that the Holding Company issue preferred stock which, as the Holding Company is a domestic corporation, it was assumed would be non-taxable. But since the preferred shares of an unincorporated public service holding company had been declared by the Supreme Judicial Court an improper investment for trustees,[8] the promoters of this scheme found it necessary to give to their wares added stability and security. This bit of history explains the origin of the legal curiosity which was thereupon authorized and which has since been sold as a non-taxable trust investment.

Chapter 639 of the Acts of 1910 provides that the Boston Railroad Holding Company may issue preferred stock, the holders of which shall be entitled on liquidation or on default in the payment of any stipulated dividend, in preference to all other stock, to the payment of par and accrued dividends, and shall further be entitled to semi-annual cumulative dividends out of the net profits of the corporation not exceeding five per cent. This stock is without voting power, and subject only to the rights of creditors existing at the date it is author-

[8] *Smith* v. *Smith*, reported only in *Banker & Tradesman* of June 27, 1908. It never appeared in the official reporter because the parties settled the case and consented that it be dismissed for want of jurisdiction.

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ized, is a charge and lien upon and secured by all the stock of the Boston & Maine Railroad at any time held by the Boston Railroad Holding Company. There is a provision for retirement of the shares. The right to a judicial sale of the underlying stock of the Boston & Maine Railroad on default in the payment of any dividend is given a majority of the holders of the stock. It is then provided that any railroad corporation owning any of the common stock of the Boston Railroad Holding Company may guarantee the payment of the stipulated dividends thereon and of the par value thereof in case of liquidation or distribution of said Boston Railroad Holding Company, and of any deficiency resulting from a sale under the provisions of the preceding section of the act.

Under the provisions of this statute, stock certificates of the Holding Company bearing the guaranty of the New York, New Haven & Hartford Railroad Company, which owns the common stock in the Holding Company, have been issued in the following form:

This certifies..... is the owner of ..... fully paid shares of the Preferred Capital Stock of the Boston Railroad Holding Company, transferable in person or by attorney upon surrender of this certificate.

The Preferred Shares of Stock represented by this certificate are authorized to be issued by Chapter 639 of the Acts of Massachusetts of the year 1910. The stock represented by this certificate shall be entitled to the privileges and priorities provided for in said act, and shall be subject to the restrictions, qualifications, and limitations therein provided for, and shall be entitled to cumulative semi-annual dividends at the rate of four per centum (4%) per annum, and shall be subject to the further qualification that the company shall have the right at any time to retire and cancel the whole of such preferred stock that may be outstanding upon payment to the holders thereof of interest to date at the said rate of four per centum (4%) per annum and one hundred and ten dollars ($110) per share.

This certificate is not valid until countersigned by the Transfer Agent and the Registrar.

In Witness Whereof, Boston Railroad Holding Company has caused its corporate seal to be hereto affixed to this certificate to be signed by its duly authorized officers this.....

..... *Treasurer.*

Guaranty.

For Value Received, the New York, New Haven & Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts, and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate; and the payment of one hundred dollars ($100) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company, and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter 639 of the Acts of Massachusetts of the year 1910.

The New York, New Haven & Hartford Railroad Company

.....
Treasurer.

.....
Vice-President.

This security of the Holding Company is evidently intended to imitate a bond as far as possible without losing the immunity from taxation afforded to stock. It will be observed that it is deprived of voting power, and is secured by a lien on the assets enforcible by judicial sale on any failure to pay the semi-annual dividend, which lien is subject only to claims of creditors existing at the time of issue of the stock. The only attribute of this security, which resembles corporate stock, is its name. None of its terms would be improper in a bond. The only characteristic of the ordinary bond which it lacks is payment of the principal at a time certain. In fact, its provisions for payment are even more definite than those of the familiar income bonds, which it most nearly resembles. No one

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would doubt that an income bond was taxable in Massachusetts.

Courts have held such securities to be bonds.[4] A similar stock issued by special statute in Massachusetts in the early days of railroad financing, which differed only in the fact that the interest or dividends on it were payable absolutely regardless of profits, was said by our court to make its holders creditors, at least as to dividends.[5]

That the court did not mean to say that they could be both creditors and stockholders by virtue of the same certificates, is shown by the language of the same court in a later case.

"To suppose such a relation (*i.e.*, preferred stockholder's) to be coupled with that of an ordinary contract to pay interest on a debt, and that the same contribution to capital constitutes at once a member and a creditor of the company, would destroy all distinction between capital stock and corporate indebtedness."[6]

"The question in all cases is, are the parties actually stockholders or are they creditors? . . . They cannot occupy both positions of stockholders and creditors," said a New Jersey judge.[7]

It is, of course, possible that a court in dealing with provisions in a stock certificate inconsistent with its nature as stock might prefer to declare these provisions void instead of declaring the entire security a bond. There is a dictum of Judge Lurton that a similar clause postponing subsequent creditors would be void.[8] But since the priority given owners of preferred stock in the Holding Company is conferred by special act of the Legislature, which doubtless had power to authorize the Holding Company to issue mortgage bonds, it would seem more likely that the courts would interpret the security as a contractual obligation, or, in other words, a bond. This was the result in an important Maryland case.

A Maryland statute authorized corporations to issue bonds secured by mortgage, or instead of raising money that way to issue preferred stock to the amount for which it could issue bonds, and execute an agreement under seal guaranteeing to the purchasers of the preferred stock a perpetual six per cent dividend out of the profits of the corporation before any dividend was distributed to any other stockholders. Later an amendment provided that this agreement, under seal, might be recorded, and that the said preferred stock should be a lien on the franchises and property of the corporation and have priority over any subsequently created mortgage, or any encumbrance. A corporation issued preferred stock in accordance with the amended statute. Then debts were contracted. The property was burned and the question related to the distribution of the insurance fund

[4] *Burt* v. *Rattle*, 31 Ohio St. 116, 127; *Savannah Company* v. *Silverberg*, 108 Ga. 281, 286; *Storrow* v. *Texas Assn.*, 87 Fed. 612, 616 (C. C. A. Tex. 1898). Merely calling a thing stock does not make it so, if it is really a loan.

Kidd v. *Puritania Co.*, 122 S. W. 784, 787, 789.

The converse of this was recently decided in the Supreme Court of New Jersey as to "debenture certificates," designed to escape the franchise tax. *Hillson Co.* v. *State Board of Assessors*, 80 At. 929.

[5] *Williams* v. *Parker*, 136 Mass. 204, 207.

See also *American Tube Works* v. *Boston Company*, 139 Mass. 5, 9.

[6] *Williston* v. *Michigan Co.*, 13 Al. 400, 404.

See also *Barrett* v. *King*, 181 Mass. 476, 479.

[7] Holding that a mortgage securing so-called preferred stock did not have priority over subsequent debts (but partly on the ground of lack of statutory authority).

Black v. *Hobart Trust Company*, 64 N. J. Eq. 415, 425.

Acc. Chafee v. *Railroad Co.*, 55 Vt. 110, 129.

[8] "If the purpose in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the capital stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to public policy, and void as to creditors affected thereby." (Preferred stock bearing interest and with lien.)

Hamlin v. *Toledo Company*, 78 Fed. 664, 671.

Acc. Ellsworth v. *Lyons*, 181 Fed. 55, 60 (C. C. A. Mich. 1910).

See *Warren* v. *King*, 108 U. S. 389, 399.

National Salt Company v. *Ingraham*, 122 Fed. 40, 44 (C. C. A. N. Y., 1903.)

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by the receiver. The preferred stockholders claimed priority. The court said:

If this stock is preferred stock, pure and simple, the contention of the creditors is right. The law is perfectly well settled that as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution its assets, entitled to nothing until its creditors are first fully paid. There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. Stock, whether preferred or common, is capital; and generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor who may compete with other creditors in the distribution of the fund arising from a conversion of the corporation's assets into money. He cannot, if he is simply an ordinary preferred stockholder, in the nature of things, so far as third persons are concerned, be at one and the same time and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name. His certificate, therefore, in such circumstances, merely measures the quantum of his ownership. As this chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied. Whether this characteristic may be modified by statute will be considered later on. To be strictly accurate, we ought to say there is a sense in which a shareholder is a creditor. In that sense every corporation includes its capital stock amongst its liabilities, but it is a liability which is postponed to every other liability. And as to the matured and unpaid dividends due on preferred stock, the relation of creditor undoubtedly exists.

But, after all, is this particular stock, technically speaking, ordinary preferred stock, and subject, consequently, to the legal incidents and characteristics of that species of property?

If you call it preferred stock, and it is what you call it, then the law is perfectly clear that it has no priority over the contesting creditors. If you call it preferred stock, and it is *not* preferred stock, then, obviously, it is not governed by the principles applicable to preferred stock, but by those relating to the thing that it really is. The mere naming of it does not make it that which it is named, if, in fact, it is something else. Its properties and qualities determine what it is. If the statute calls it what its properties and qualities show that it is not, surely it does not thereby become that which it is misnamed, and cease to be what it essentially is. Calling stock preferred stock does not *per se* define the rights in such stock, but these depend on the statute or contract under which it was issued. *Elkins* v. *Cam. & A. R. Co.*, 36 N. J. Eq. 233. As said by the Supreme Court of Ohio: To call a thing a wrong name does not change its nature. A mortgage creditor, although denominated a preferred stockholder, is a mortgage creditor nevertheless; and interest is not changed into a dividend by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the Court to correct such self-evident misnomers by supplying the proper words. To use the language of the Court in *Corcoran* v. *Powers*, 6 Ohio St. 19. "The question in such cases is, not what did the parties call it, but what do the facts and circumstances require the Court to call it." *Burt* v. *Rattle*, 31 Ohio St. 116. Courts are not influenced by mere names. They look beyond these and give to the subject dealt with the character — the *status* — which its properties denote it possesses. The qualities and properties of a thing are its essentials — they define and mark *what* it is — the name is purely accidental — it is no part of the thing named. If, then, the thing which the statute contemplates possesses the characteristics and qualities of preferred stock — *and possesses none other* — it *is* preferred stock; but if, on the other hand, it possesses characteristics and qualities that are entirely foreign to preferred stock as strictly defined, and that are descriptive of something else, then the thing is obviously either not ordinary preferred stock, or not preferred stock at all, even though it be called preferred stock, and have in addition to its own qualities some of the characteristics that do pertain to preferred stock. Precisely because preferred stock has no lien on the company's property and cannot be repaid in advance of general creditors, it is necessarily true that a security which is, by express and emphatic legislative enactment, entitled to just such a lien and just such priority, is *not* preferred stock technically speaking, though called by that name and

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though having many features incident to preferred stock. The whole ingenious and exceedingly able argument for the appellants proceeded upon the assumption that this is ordinary preferred stock, because called preferred stock, and because it possesses the incidents of such stock (but it ignored the fact that it has a quality which preferred stock has not), and the conclusion thence deduced was, that being that kind of stock it has no preferential lien. Now, the converse is exactly true. If the statute plainly gives a lien and a preference, then the so-called preferred stock is not ordinary preferred stock at all, no matter what it is called and no matter what incidents it may have in common with preferred stock, and therefore it has not that particular characteristic which, if it were ordinary preferred stock, would defer it to the claims of unsecured creditors. Brushing aside the name, let us see what are the essential qualities of this statutory creation.

The earlier statute created what is properly preferred stock, but the amendment giving the shareholder a lien altered the nature of the preferred stock and made it something that it had not been under the earlier statute. Preferred stockholders may be given a lien, but in that case it cannot be distinguished from an income bond (citing cases). It is unnecessary to say that giving a lien was void because a lien was inconsistent with the properties and qualities of stock. There is neither a physical nor legal impossibility in the way. The substance of the thing was changed. The name was retained. None of the cases cited in opposition arose under statutes like this.

The court, therefore, held that the provision for a lien was valid and the stock properly issued but, further held that the lien was not applicable to the insurance fund.[9]

If it were merely a question of nomenclature the Massachusetts court might properly hesitate to criticize the description of the Legislature, but there is involved a question of the constitutional right to exempt from taxation. The justification given by the Massachusetts court for the exemption from taxation of stock in domestic corporations is based on the conception that their right is proprietary and not an obligation.

[9] *Heller* v. *Marine Bank*, 89 Md. 602, 610, 611, 612.

"If a reasonable excise tax is lawfully imposed upon a corporation, according to the amount of its property or business, it is in the power of the Legislature, for the purpose of avoiding double taxation, to exempt its property held and used in the business for which the excise tax is paid, and to exempt the stockholders or owners of the beneficial interest in this property from liability to a property tax upon it."[10]

As there is no express exemption from taxation in the charter of the Holding Company,[11] its privilege depends on the general exemption of domestic stock referred to in the above quotation.[12] There is, therefore, much ground for contending that the Courts should declare this so-called stock a bond for the purposes of state taxation.

But even if the principal security here is properly called "preferred stock," what is the nature of the so-called guaranty of the New Haven Railroad annexed to it? A guaranty is, so to speak, a triangular obligation. It is usually an obligation dependent upon and referring to another obligation, and identical in scope with it; that is, it is a conditional agreement to pay or perform the obligation of another. Is the right of a preferred stockholder the result of a contractual obligation of the corporation and if so is it as extensive as the obligation of the so-called guaranty in this case? The essential nature of stock in a corporation, as distin-

[10] Opinion of the Justices, 195 Mass. 607, 661.

[11] Chap. 519 of Acts of 1909.

[12] An amusing complication arises here. The exemption, as has been seen, is based on the fact that the corporation pays the state a franchise tax. The Boston Railroad Holding Company, not being a railroad company, is liable to a franchise tax as a "domestic business corporation" under Sec. 43 of Part III of Chapter 490 of the Acts of 1909 upon the value of its corporate franchise. This is ascertained under Section 41 by making certain deductions from the market value of the shares of domestic corporations. One of these deductions is the value of "securities which, if owned by a natural person resident in this commonwealth, would not be liable to taxation." As all the assets of the Holding Company consist of shares in the Boston & Maine Railroad Company which are tax exempt, the Holding Company in fact pays no franchise tax whatever.

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guished from its bonds, is that stock is not an obligation, but a proprietary interest in the assets of the company which issues it. "A share of stock represents a fraction of all the rights and duties of the stockholders composing the corporation."[13] A bond is an obligation.

The exact nature of preferred stock has not been carefully worked out by the courts. Indeed there is a surprising lack of clearness in the definitions of the nature of stock in general. When courts have considered the question, however, they seem to have agreed that ownership of stock is essentially a proprietary interest of some sort in the assets of the corporation, to which perhaps should be added, as a distinct characteristic, certain personal rights incidental to membership in an association.[14]

It is true, of course, that a contract may be implied from the acceptance by a grantee of a document of title containing an express contract running from the grantee to grantor, as in the case of a mortgage. It is possible likewise to imply from the delivery and acceptance of a stock certificate, containing limitations on or additions to the ordinary rights of a stockholder, a contractual obligation embodying what might otherwise be regarded as a proprietary right incidental to the ownership of the stock.[15] Such doctrine, however, is unnecessary, because the same result can be reached by defining the stockholder's rights in terms of property. Since, in any event, most of the stockholder's rights must be defined in terms of property, it is simply confusing to try to work out limitations on the obligations of ownership by describing them in terms of contract. Thus, while many courts have enforced the rights of preferred stockholders on the theory that they are founded in contract,[16] and other respectable judges even described the rights of all stockholders as contractual,[17] these all occurred in cases where the same result would have been reached on the principle that the stockholder's rights are proprietary and incident to ownership. In cases where it was important to decide whether a stockholder was *ipso facto* a creditor,

[13] Lowell, Transfer of Stocks, Sec. 40.

[14] "The rights of the stockholder evidenced by the certificate are all comprised in two classes: First, the personal rights inherent in a stockholder as member of the corporation, being the right to attend meetings, vote, and the like, including all personal rights as member: and second the property rights which are the rights to share in the dividends of the corporation and in the distribution of its assets. These rights, with those conferred by law as incidental solely to their protection, comprise, I think, all the rights of the stockholder and the certificate of stock is as between the stockholder and the company and all its other shareholders, the evidence of this membership and right to share in the property and assets."

Bijur v. *Standard Co.*, 70 At. 934, 938, 939. (N. J., 1908.) See *Kain* v. *Angle*, 69 S.E. 355 (Va.).

[15] Subscription for stock has been held to be an acceptance of an offer of the corporation, in its by-laws, to redeem the stock on demand. But Shaw, C.J., carefully explained that the contract "arose out of the defendant's vote and the plaintiff's subscription. The certificate issued under the seal of the president and clerk was not the contract, but merely established or evidenced the relation of the plaintiff as a stockholder."

Davis v. *Congregational Meeting House*, 8 Met. 321, 326.

An obligation on the holder printed on his certificate requiring his estate on his decease to sell his shares to the corporation at an appraisal, by reason of his acceptance of the certificate, implies a contract of the holder to do this.

N. E. Trust Company v. *Abbott*, 162 Mass. 148, 151.

[16] An amendment to a charter reducing preferred dividend was said to impair the obligation of contract. The difficulties the court found in applying this theory, in the face of the express power of amendment reserved by general law, could have been avoided by treating the right to the dividend as a vested property right.

Pronick v. *Spirits Distributing Co.*, 58 N. J. Eq. 97, 100.

In another case the two theories were stated in the alternative.

Roberts v. *Roberts Wicks Co.* 184 N. Y. 257, 264.

[17] "The relation of a stockholder to his corporation, to its officers and to his co-stockholders is one of contract and confidence." Sanborn, J., in *Jones* v. *Missouri Company*, 144 Fed. 765, 770 (C. C. A. Mo., 1906.)

See *Clearwater* v. *Meredith*, 1 Wall. 25, 45.

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courts have uniformly insisted that there is an essential distinction between proprietary duties and contractual obligations, and that it is important to preserve this in defining the rights of stockholders.[18]

Preferred stock, it is submitted, confers upon the holder rights differing only in degree, but not in nature, from the rights conferred by ownership of common stock. These rights of the holder, though implying certain duties on the part of the corporation, should not properly be regarded as the complement of an obligation of the corporation, in the sense of which that term is ordinarily used, any more than the duties of a trustee toward his beneficiary should be described as contractual. The Massachusetts court has been more careful than those of most other states to preserve this essential distinction.[19]

But, in any event, whether stock ownership involves a contractual obligation or not, it has never been contended that it does not involve a proprietary interest, and most of the rights of stockholders must be proprietary in nature. Any contractual obligation, therefore, is distinct from and additional to this proprietary right. And while, as has been previously shown, it is only the proprietary right which is exempt from taxation, the contractual obligation is the only one which can be guaranteed. Moreover, the guaranty in this case is necessarily greater in scope than the stock obligation, and therefore is an independent obligation and not properly a guaranty, and therefore is taxable.[20] The Holding Company is not bound to pay dividends in all events, but to pay them if earned. The holder of the certificate has no right to bring an action at law against the corporation for failure to pay dividends, even if he claims they were earned,[21] though injunctions have been issued to prevent the payment of dividends on common shares until accrued preferred dividends were paid.[22] When earnings properly applicable to preferred dividends have been withheld, some Courts have granted relief on the theory of specific performance of an implied collateral agreement,[23] but generally the amount of working capital to be kept on hand is left to the discretion of the directors if they act in good faith toward the preferred shareholders.[24]

If the right of the preferred shareholder is a proprietary interest and not an obligation, or if his contract is not enforcible,[25] or if the obligation of the so-called "guarantor" is greater in extent than that of the Holding Company,[26] then the obligation of the New Haven Railroad is not properly a guaranty. In determining that a defendant's agreement to indemnify one who had loaned money to his minor son was not a guaranty within the statute of frauds, Shaw,

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[18] *Chaffee* v. *Railroad*, 65 Vt. 110, 129.
State v. *Thompson*, 16 S. C. 524, 528.
Grover v. *Cavanaugh*, 40 Ind. App. 340, 346.
Hamblack v. *Clipper Co.*, 148 Ill. App. 618, 621.

[19] *Williston* v. *Michigan Company*, *supra*.
"Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. . . . We perceive no difficulty in the case, except the somewhat academic question whether the by-law accepted by Holmes when he accepted the certificate operates only by way of contract, and should be pledged as such, or whether it affects the character of the property itself as we have suggested."
Barrett v. *King*, 181 Mass. 476, 479.

[20] *Thayer* v. *Wild*, 107 Mass. 449, 452.

[21] *Field* v. *Lamson & Goodnow Co.*, 162 Mass. 388, 396.

[22] *Boardman* v. *Railroad*, 84 N. Y. 157, 173.

[23] *Hazelton* v. *R. R.*, 79 Me. 411, 416.
And in one case an action at law was allowed.
Bates v. *Androscoggin Co.*, 49 Me. 491, 504.

[24] *Field* v. *Lamson & Goodnow Co.*, 162 Mass. 388, 396.
N. Y., etc., R. R. v. *Nickals*, 119 U. S. 296, 304.
Belfast Company v. *Belfast*, 77 Me. 445, 54.

[25] *Chapin* v. *Latham*, 20 Pick. 467, 471.
See also *Stratton* v. *Hill*, 134 Mass. 27, 30.
See *Merritt* v. *Hass*, 129 N. W. 379 (Minn.)

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C. J., said, "The son of the defendant was a minor and not liable to any action by the plaintiff for the money paid on his account on a joint and several note signed by the plaintiff in pursuance of the defendant's request. The undertaking and promise of the defendant, therefore, was not collateral to any promise of the son, but was separate, independent and original."[25]

Similarly the so-called guaranty of the Railroad Company is an independent obligation which happens to be on the same paper on which the stock certificate is printed, and incorporates by reference some of the terms of that certificate. In other words, it is a bond of the Railroad Company. The fact that this obligation of the Railroad Company is conditional, or contingent, does not properly exclude it from the class of obligations known as railroad bonds. A familiar class of conditional railroad bonds sometimes used in a reorganization to replace former fixed charges is the income bond.[26] Indeed, the so-called stock certificate of the Holding Company, as has been previously noted, is a good example of the typical income bond. In the only case that has been found of a guaranty by one corporation of dividends of another the Court said: —

"But as bearing on the question whether these prior negotiations can be resorted to for the purpose of controlling the contract in the present case, it is proper further to add that the Standard Company, although referred to a guarantor, in this one feature of the plan of adjustment, the endorsement of the certificates really occupied the position of an independent contractor, when the entire scope of the negotiation is considered."[27]

A contract that stock purchased would be worth par in three years was said to be not a guaranty but an independent contract,[28] and likewise a "guaranty" of dividends.[29] Such contracts have been held not guarantees within the statute of frauds.[30]

Chapter 490 of the Acts of 1909 is the most recent codification of the tax laws of Massachusetts. Section 2 of Part 1 provides that all property, real and personal, situated with the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation. Section 4 provides that "Personal estate for the purpose of taxation shall include . . .third, public stocks and securities . . . bonds of railroads and street railways . . .," etc.

It will be seen, therefore, that the evident purpose of the framers of this legislation was to issue a bond which should be non-taxable. They have issued two securities in one document. One of these, though called stock, is deprived of the essential features of stock, and has conferred upon it the most essential features of a bond. The other obligation bears all the ear marks of a railroad bond, and is, in fact, the most important part of the document.

[25] See *ante*, note 25.

[26] Examples of these are the second mortgage bonds of the New York, Philadelphia & Norfolk Railroad Company (part of the Pennsylvania system), and the Kansas City, Memphis & Birmingham 5's.

[27] A parent company guaranteed dividends on preferred stock of a subsidiary company as part of a purchase price. The parent company through ownership of a majority of the stock of the subsidiary company dissolved it and thus sought to wipe out its liability on the guaranty. The issue was whether extrinsic evidence could be admitted to explain the so-called guaranty.

Bijur v. *Standard Co.*, 70 At. 934, 938 (N. Y., 1908).

See also to the same effect a decision relating to the same guaranty.

Windmuller v. *Standard Co.*, 94 N. Y. S. 52, affd. 186 N. Y. 572.

The so-called guaranty in *Roich* v. *French*, 176 Mass., was not endorsed on the certificate and no claim was made that it was not an independent contract.

[28] *Hill* v. *Smith*, 21 How. 283, 286.

[29] *Kernochan* v. *Murray*, 111 N. Y. 306, 309.

[30] *Moorhouse* v. *Crangle*, 36 Ohio St. 130, 133.
Green v. *Brookins*, 23 Mich. 74.
Kilbride v. *Moss* 113 Cal. 432, 435.

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If there is a contract obligation of the Holding Company, it is collateral to and independent of the proprietary interest of the holder of the stock. It is the proprietary interest and not the contract right that is exempt from taxation. If there is only the proprietary interest, there is nothing to guaranty, and the obligation of the railroad is independent. Even if there is a non-taxable obligation of the Holding Company it is less in scope than the agreement of indemnity, and so that is not a guaranty, but an independent obligation to pay money. As such it is taxable in Massachusetts.

These considerations merely illustrate the uncertainties which are inevitable in the highly artificial forms which simple business operations are forced to assume under the existing system of taxation in Massachusetts.

The Policy of Compulsory Competition

THE past month has witnessed a great amount of discussion of the Sherman Anti-trust Act, in terms for the most part distinctly unsympathetic with the Administration. Never before has the question been more widely discussed from the standpoint of the business man rather than of the consumer or politician. The remarks of speakers before the Senate Committee on Interstate and Foreign Commerce, before the Academy of Political Science of New York, and before the New York Economic Club, plainly show that public sentiment has already begun to move in a new direction.

Mr. Roosevelt wrote an article in the *Outlook* of November 18, in which President Taft's name was not once mentioned, and in which he appeared to be mainly advocating the regulation of trusts by a commission, but the article was immediately construed throughout the country as an attack upon the Taft-Wickersham policy of administering the Sherman act. Mr. Roosevelt said:

"The position now taken by the Government is absolutely destructive of legitimate business, because they outline no rule of conduct for business of any magnitude. It is absurd to say that the courts can lay down such rules. The most the courts can do is to find as legal or illegal the particular transactions brought before them. Hence, after years of tedious litigation, there would be no clear-cut rule for future action. This method of procedure is dealing with the device, not the result, and drives business to the elaboration of clever devices, each of which must be tested in the courts. . . .

"The effort to restore competition as it was sixty years ago, and to trust for justice solely to this proposed restoration of competition, is just as foolish as if we should go back to the flintlocks of Washington's Continentals, as a substitute for modern weapons of precision. The effort to prohibit all combinations, good or bad, is bound to fail, and ought to fail; when made, it merely means that some of the worst combinations are not checked and that honest business is checked. Our purpose should be, not to strangle business as an incident of strangling combinations, but to regulate big corporations in thoroughgoing and effective fashion, so as to help legitimate business as an inci-

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dent to thoroughly and completely safeguarding the interests of the people as a whole. . . .

"This nation should definitely adopt the policy of attacking, not the mere fact of combination, but the evils and wrongdoing which so frequently accompany combination. The fact that a combination is very big is ample reason for exercising a close and jealous supervision over it, because its size renders it potent for mischief; but it should not be punished unless it actually does the mischief; it should merely be so supervised and controlled as to guarantee us, the people, against its doing mischief. We should not strive for a policy of unregulated competition and of the destruction of all big corporations, that is, of all the most efficient business industries in the land. Nor should we persevere in the hopeless experiment of trying to regulate these industries by means only of lawsuits, each lasting several years, and of uncertain result. We should enter upon a course of supervision, control, and regulation of these great corporations — a regulation which we should not fear, if necessary, to bring to the point of control of monopoly prices, just as in exceptional cases railway rates are now regulated."

Mr. Roosevelt suggested that the first and most elementary kind of a square deal to give the man engaged in big business, who honestly desires to do right, is to give him in advance full information as to just what he can, and what he cannot legally and properly do. The present uncertainty of the law has had a paralyzing and demoralizing effect upon business.

William Jennings Bryan, in a newspaper interview granted before his departure for Jamaica, dissented from Colonel Roosevelt's plan for the regulation of trusts by a commission. Such a commission, he said, rested on a dangerous theory — that competition is impossible in large business enterprises. This is the socialistic theory, he said. "The Democratic position, as I understand it, is that competition is not only desirable, but essential. The Democratic plan is to limit the percentage of control so as to secure competition. I need hardly add that I favor the Democratic platform in this respect. I believe that the limit should be set so that corporations should not control more than fifty per cent of their power."

In an article published in the *New York Times*, Colonel Bryan said further:

"Federal regulation is not a complete remedy. The influence exerted by monopolies is so great that the people would be in a constant battle with the great corporations to see which would elect officials through whom control would be exercised; and no one who has watched these decisions can fail to recognize the helplessness of the masses when they have to fight a vigilant, sleepless group of financiers who have a large pecuniary stake in controlling the government.

"The larger the control vested in the national commission or court the more important it would be for the trusts to control the selection of the members. If the court was intrusted with the fixing of prices it would mean hundreds of millions a year to the trusts."

This is unconvincing and in a characteristic vein of invective against wealth, whatever form it may assume. More weighty views have been expressed in a timely series of articles in the *New York Times* written by a number of leading business men. The significant thing about these articles is their sincerity and breadth of view; they are written, not to advance any special inter-

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est, but to help in the wise solution of a problem of equal concern to the entire community.

The writers are almost unanimous in recognizing that the era of unrestricted competition has passed. Some of them denounce the Sherman law in uncompromising terms, and those who do not attack it complain of the evil of its vagueness and negativity. There are signs of a strong sentiment in favor of administrative control by the federal Government as the most desirable means of dealing with the problem. The plan of regulation by a commission, favored by Judge Gary, Colonel Roosevelt, and others, thus seems to have been received with more sympathy than was looked for from a considerable part of the business community.

Of these writers, one group looks upon the Sherman act as an unmitigated evil and danger, in need of repeal or radical amendment. Thus Charles G. Dawes, president of the Central Trust Company of St. Louis, speaks of "the inefficiency and inutility" of the law, and the need of business men turning their thoughts to "legislation which will be forward and not backward"; E. C. Simmons, president of the Simmons Hardware Company of St. Louis, thinks the Sherman law "the worst and most dangerous business legislation that has ever been put into the United States statutes," and that it should make way at once for a law so plain that everybody can understand it; and William L. Douglas, the Massachusetts shoe manufacturer, "does not believe we have any use for the Sherman law," which has been "a menace to business ever since prosecutions under it were begun."

In place of the Sherman act, Mr. Dawes would like regulation by an unofficial tribunal of business men, which would pass on the relation to the public interest of proposed agreements in restraint of trade, from the decision of which tribunal there shall be a right of appeal to the courts in regard to the reasonableness or unreasonableness of such an agreement. Mr. Douglas would establish a system of federal licensing of interstate business, the law requiring all capital to be paid up in full, and providing for a system of visitation and examination of corporations similar to that existing under the national bank act.

To this group also belongs Henry L. Higginson, the eminent Boston banker. He declares that the Sherman act "is not now being interpreted in the sense which Senators Edmunds and Hoar, who wrote it, meant that it should be." He thinks that the law has been spoiled by a destructive interpretation, and that Congress should busy itself by formulating a constructive statute. "Combinations are essential." He thinks that business might well be regulated by a commerce court or commission. "As our country is constituted a monopoly hardly exists; if it does exist the common law will take care of it, and we need no Sherman law for such purpose."

Another group of these business men considers the Sherman act harmless in so far as it may be possible to overcome its mischief by judicial construction, slight amendments, or a change in administrative methods. Charles Nagel, Secretary of Commerce and Labor, considers that "we are trying to regulate creative work under a purely negative statute," and he would provide a supplement to it in the form of a broad, constructive measure. Theodore P. Shonts, president of the Interborough-Metropolitan Railway Company of New York, believes that "the statute as now

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construed opposes a nation-wide principle of economic development," and that if business is to be adjusted to an artificial legislative program. Such a process should not be hurried, and "the change should be effected through the prudent co-operation of the Government, rather than at the point of court decrees." John H. Hanan, president of the National Boot and Shoe Manufacturers' Association, says that "it is just as impossible to resolve the present business and economic conditions into the independent entities which existed one hundred years ago as it is to resolve our present civilization into the barbarous elements of the barbarous past." While he declares that neither the Sherman law nor its interpretation attains perfection, he does not suggest any specific remedy apart from a more liberal interpretation of the law.

Secretary Nagel, however, proposes a more definite remedy, in the form of a supplemental statute for federal incorporation, showing "under what conditions and for what stated purposes a commercial company may organize for interstate and foreign business. Such a measure (particularly if it provides machinery to determine how and when existing companies may avail of it) would, in my judgment, eliminate much of the confusion which now exists with respect to our commercial combinations." Levy Mayer, general counsel for the Illinois Manufacturers' Association, who also favors voluntary federal incorporation, is more specific in his suggestions. He would remove every federal corporation from subjection to the anti-trust law, but would subject it to visitation and examination as under the national bank act, and would require it to pay into the United States Treasury one fourth of its net profits, as the price of its immunity from the harrassing provisions of the Sherman law.

If not one article of the series to which we have just referred is of great intrinsic value, as regards its recommendations of specific remedies, nevertheless the papers collectively considered give weighty embodiment to a shrewd judgment which deserves the most respectful attention. That judgment is, so far as a composite can be made of divergent opinions, that the Sherman act, as construed by the Administration (and as construed by the Supreme Court if the Administration is correct in its views, which we greatly doubt), is a mischievous interference with necessary conditions of economic development. The judgment is that the law must be liberalized, whether by judicial construction, by amendment, or by repeal, and that in the event of the liberalized law failing to show plainly the rights of organized business and to guide great corporations in their conduct, they must be assisted to know exactly where they stand by some efficient method of administrative supervision. The method may or may not be that of federal incorporation.

An interesting contribution to this discussion has been made by Frank D. Pavey of New York City. He would amend the Sherman act to provide that:

"(*a*) All organizations, associations, combinations, and agreements, the purpose and effect of which are to increase the wages and improve the terms and conditions of employment of labor, are lawful unless they violate rights of life, liberty, or property.

"(*b*) All organizations, associations, combinations, and agreements, the purpose and effect of which are to regulate competition, improve the conditions of business, and increase the profits of capital, are lawful unless they injure trade or commerce, create a monopoly, or violate rights of liberty or property.

"(*c*) Violations of the law on the subject shall be punished by penalties imposed upon the persons responsible for the violations of the law,

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and not by injury to business, destruction or investments or confiscation of property.

"(*d*) Jurisdiction for the administration and enforcement of the law on this subject shall be conferred on the courts of the United States and upon such executive officers or industrial commissions as Congress may from time to time designate or establish."

Judge Peter S. Grosscup has already made known his dissent from the policy of enforced free competition. He again takes a hand in the discussion, going so far as to say that—

"The Sherman law which is the one concrete act that up to now has dealt with the 'Trusts' I believe has run its course and we must now try the issue in the court of public opinion." Judge Grosscup would regulate the profits of corporations, not by the interference of government officials in their affairs, as in Germany, but by curtailing their dividends to a just return on their investment. He would subject interstate corporations to national regulation in the same way as interstate railways.

The Recall

By Dan C. Rule, Jr.

THE *Greenville Blade* was edited by one Augustus Shaw,
A seer in things political whom Greenville held in awe,
To Congress thrice Augustus went, thrice Democrats elate
To victory by him were led, until, we grieve to state,
J. Freeman edited *The Call*, likewise in Greenville town,
Of which the only purpose was to throw Augustus down.
So Shaw in "caps" did Freeman curse, and Freeman muckraked Shaw,
But when the former went too far the latter went to law.
For damages did Freeman sue, and when the case was tried
The District's voters solid were arrayed on either side.

At last to give the jury's charge old Justice Bray arose,
And twice His Honor cleared his throat and once he blew his nose,
For well he knew that either way stern Justice' sword should fall,
The losing faction loud would urge the Judge's prompt recall.
Said he: "In this important case there's no opinion that
Will meet the approbation of the proletariat;
But summing up the evidence, I find, when all is done,
The question for the jury is, Who'll go to Washington?
Since judges by the crowd are judged, it is my firm design
To quit my own judicial job and try a different line.
A Congressman a man of worth and honesty should be,
Freeman and Shaw alike are rogues, but what is wrong with me?"

Ex-Justice Bray's in Congress now, and grows exceeding merry
When some one mentions the recall of the Judiciary.

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Reviews of Books

STREET'S CIVIL LIABILITY FOR PERSONAL INJURIES

The Law of Civil Liability for Personal Injuries by Negligence in Texas. By Robert G. Street, District Judge, Galveston, Texas. T. H. Flood & Company, Chicago. ($6, *net.*)

HERE is a valuable book on an interesting subject. Comprehensive in its scope and well planned in execution, the Texas lawyer will find it eminently suited to his needs, enabling him by fullness of citation and lucidity of diction to follow any desired line of inquiry presented in the most practical branch of the lawyer's daily work. As was to have been desired and to a certain extent anticipated, especial attention has been paid to recent statutes and to the case law attaching to the negligent infliction of personal injuries by steam railroads and street railways. The rights of passengers and of the public generally as related to these powerful and perilous conveniences of modern life are carefully covered. Taken all in all, the book seems certain to win its place.

A unique feature of Judge Street's work is rich in suggestion. The scholarly turn of the author's mind reveals itself in a characteristically broad statement of principle as preliminary to discussing individual cases. Occasionally these fundamentals seem too general in their nature to be specifically useful either to the lawyer or the jurist, the student or the practitioner. More often, however, the principle stated not only illustrates but is, to a certain extent, formative as well. In other words, it is not only fairly to be distilled, inductively reasoned, from the cases decided by the court. When stated it tends also to establish a norm to be applied to a large number of similar states of fact, constitutes a nucleus around which a systematic and symmetrical body of rules may be later developed and arranged.

This is constructive work of a high order of merit. It goes beyond the ambitions of the text-writer tabulating the things which a hurried and overburdened court has let fall. It enters the field of the jurist. Certainly in the American law of to-day there is urgent need for such efforts at scientific coördination and growth. Induction has wrought gloriously the development of law. Undeniably, the "case system" whether in professional education or as a means of legal evolution has perpetual merits. Yet the enormous bulk of reported cases, the multiplying and equalization of jurisdictions, the insufficient leisure afforded court or counsel for the time-consuming process of digesting the mental pabulum essential for the inductive system, is placing a pressure upon the latter which it is standing badly. The strain is one which seems likely to intensify, rather than relax.

In seeking relief, some substantial modification is essential. Apparently it lies in turning toward the deductive method of judicial administration. In sound reasoning, induction and deduction are seen to alternate for the best results. May it not be that the time is approaching, if not already here, when a more fitting importance may be given the process of deduction? A principle or rule broad enough to guide, not so

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specific as to cramp, could be authoritatively announced. Cases as they arise might then be treated as illustrations of the appropriate principle but themselves denied force as precedents. Thus regarded, simply as aiding and suggesting the formation of a sharper and clearer defining of the rule or principle, specific cases might well be of use. At present they confuse and bewilder. In the absence of that great desideratum, some statement of the law which could speak with authority, the building of a code of laws of increasing usefulness, because of greater certainty and clearness, would be the proper work of statutory revision. Such a codification, however, would plainly not be that of the irresponsible and ill-trained political legislator, but of the responsible and purposeful judiciary. The proper performance of a public duty so momentous in its consequences to a complex civilization may appropriately be claimed by the legal profession. To this it should consecrate itself in the highest spirit of social service. It is therefore no small part of the merit of Judge Street's excellent work that it, in some sort, points the way to this high end.

STEDMAN'S MEDICAL DICTIONARY

A Practical Medical Dictionary; of words used in medicine, with their derivation and pronunciation, including dental, veterinary, chemical, botanical, electrical, life insurance and other special terms; anatomical tables of the titles in general use, and those sanctioned by the Basle Anatomical Convention; pharmaceutical preparations, official in the U. S. and British Pharmacopoeias and contained in the National Formulary; chemical and therapeutic information as to mineral springs of America and Europe, and comprehensive lists of synonyms. By Thomas Lathrop Stedman, A.M., M.D., Editor of "Twentieth Century Practice of Medicine" and of the *Medical Record*. William Wood & Co., New York. Pp. 988 + 10 (appendix). (Thumb-indexed, $5; plain, $4.50.)

THE high professional standing of the author of this medical dictionary, the reputation of his publishers, the noticeably complete and scholarly plan of the book, and its dignified and attractive form, justify us in recommending this work as a reliable one for the use of those outside the medical profession who recognize the growing necessity of a layman's knowing something about a science constantly being broadened by current investigation.

We are pleased to see that the author has done what he can to discourage the use of those hideous Greco-Latin macaronic terms which have fastened themselves on the nomenclature of medical science, and that he would substitute, for example, "oothectomy" for "ovariotomy." The recent Basle Anatomical Nomenclature is adopted, and if, as we believe, one of the functions of the technical lexicographer should be to standardize a terminology, Dr. Stedman seems to have produced in this respect a model of scholarly thoroughness and scientific precision.

The work is entirely new and up-to-date, and its utility to medico-legal practitioners and criminologists is apparent at a glance.

PARISIAN WOMEN LAWYERS

Love *vs.* Law. By Colette Yver. Translated by Mrs. Bradley Gilman. G. P. Putnam's Sons, New York. Pp. 401. ($1.35 *net.*)

IN a novel of real worth, written with seriousness of purpose, a French authoress, known in private life as Mme. Hazard, deals with the marriage of a gifted woman barrister to a leader of the Paris bar, and with the fortunes of an imaginary group of women lawyers who have their counterpart in some actual personages in the Palais de Justice. The novel is interesting as a study of the influence of the feminist movement on domestic life, and also as a portrayal of various types, all rather attractive, of the French woman barrister.

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To how great an extent Mme. Hazard has idealized her characters we have no means of knowing. They have a delicate feminine charm which we Americans do not associate with women who venture to compete with men in the masculine professions. This charm may largely come from a Parisian elegance and refinement that we would not expect to find paralleled in other countries. These women advocates, moreover, have an air of dignity and authority which imply the bestowal of a well-deserved masculine respect for the skill with which they have mastered their profession — a respect which for obvious reasons is not elsewhere accorded. If the characters are idealized, the author has nevertheless drawn a charming picture of the women lawyers of a perhaps not distant future.

There will be some dispute whether feminism is vindicated by such a book. These women are evidently attracted to criminal more than to civil practice, and a maternal interest in their unfortunate clients makes them sometimes too willing to defend an unjust cause. They have great intelligence, yet reveal that the legal intellect is rare among women; they have fine consciences, yet show that the legal conscience which exalts the community above the individual is scarcely a feminine attribute. The equality of these women lawyers with their masculine associates is by no means proved.

The heroine, Henriette Marcadieu, daughter of the president of the bar, marries the barrister André Vélines with a resolution to pursue the profession of the law independently of her husband. She soon achieves greater success than he, with the result that he grows intensely jealous, and accuses his wife of caring less for him than for her profession. In other respects high-minded and thoroughly admirable, Vélines has one serious moral defect, a proneness to jealousy under conditions which would induce in a stronger man merely a feeling of shame that his marriage should be made ridiculous by his wife's conduct. The breach widens, and in so far as this is a "problem novel," the problem is that of the relation of the feminist movement to the maintenance of the family. The author's solution is a sane one; the heroine sees her mistake and becomes thenceforth the companion and assistant of her husband, who achieves the leadership of the bar.

The characters, limned with a vividness which dwells, womanlike, on externals more than on the complexities of psychology, are portrayed with a delicacy of sympathy which seems to know little of the harsher realities of a rough world. The picture of Maître Fabrezan, that honored leader, is particularly fine. The conversations of lawyers with their clients are described in a manner which throws much light on the practice of the law in France, and give more than an ephemeral interest to a well-written story.

A SCRIPTURAL ANTHOLOGY

Christ's Christianity: being the precepts and doctrines recorded in Matthew, Mark, Luke, and John, as taught by Jesus Christ, analyzed and arranged according to subjects. By Albert H. Walker, of the New York bar. Equity Press, New York. Pp. 161 + 11 (indices). ($1.)

THE compiler of this work evidently believes in the literal inspiration of the four Gospels, otherwise he would not have taken such pains to assemble the recorded sayings of Jesus under particular sub-headings, with no notes save citations of chapter and verse, and no attempt to suggest the historical

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basis of the Synoptic accounts. He properly observes, however, that "the great literary merits of the sayings and speeches of Jesus are not fully apparent in the four Gospels, because many of his shorter sayings are scattered among many miscellaneous statements of the writers of the Gospels themselves, and because no one of the Gospels contains the whole of any of his longer and more elaborate speeches." The book will be prized by many for its grouping of these disconnected sayings, so that they can be read in logical order, and as the author is content to take the text of the Revised Version without adding anything of his own, readers will have no occasion for experiencing any sense of loss by substitution.

BOOKS RECEIVED

The Law of the Employment of Labor. By Lindley D. Clark, LL.M. Macmillan Company, New York. Pp. 340 + 33. ($1.60 *net.*)

The Law of Contracts. By Clarence D. Ashley, Professor of Law and Dean of the Faculty of Law in New York University. Little, Brown & Co., Boston. Pp. 292 + 18 (index). ($3 *net.*)

Control of the Market; a legal solution of the trust problem. By Bruce Wyman, A.M., LL.B., Professor of Law in Harvard University and Lecturer in the Department of Economics. Moffat, Yard & Co., New York. Pp. 277 + 5 (table of cases discussed). ($1.50 *net.*)

The Corporate Nature of English Sovereignty; a dissertation. By W. W. Lucas, B.A., of Trinity Hall, Cambridge, and of the Inner Temple, Barrister-at-Law. Submitted to and accepted by the University of Cambridge as a work of original research for the degree of Bachelor of Arts. Jordan & Sons, Ltd., London, W.C. (2*s.* 6*d. net.*) Pp. 91.

Social Reform and the Constitution. The Kennedy Lectures for 1911, in the School of Philanthropy, conducted by the Charity Organization of the City of New York and affiliated with Columbia University. By Frank J. Goodnow, LL.D., Eaton Professor of Administrative Law at Columbia University. American Social Progress Series. Macmillan Company, New York. Pp. 359 + 6 (index). ($1.50 *net.*)

Commentary on the Science of Organization and Business Development; a treatise on the law and science of the promotion, organization, reorganization, and management of business corporations, with special reference to approved plans and procedure for the financing of modern business enterprises. By Robert J. Frank, LL.B., of the Chicago bar. Third edition. Chicago Commercial Publishing Co., Chicago. Pp. 184 + appendix 81 and index 15.

A Treatise on the Federal Corporation Tax Law, including therein a commentary on the tax itself, an appendix containing the text of the Act, all rules and regulations of the Treasury Department relating in any way to the Act; text of all laws relating to the collection, remission, and refund of internal revenue; text applicable to the administration of the federal Corporation Tax Law, and Opinions of the Attorney-General bearing upon the meaning of the Act. By Thomas Gold Frost, LL.D., Ph.D., of the New York City bar, author of "General Treatise on the Law of Guaranty Insurance," "The Incorporation and Organization of Corporations," etc. Matthew Bender & Co., Albany. Pp. xvii, 174 + 147 (appendices and index). ($4.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Agency. "The Real Estate Broker and His Commissions." By Floyd R. Mechem. 6 *Illinois Law Review* 238 (Nov.).

Continuation of article noticed in 23 *Green Bag* 644.

Aliens. "The Treatment of Aliens in the Criminal Courts." By Grace Abbott. 2 *Journal of Criminal Law and Criminology* 554 (Nov.).

A helpful first-hand investigation of conditions in Chicago. "Even when the judge is honest and intelligent, there is often an atmosphere of offhandedness and apparent disregard of the main issues. The inarticulate administration of the oath, the aimless going to and fro; the close, unpleasant odor, the noise and confusion, now lulled, now increased by the pounding of the gavel, these things leave with those who are having their first experience with our judicial system a scattered and distracted impression. Very often one encounters among the foreign-born of Chicago the very definite conviction that an innocent man has no better chance of release when brought before the Municipal Court than a guilty one. This seems to be due not so much to actual misjudgment of facts presented, but to the general haste which makes a man timid about presenting his case and convinces him that the judge has no time to hear his story of how it all happened. This varies very much, however, with the individual judge."

See Immigration.

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Bankruptcy. "The Law of Bankruptcy." By Lex. 37 *Law Magazine and Review* 17 (Nov.).

"In one respect I think the present law is unduly hard on a fraudulent bankrupt. He is bound to answer all questions put to him relating to his dealings with his creditors or his estate, and may be imprisoned for contempt of court if he refuses to do so. But it is not very unusual to find in this way that he has committed a criminal offense; and the answers which he has given under compulsion may be used against him on a prosecution which is sometimes directed or suggested by the judge. It should, I think, be provided that his answers to questions put to him in court should not be used against him on a criminal trial — except, of course, a trial for perjury, based on the allegation that the answer in queston was wilfully and materially untrue. This would leave all other grounds for prosecution open, but exclude his own admissions of the offense in answer to questions which the court compelled him to answer."

Codification. "The Codification of International Law." By Ernest Nys. *American Journal of International Law*, v. 5, p. 871 (Oct.).

This article reviews the history of the movement for the codification of international law. The advance of this idea has been particularly rapid in the past few decades. The difficulties of the task are recognized. But there is no risk of rigidity or stagnation, with judicial action playing the part which should be given to it, and with periodical conferences on set occasions.

See Partnership.

Constitutional Law. See Government, etc.

Conveyancing. See Torrens System.

Criminal Insanity. "Insanity and Criminal Responsibility." Report of Committee B of the Institute, Edwin R. Keedy, chairman. 2 *Journal of Crim. L. and Criminology* 521 (Nov.)

Summary of the Committee's recommendations which are set forth with an instructive discussion:

"(1) That the legal tests of insanity for determining criminal responsibility be abolished.

"(2) That insanity should be held to be a good defense, whenever it negatives the necessary criminal intent.

"(3) That the various medical associations shall establish and maintain a code of professional ethics to govern medical experts.

"(4) That the various bar associations shall establish and maintain a code of professional ethics to govern counsel in criminal trials, where the defense of insanity is raised.

"(5) That medical witnesses who give opinion evidence in criminal cases, where the defense is insanity, shall be chosen from a qualified group.

"(6) That the respective functions of medical expert, judge, and jury shall be as set forth in this report."

Criminal Law. See Criminal Insanity, Criminology.

Criminal Law Enforcement. "Lynching and the Miscarriage of Justice." By Theodore Roosevelt. *Outlook*, v. 99, p. 706 (Nov. 25).

"Slowness in deciding cases, readiness to admit appeals, the subordination of justice to legal technicalities, the irritating delays in getting the machinery of the law in motion, and the utterly improper attention paid by the courts to the sharpness of lawyers in invoking technicalities — all of these result in frequent miscarriages of justice and as delays which, if long enough, amount, especially in their effect upon the public, to an absolute miscarriage of justice. When such is the case, the community is deliberately preparing itself for the violence of mob action if ever a crime is committed that arouses the utmost intensity of furious passion."

Criminal Procedure. "Some Characteristics of English Criminal Law and Procedure." By G. Glover Alexander. 37 *Law Magazine and Review* 1 (Nov.).

"It is very curious to notice how the old prejudice against what used to be called 'circumstantial evidence' has now almost completely died out. It was never anything but a dyslogistic expression, an advocate's mode of speaking contemptuously of his opponent's case. All evidence which is not direct and positive is circumstantial. In ninety per cent of the cases which come before the criminal courts nothing but circumstantial evidence is possible; and if it were not admitted most crimes would go unpunished."

See Criminal Insanity, Criminology, Legal History.

Criminal Statistics. "Criminal Statistics in the United States. Report of Committee of the Institute, John Koren, chairman." 2 *Journal of Criminal Law and Criminology* 568 (Nov.).

"The Committee believes it would be a distinct gain if knowledge could be obtained of the amount of the Undetected Crime. For general statistical purposes, our main reliance must always be upon the returns from the criminal courts, but these as well as police statistics would gain in significance when examined in the light of facts about the undetected crime. It is most improbable that reliable information about the amount of undetected crime can be obtained until legislation compels the proper officials to make returns to some central office."

Criminology. "Assassins of Rulers." By Arthur MacDonald. 2 *Journal of Criminal Law and Criminology* 505 (Nov.).

Interesting as a study of the character of noted American assassins, including those of Lincoln, Garfield, and McKinley.

"We have pointed out some of the physical anomalies of American assassins, with little comment, for the reason that conclusions drawn from physical defects as to mental and moral character are untrustworthy. Knowledge of exact relations between body and mind is as yet very inadequate. While it is true that mentally defective persons, as a class, have more physical anomalies than people in general, it is not always true of particular individuals of this class. Physical anomalies are more serious in proportion as they are more profound and more numerous, but

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they are less significant as we rise in the scale of degeneration, when they become inconstant and often are absent, and sometimes seem not to have any correlation with mental troubles."

"The Future Attitude toward Crime." By Professor George W. Kirchwey. 2 *Journal of Criminal Law and Criminology* 501 (Nov.).

Annual address delivered at the third annual meeting of the American Institute of Criminal Law and Criminology last September.

"The state is not ashamed to avow itself the guardian of the delinquent as of the dependent child. May we not hope that it will in the not distant future realize that there is no distinction of age among her erring children, and that all must — in the interest of society — equally feel her wise, firm, parental hand resting upon them?

"But the Juvenile Court throws another ray of light farther down the broad avenue of crime. Why limit the guardianship of the state to the delinquent and the dependent child? It is not only from these that the ranks of adult criminality are recruited. The seeds of criminal tendency lie deep in human nature, but not too deep to be detected by the penetrating eyes of wisdom and sympathy. Through the school, public and private, the children can be reached and examined and known, and their mental or physical or moral defects, whether congenital or acquired, ascertained, if not in all, at least in all but the more obscure cases — and, as in the case of the delinquent in the Juvenile Court, the appropriate remedy applied.

"Nay, I will go further. Our Anglo-Saxon notion that the state has nothing to do with the individual except as a taxpayer or a lawbreaker must give way to the conception that society as a whole is responsible for the acts of all its members, and that it may, in so far as its interests require, exercise an effective supervision and guardianship over each and every one.

"The doctrine that 'a man's house is his castle' has received some rude shocks in these days of compulsory education and tenement house and health inspection. It is destined to be relegated to the lumber room of the law when we come to realize that the most contagious, as well as the most mortal, of all diseases is criminality and moral degradation."

Report of the President of the American Institute. By Nathan William MacChesney. 2 *Journal of Criminal Law and Criminology* 573 (Nov.).

Delivered at third annual conference in Boston, Sept., 1911.

Proceedings of third annual conference of the American Institute of Criminal Law and Criminology. 2 *Journal of Criminal Law and Criminology* 583 (Nov.).

"The Camorra in Modern Italy." *Edinburgh Review*, v. 214, no. 438, p. 379 (Oct.).

A vivid sociological study, based on some first-hand documents, of this sinister institution. The criminal types which it represents are keenly analyzed.

See Aliens, Criminal Insanity, Criminal Statistics, Immigration.

Direct Government. "New Forms of the Initiative and Referendum." By S. Gale Lowrie. *American Political Science Review*, v. 5, p. 566 (Nov.).

The writer looks upon the Wisconsin plan of initiative with favor, because it makes the legislature a co-laborer rather than a competitor of the people.

See Election Laws.

Election Laws. "Direct Primaries and the Second Ballot." By A. N. Holcombe. *American Political Science Review*, v. 5, p. 535 (Nov.).

An able study of the effect of the second ballot on the result of the primary election, the facts supporting the author's conclusions being obtained chiefly from Italian and German observations, in the absence of American evidence. He concludes that "in the United States, there is no argument in favor of the abolition of the party test in the primary election which cannot be advanced with greater force in favor of the abolition of the official primary altogether and the introduction of preferential voting into the general election. A system of preferential voting at the general election would perform simultaneously the function of a nominating system."

The author's position is far in advance of American election laws, and publicists can ill afford to neglect so searching and illuminating an investigation.

This article, by the way, is a good example of that "laboratory" method of studying the direct nomination system, the need of which A. Lawrence Lowell referred to not long since, in his address as president of the American Political Science Association.

Equity. "Confusing Law and Equity." By Dean Henry H. Ingersoll, University of Tennessee. 21 *Yale Law Journal* 58 (Nov.).

Considering at length the relations between the systems of law and equity in the various states, Dean Ingersoll feels that he has shown "the abounding variety of jurisdiction and proceeding even in states of the same class." The fusion of Law and Equity is not in sight in America. Whether the existing confusion is permanent, time alone can determine.

Freedom of Trade and Occupation. "Principles of Liability for Interference with Trade, Profession, or Calling, II." By Sarat Chandra Basak. 27 *Law Quarterly Review* 399 (Oct.).

Continuation of article noticed in 23 *Green Bag* 543.

Government. "New States and Constitutions." By Attorney-General George W. Wickersham. 21 *Yale Law Journal* 1 (Nov.).

Address delivered before Yale Law School last June. Considerable attention is devoted to the proposed constitution of Arizona.

"The Federal Judiciary in Brazil and the United States of America." By Amaro Cavalcanti. 60 *Univ. of Pa. Law Review* 103 (Nov.).

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"Justice in modern states is so essential to national life and its relation to the individual, that notwithstanding the settled rule of the non-responsibility of the United States before the courts, Congress has authorized suits against the government in a great variety of cases. . . . It is not apparent why Congress was not equally willing to subject the government of the Union to suit in cases of torts by its officers in the performance of their duties or public functions, as well as for violation or breach of contract. For individual rights may be transgressed tortiously as well as *ex contractu*, by officers of the government under color of federal authority. In the Brazilian jurisprudence, as stated, there is no limitation of this kind in the grant of jurisdiction to the courts."

Great Britain. "Impressions of British Party Politics, 1909–1911." By Alfred L. P. Dennis, University of Wisconsin. 5 *American Political Science Review* 509 (Nov.).

A vivid, well-written review of the developments of the past two years, which shows familiarity with the ins and outs of English politics, and a perception of the social and economic as well as the purely partisan factors in the situation. The writer's estimates are marked by great impartiality.

See Direct Government, Mob-Law.

Habeas Corpus. "*Habeas Corpus* in the Empire." By Norman Bentwich. 27 *Law Quarterly Review* 454 (Oct.).

"A British subject takes with him into a new country the common law of England even before a regular government or any regular jurisdiction is set up. But he does not, it seems, enjoy this privilege in a protectorate. Magna Carta may have no effect there; the law depends 'upon the foot' of the High Commissioner, and any kind of special legislation may be introduced *per rescriptum principis*."

Hague Conferences. "Periodical Peace Conferences." By M. Jarousse de Sillac. *American Journal of International Law*, v. 5, p. 968 (Oct.).

This somewhat vague title covers an exposition of the general character of the work of the Hague Conferences — more specifically, of principles deducible from the Hague texts, and of work awaiting the attention of future Conferences.

Immigration. "Crime and Immigration. Report of Committee G of the Institute, Gino C. Speranza, chairman." 2 *Journal of Criminal Law and Criminology* 546 (Nov.).

"I believe that the American Institute of Criminal Law has not only a clear duty before it, but the means for a real service to our country if it will continue the work undertaken by this committee and increase it along these three main lines:

"*First*, to teach the alien among us the respect of our laws and our courts by making it possible for him to find in them equal protection and equal opportunities that are extended to the citizen.

"*Second*, to seek ways and means to aid the efforts of foreign governments to discipline and help the current of immigration and emigration to and from our country.

"*Third*, to co-operate with foreign governments in an endeavor to establish safe and reliable means to prevent criminals from coming to our country and of surrendering fugitives to the justice of foreign governments by some inexpensive and prompt proceedings."

Insanity. See Criminal Insanity.

International Arbitration. "Sanctions of International Arbitration." By Jacques Dumas. *American Journal of International Law*, v. 5, p. 934 (Oct.).

A very able summary of the sanctions of international arbitration. While the author recognizes that it is earnestly to be desired that no other sanction than the force of international opinion which Elihu Root emphasizes should be needful, he shows that other sanctions, political, juridical, economic, and penal, exist in the form of remedies that can be made effective in cases of emergency.

"The Hague Peace System in Operation." By James L. Tryon. 21 *Yale Law Journal* 32 (Nov.).

"The fisheries arbitration and the eight arbitrations of the Hague Court, in about one decade of its existence, the use of the international commission of inquiry in dealing with the North Sea incident, and the mediation of President Roosevelt in the war between Russia and Japan, have shown that some features of the Hague peace system have already proved their practical success, and justified belief in the feasibility of the system as a whole."

See Hague Conferences.

International Law. See Codification, Hague Conferences, Legal History.

Landlord and Tenant. "A Lessee's Covenants to Repair." By Walter Strachan. 27 *Law Quarterly Review* 433 (Oct.).

Considerations suggested by the recent decision of the Court of Appeal in *Lurcott v. Wakely*, 1 K. B. 912.

Lawyer and Client. "The Bar in Russian. By L. P. Rastorgoneff. 37 *Law Magazine and Review* 70 (Nov.).

"Russian law does not recognize the division into barristers and solicitors as known in England, Russian advocates conducting their cases entirely themselves from beginning to end, including the execution of the judgment."

Legal History. "The Reception of Roman Law in the Sixteenth Century, I." By Prof. W. S. Holdsworth. 27 *Law Quarterly Review* 387 (Oct.).

English law for a short period following the legal renaissance of the twelfth and thirteenth

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centuries came under the influences which later, in the sixteenth century, affected reception on the Continent, but in England there was no reception. At the same time, the Continental reception has a bearing on English legal history, because the common law was in some respects modified by contact with new institutions and principles which in the sixteenth century struggled for supremacy, and also because Continental developments, if clearly understood, throw light on the forces which made the native common law strong enough to resist foreign influences.

"The History of International Relations during Antiquity and the Middle Ages." By Amos S. Hershey. *American Journal of International Law*, v. 5, p. 901 (Oct.).

A survey of broad scope, succinctly covering the foreign relations of numerous nations of the ancient and mediæval world.

"The History of the Inns of Court." *Edinburgh Review*, v. 214, No. 438, p. 293 (Oct.).

An interesting sketch, which goes back to the days of Fortescue and Chaucer. Incidentally American statesmen who received their legal education in England in the eighteenth century are mentioned. "The evidence justifies a general statement that the Middle Temple was the *alma mater* of the English-trained lawyers who took a leading part in laying well and truly the foundations of the American commonwealth."

"The Trial of Alice Lisle." By J. A. Lovet-Fraser. 37 *Law Magazine and Review* 31 (Nov.).

An interesting account of a brutal seventeenth century trial before Chief Justice Jeffreys.

See Mob-Law, Public Service Corporations.

Literature. "Trying a Dramatist; an original sketch in one act." By Sir William S. Gilbert. *Century*, v. 83, p. 179 (Dec.).

The prisoner is placed on trial before Justice Rhadamanthus for having written an extremely tedious play called "Lead." The author seizes his rich opportunity to satirize some of the whims of the playgoing public.

"The Law and Lawyers of Honoré de Balzac." By Judge John Marshall Gest. 60 *Univ. of Pa. Law Review* 59 (Nov.).

Read before the Pennsylvania Bar Association last June. See 23 *Green Bag* 456.

Martial Law. See Military Law.

Military Law. "Military Tribunals and their Jurisdiction." By Henry Wager Halleck. *American Journal of International Law*, v. 5, p. 958 (Oct.).

A short statement of the jurisdiction of these courts under the United States Constitution.

Mining. "The Doctrine of *Farrell* v. *Lockhart*, and its Application to Other Rules Applicable to the Location of Mining Claims." By George P. Costigan, Jr. 11 *Columbia Law Review* 593 (Nov.), 723 (Dec.).

"The law in relation to the making of mining locations is in an unsatisfactory condition, and will remain so until the Supreme Court of the United States gives adequate reconsideration to the problem presented in the case of *Farrell* v. *Lockhart* (210 U. S. 142). In that case, under the guise of 'qualifying' the earlier case of *Lavagnino* v. *Uhlig* (198 U. S. 443), the Supreme Court in effect overruled the earlier case, and did so in a way that is most troublesome. . . . *Farrell* v. *Lockhart* should have been decided the same way as *Lavagnino* v. *Uhlig*, though the reasons given for the decision of *Lavagnino* v. *Uhlig* and for any decision reversing *Farrell* v. *Lockhart* should be different from those actually given by the court in *Lavagnino* v. *Uhlig*."

Mob-Law. "The King's Peace *vs.* Mob-Law." By Kenelm D. Cotes and C. A. Herreshoff Bartlett. 37 *Law Magazine and Review* 43 (Nov.).

"It is as difficult to exterminate mob-law as it is to do away with illicit sexual intercourse and drink; but it can be controlled in a measure and made less likely to occur, and this is a work deserving the highest praise. The remedy must come from within, and not from without. Laws, authority, social opinion, power, and force will prove efficient, for they are like throwing earth on a charcoal fire — they suppress the flames but heighten the fiery heat beneath. The cure must be found within those conditions of social and commercial life, progress, and prosperity that restrain the passions of the brute in man and make him amenable to reason."

Monopolies. "The *Standard Oil* and *Tobacco* Cases." By Robert L. Raymond. 25 *Harvard Law Review* 31 (Nov.).

The ablest and most minute discussion of these decisions which has yet appeared.

"It is . . . proposed to state as definitely as possible the rules of law to be drawn from these decisions. As a general summary the following is offered:

"Any undue or unreasonable restraint of interstate trade is illegal. Trade is unduly restrained by agreements which lessen competition among those agreeing to an extent which may reasonably be thought to injure the competing or consuming public. Trade is also restrained unduly by acts, combinations, or mere conditions of existence, which represent a purpose to increase the trade of those who are parties to the assailed transaction or condition, by interfering with the right to trade of those who are strangers to such transaction or condition; or, in other words, a purpose to acquire monopoly control. Trade is not unduly restrained by the termination of competition among those who voluntarily combine in the form of a corporate combination. Nevertheless, the combination of a great number of previously independent corporations, certainly if by means of a holding company, and probably if by means of the purchase of plants outright, creates a *prima facie* case of illegality. Given an undue restraint, the law can reach any possible form of organization or condition of existence in which such restraint is manifested. A single corporation in no way representing any combination may offend the Act. The issue is to

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be determined in each case by a consideration of all the pertinent facts, such as specific acts, general course of conduct, and results. . . .

"From an economic point of view it becomes continually clearer that what is needed is not the dissolution of existing combinations, nor the arbitrary prohibition of new ones, but the prevention of the evils which frequently if not usually accompany combinations. Unfair competition and discriminations must be forbidden by a law which shall be, so far as possible, actually preventive. In addition it must be recognized that distinctions which it is easy and proper to make in theory are difficult to make when dealing with actual facts. There is unquestionably a dangerous potentiality of evil in all great combinations. This means both that they are likely to use unfair methods and also that great harm will be done if they do. Because of the fact that it is probably impossible to reach directly all forms of unfair competition without government supervision, such combinations should be directly supervised by the government to the end that unfair methods be discovered and prevented. . . .

"A substantial change in the law has been made. Judicial legislation could hardly accomplish more than it has done in these cases. It remains true that judicial legislation cannot do everything. A great step has been made towards the solution of the trust problem. It consists in the fact that attack is at last concentrated, not on combination on a large scale, but on the evils and wrongdoing which accompany combination. It remains to clear up the considerable remaining obscurity of the situation by embodying the principles of these great decisions in a statute which shall lay down clear and definite rules of conduct, and which shall not supplant but supplement the Anti-Trust Act as now construed."

"Anti-Trust Legislation and Litigation." By William B. Hornblower. 11 *Columbia Law Review* 701 (Dec.).

Address delivered before the American Bar Association in Boston last August.

"The truth is, and there is no logical escape from the conclusion, that a literal interpretation and an impartial enforcement of the statute would stop the wheels of industry and would paralyze trade."

"The Interstate Trust and Commerce Act of 1890." By Ex-Senator George F. Edmunds. *North American Review*, v. 194, p. 801 (Dec.).

In a foreword the editor of the *North American Review* explains that while Senator Edmunds wrote all of sections 2, 3, 5, and 6 of the act, and practically all of section 1, the title of the law does Senator Sherman no more than justice, since he was the originator of the general plan.

Senator Edmunds, writing from an intimate knowledge of all the circumstances under which the law was slowly framed, declares, with great emphasis and earnestness, that its framers never intended that it should be used as a weapon for the destruction of honest business, but really anticipated that the courts should construe it as the United States Supreme Court has construed it and apply it for the healthy growth of trade, fairly conducted.

Senator Edmunds concludes by declaring that the Government should strike out boldly:—

"The evils are great," he says, "and the remedies must be applied. But it is said that in doing this the business operations and interests of the country will be disturbed and upset. Well, if the 'business interests' of the great and widespread combinations, as now carried on, are crushing out smaller enterprises and monopolizing industries that should be fairly and equally open to all, and controlling and enhancing the prices of almost everything in every household, must suffer from the enforcement of equal laws necessary to the welfare of the whole people, it is the consequence of their evildoing and must be borne, and every honest and fair enterprise will survive for the good of all. . . .

"Business of every civilized country in a condition of peaceful and stable order will always — at least generally — adjust itself to the capacities and necessities of the people; in short, to the laws of demand and supply, which are permanent and supreme. If it is conducted under circumstances of relative equity and of fair dealing there will be healthful competition and finally co-operation in production, manufactures, commerce, and finance, and for the industrious labor that moves them all. Large operations need not destroy the small, and real progress and prosperity will bless the Commonwealth. The cynic will say that this is visionary; but if so, it has been at some periods a fact. It can be made so again by patience, persistence, and justice."

"What's the Matter with Business? I, Views of Frank A. Vanderlip." *Outlook*, v. 99, p. 857 (Dec. 9).

"The Sherman Law, to me, seems like an attempt at turning back the hands of the clock. However earnest and sincere the efforts may be to enforce that law and to compel people who have comprehended the waste and destruction of remorseless economic warfare to return to a state of unrestricted competition, however strong the belief may be that by legislation and judicial judgments, by fines and imprisonments, it will be possible to compel the abandonments of a great economic device and force business to wheel around in its tracks and return to the status of fifty years ago, the whole effort will be as futile as the turning back of the hands of the legislative clock. Time ticks on, let the laws be what they may."

"The Industrial Problem." By Andrew Carnegie. *North American Review*, v. 194, p. 914 (Dec.).

"The Republic has triumphed over all difficulties in the past and will easily triumph over this, which is really not alarming. An industrial court passing upon fair prices, as the Interstate Commission passes upon railway rates, is all we need. We are soon to look upon the coming change in laws regulating industrialism as desirable, rejoicing that it brings better security of fair and deserved returns, although no longer monopolistic prices, to the producer, fairer prices to the consumer, and closer and more friendly relations between employer and employed than ever existed before."

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"Recent Interpretation of the Sherman Act." By Attorney-General George W. Wickersham. 10 *Michigan Law Review* 1 (Nov.).

Address delivered before the Michigan Bar Association last July.

"Size alone does not constitute monopoly. The attainment of a dominant position in a business acquired as the result of honest enterprise and normal methods of business development, is not a violation of the law. But unfair methods of trade, by destroying and excluding competitors by means of intercorporate stockholdings, or by means of agreements between actual or potential competitors, whereby the control of commerce among the states or with foreign countries in any particular line of industry is secured or threatened, expose those who are concerned in such efforts to the penalties prescribed in the second section of the act, because they are engaged in monopolizing or attempting to monopolize such commerce."

"The Trusts, the People, and the Square Deal." By Theodore Roosevelt. *Outlook*, v. 99, p. 649 (Nov. 18). See p. *supra*.

"Price Restriction on the Re-Sale of Chattels." By William J. Shroder. 25 *Harvard Law Review* 59 (Nov.).

Discussing *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, the writer says:

"It would be difficult to conceive of a restraint of trade more complete than one seeking to fix the prices on all sales from the manufacturer through the intermediate dealers to the consumer. The manufacturer restrains himself by agreeing to sell at only one price and only to contracting dealers. All competition between wholesale dealers is destroyed by their agreement to sell only at a minimum price and only to authorized purchasers. The retail dealer likewise is removed from the possibility of competition by his agreement to sell at fixed prices and to none other than the consumer. No discoverable room for competition is left from the manufacturer to the consumer. . . . To legalize the system of fixing prices would furnish the 'trusts' the most simple and least expensive method of accomplishing this end. The establishment of such right would render nugatory the efforts of a quarter of a century to enforce the public policy declared in all the anti-trust statutes."

Negligence. "Humanity and the Law." By Andrew Alexander Bruce. 73 *Central Law Journal* 335 (Nov. 10).

"One thing is certain, and that is, that the law of negligence and of tort liability has been, and always will be, progressive. It has in the past, it is true, been and perhaps always will be, largely judge-made. It has in the past hardly been popular in its origin. It has, however, though king and judge made, largely reflected the social conscience of the king and of the judge. Though circumscribed by formalism it has had its origin and expansion in a policy of democracy and of humanity. As our democracy and humanity grow, that expansion will continue."

Partnership. "The Desirability of Expressing the Law of Partnership in Statutory Form." By Dean William Draper Lewis, University of Pennsylvania. 60 *Univ. of Pa. Law Review* 93 (Nov.).

"Whenever a subject is exceedingly complex, that is whenever it requires for the unraveling of its more difficult problems, close analytical reasoning, the chances increase that these weaknesses in the common law system will prevent the development of a body of law which will be both certain and clear. This is exactly what has taken place in the domain of partnership law, a subject which presents peculiar difficulties. . . . Of course a hundred and more years of judicial decision has of necessity cleared up many concrete questions; but the fundamental causes of confusion indicated, as well as several minor ones, still remain, and there is no reason to expect that the next ten, or fifteen, or twenty years will make matters any better than they are today. If the law of partnership is to become more certain than it is, the fundamentals must be rendered clear, and this can only be done, for the reasons given, by the careful statutory expression of rules of law based on clear ideas of fundamental principles."

Perpetuities. "Unenforcible Trusts and the Rule Against Perpetuities." By George L. Clark. 10 *Michigan Law Review* 31 (Nov.).

"In conclusion, if a case should arise of an unenforcible trust for a purpose not unlawful in itself, it would seem a fair prediction that such a trust would be held valid if it should be limited in duration to a period not longer than twenty-one years after lives in being at the creation of the trust."

Preferential Voting. See Election Laws.

Procedure. "Uniform Judicial Procedure — Let Congress Set the Supreme Court Free." By Thomas Wall Shelton. 73 *Central Law Journal* 319 (Nov. 3).

"If it be decided to give announcement to the repeal of section 914 of the Revised Federal Statutes and the amendment in lieu thereof, of a statute or statutes conferring upon the federal Supreme Court the power and duty to prepare and put into effect, on the law side of the federal courts, a complete, simple, and expeditious system, there will, in the opinion of able and patriotic lawyers, have been taken one of the greatest forward strides. This idea was mooted at the 1910 meeting of the American Bar Association at Chattanooga. It met with the official approval of the President of the United States in his December (1910) message, and there is reason to believe that Congress would gladly permit the burden to be lifted from its shoulders and placed where it belongs."

"Necessity for Summary Action in Judicial Proceedings." By Judge R. B. Middlebrook. 21 *Yale Law Journal* 55 (Nov.).

"No fair observer will contend that at this time we are suffering from a tyrannical, domi-

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neering, or cruel Judiciary. On the contrary, the powers of our State Nisi Prius Courts have been gradually clipped away until our ordinary Circuit or District Judge has become hardly more than a monitor or moderator, to keep some semblance of order during a trial. This is especially true in our Western states — and Middle Western states — in many of which the trial Judge gives no oral instructions to the jury, and is obliged to refrain from commenting upon the testimony, and must give his written instructions to the jury upon the law alone, not weighing the evidence, and must do so before the final argument of counsel to the jury, the Court's written instructions being read to the jury by counsel, and not by the Court. A restoration of the ancient Common Law powers of the Judiciary should be given Nisi Prius Judges."

See Criminal Procedure.

Professional Ethics. "The Duties of Attorney." By Hon. Edwin Baker Gager, M. A. 21 *Yale Law Journal* 72 (Nov.).

"The longer I live the more clearly I see and the more strongly I realize that the reason why so many fail to reach a high standing in the profession is that in the earlier years of their practice they did not adequately realize that the law is and always will be a learned profession, involving a lifetime of labor as the condition of its highest rewards. The man who knows is the man sought for by those desiring assistance in any profession; and it is as true of the lawyer as of the engineer, the surgeon, or the specialist in any line; and this knowledge, to be effective, must be your own knowledge."

Property. See Succession.

Public Service Corporations. "The Origin of the Peculiar Duties of Public Service Companies, II, III." By Charles K. Burdick. 11 *Columbia Law Review* 616 (Nov.), 743 (Dec.).

For the first instalment of this important monograph, see 23 *Green Bag* 427–428.

"It seems to me that this discussion has made it clear that the common law does not impose public service duties upon businesses simply because they are of importance to the public and are enjoying a virtual monopoly. The only legitimate method of controlling the service and charges of such business is by legislative regulation. Any attempt by the courts to impose public service duties upon such businesses, independent of statutory regulation, constitutes judicial legislation, or, in other words, a usurpation of the functions of an entirely separate branch of the government. I frankly admit that there are *dicta* in support of such judicial action, and that there are one or two decisions which are based on the assertion that the right to so act inheres in the courts of common law. However, I believe I have shown that both the reasoning and authorities by which the courts have sought to support such decisions and such *dicta* (in the rare instances where the latter are more than unargued suggestions) are most unsatisfactory, and that the cases which take an opposing position are at once more numerous and present a sounder exposition of the law."

Railway Rates. "The Legal Basis of Rate Regulation — Fair Return on the Value Employed for the Public Service, II." By Edward C. Bailly. 11 *Columbia Law Review* 639 (Nov.).

Continuation of article noticed in 23 *Green Bag* 429.

"What is a fair net return on present value is really a question of fact which must be determined by the circumstances of each particular case. Briefly, the market or current rate upon equally hazardous investments is determinative, for, while rates cannot legally be reduced to a point where they become confiscatory, the security of the investment is not guaranteed by the public. Rates which should yield a fair return may cease to do so because of competition or other forces, but they are not thereby rendered confiscatory. It is under such circumstances that value of the service becomes an important consideration."

"The Interstate Commerce Commission." By James W. Crook. *North American Review*, v. 194, p. 858 (Dec.).

A review of the legislation under which the Commission performs its functions and description of some of its powers as defined by statute and judicial decision.

Real Property. See Torrens System.

Succession. "Meaning of the Word 'Issue' in Gifts to 'Issue.'" By Prof. Albert M. Kales. "Meaning of the Word 'Issue' in Gifts to 'Issue' — Another View." By Willard Brooks of the Chicago bar. 6 *Illinois Law Review* 217, 230 (Nov.).

Professor Kales favors a rule of construction which would divide gifts to "issue" *per capita* rather than *per stirpes*. Mr. Brooks thinks that a testator using the phrase "to the issue of A" probably has in his mind something more than "children"; "it is rather some more extensive group which the testator regards as the equivalent of the 'stock' or *stirps* of the ancestor."

"The Doctrine of Survivorship and the Definition of a Vested Remainder." By Henry W. Webber. 10 *Michigan Law Review* 26 (Nov.).

"The real reason for the early English rule [which was the same as that in the leading case of *Moore* v. *Lyons*, 25 Wend. 118] seems to have been mooted, because not always apparent from the decisions. It will be found, however, upon a study of the authorities, that the desire to avoid disinheritance of descendants and posterity is the underlying principle running through all the cases."

See Perpetuities.

Survivorship. See Succession.

Torrens System. "The Land Transfer Report." By Eustace J. Harvey. 27 *Law Quarterly Review* 417 (Oct.).

"The state of mind underlying this Report is one of great distrust of the registering body. The Commissioners propose to take out of the

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hands of the Registrar the more complex transactions with land, the mortgage and the settlement, leaving him the simplest only, the sale. . . . The experiment which has to be tried is, whether a Register based on simple and logical lines, in which every transaction is effected on the Register, and on the Register alone, can be made to succeed in England, as it has done on the continent and in Australia. This, it is believed, is the only type of Register which could supersede the old system of conveyancing."

Trusts. "Powers in Trust and Gifts Implied in Default of Appointment." By Prof. John Chipman Gray. 25 *Harvard Law Review* 1 (Nov.).

"A power may be given to a man, the exercise of which does not derogate from his own estate or interest, — that is, which is not a power appendant, but which derogates from the estate or interest of some other person or persons. The donee may have an estate or interest in the property, as when property is given to A. for life, with a power to him to appoint the remainder; this is called a power in gross or collateral. Or the donee may have no estate or interest in the property, as when property is given to A. for life, with a power to B. to appoint the remainder; this is called a power simply collateral.

"Is such a power ever a power in trust?

"A system of law is conceivable in which equity would compel a donee to exercise such a power or would exercise it for him. In such a system a power of this kind might be properly called a power in trust.

"But such is not the system of our law.

"When our law thinks that the objects of a power ought to have an estate or interest in the property, although no appointment has been made, it does not compel the donee to exercise the power, nor does it exercise it for him, but it declares that there is an implied gift to the objects of the power in default of appointment."

See Perpetuities.

Uniformity of Law. See Partnership.

Wills and Administration. See Succession.

Workmen's Compensation. "Workmen's Compensation in Illinois." By Samuel A. Harper. 6 *Illinois Law Review* 255 (Nov.).

"The subject of compulsory compensation for industrial accidents is a new one in this country, and while I thoroughly believe that another decade will find every one agreed upon the proposition that any state may adopt such a law, purely as a police measure, with some limitations upon the right of trial by jury tending to discourage the exercise of such a right, at the same time, in view of the lack of general information upon the subject and the consequent immature state of public opinion, it would perhaps be unwise, as a question of practical legislation, to attempt, at this time, to enact an unqualified compulsory compensation law, such as was done in New York, when the beneficial results which must follow from the operation of such a law are the real objective, rather than the mere establishment of the principle of compensation without negligence or fault.

"That the law should read into every contract of hiring a limited guaranty by the master to his servant against injury to life or limb while the servant is going about his master's business, when it appears that the larger proportion of such injuries in almost all employments are incidental to the business, does not seem any more unreasonable than that the law should conclusively presume that the servant, upon entering the employment, voluntarily assumed in advance all the necessary and inherent hazards of the trade. While such a proposition might seem novel and not in accord with the purely juristic notion of the state, in contrast with the social conception of the present, this fact alone should not be conclusive in determining whether it is sound or unsound. . . .

"If the *fault* is not the employer's, is it not his *responsibility?* We believe this will be the ultimate conviction of the courts, as it is now the opinion of the majority of both lay and professional students of the problem."

Miscellaneous Articles of Interest to the Legal Profession

Biography. "La Follette's Autobiography." By Robert M. La Follette. *American Magazine*, v. 73, p. 143 (Dec.).

Dealing with "the Reed Congress and the new national issues," Senator La Follette records his impressions of Blaine, McKinley, Hanna, and other great figures of that period.

"Explaining Mr. Wickersham." By an Insider. *Metropolitan Magazine*, v. 35, p. 18.

"Mr. Wickersham is a good lawyer. No one who knows anything about his professional career will deny that. . . . As the associate of Mr. Cadwalader and Henry W. Taft, the President's brother, Mr. Wickersham made a specialty of the law applicable to corporations, and his clients, through selection, became almost entirely large corporations having their principal offices in New York."

"Woodrow Wilson: Political Leader." By Burton J. Hendrick. *McClure's*, v. 38, p. 217 (Dec.).

An account of Governor Wilson's encounter with the political machine of his state and of his success as a political leader.

Party Politics. "Some Possible American Presidents." By H. Hamilton Fyfe. *Fortnightly Review*, v. 90, p. 899 (Nov.).

Treating of Woodrow Wilson, Theodore Roosevelt, Judson Harmon, William J. Gaynor, and others. "That Mr. Woodrow Wilson could be elected, if he were put forward as candidate, seems extremely probable."

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Latest Important Cases

Corporations. *Payment of Unearned Dividends Equivalent to Misrepresentation.* N. Y.

The Court of Appeals of New York has handed down a decision reversing the majority decision of the Appellate Division of the Supreme Court for the First Department, and adopting as its own decision the minority decision written by Justice Miller and concurred in by Justice Dowling in the suit of Marx and Moses Ottinger against John R. Bennett and other directors of the American Ice Company. In upholding the sufficiency of the complaint, the court concurred in the minority Appellate Division decision that "one who intentionally deceives another to his injury, no matter how, is accountable for the wrong; that a party is liable for misrepresentations whether by conduct or words, made for another to act upon, if they were calculated to deceive, and if in fact they do deceive such other person into acting in reliance upon them to his injury. It is quite as easy to deceive by acts as by words, and the deed is often more effectual than the word."

In the answer to the suit the directors of the ice company denied that the dividend had been declared for the purpose of deceiving any one, and stated that the stock had been publicly sold on the New York and other stock exchanges. With respect to this plan the Court held:

"A declaration of a dividend by a going concern implies earnings from which to pay it, and the publication of the fact to such a declaration is calculated to induce the public to believe that the dividend has been earned and the corporation is prosperous. . . .

"We have had many illustrations in cases before us of the devices to deceive the public employed by managing directors, who misuse their positions to promote stock speculation and the payment of dividends out of capital is a familiar one. When that is done to induce the public to purchase shares of the company and thereby create a fictitious value, upon which the wrongdoers may trade, they should be held accountable precisely as though the like deception had been practised by actual misstatements."

See Monopolies.

Insurance. *Construction of Policy —Liability for Damage by Explosion and by Fire.* N. Y.

In *Wheeler* v. *Phoenix Insurance Co.*, decided by the New York Court of Appeals, Nov. 3 (N. Y. Law Jour., Nov. 14), a fire insurance policy stated that the company should not be liable for loss occurring from certain causes enumerated "or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind."

The Court (Haight, J.) held (we quote from the syllabus), that the phrase "unless fire ensues" should be read as meaning "unless fire follows or comes after, or as a consequence of, the explosion"; that the words "by explosion of any kind" did not refer to fire as an agency producing the explosion, but to the different kinds of materials which explode, such as powder, gas, dust, etc. If, therefore, as in this case, the property insured is a grain elevator, and a fire starts in one of the rooms causing an explosion of dust which wrecks and destroys the building, the company is liable on the policy.

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Interstate Commerce. *Federal Safety Appliance Act Applies to Cars Other than Those Used in Moving Interstate Traffic.* U. S.

In *Southern Railway Co.* v. *United States* (L. ed. adv. sheets, p. 2), the Supreme Court held, sustaining the District Court for the Northern District of Alabama (164 Fed. Rep. 347), in an opinion filed October 30, that the Safety Appliance Act of March 2, 1893, 27 Stats. 531, chap. 196, as amended by the Act of March 2, 1903, 32 Stats. 943, chap. 976, applies to all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce, whether actually in use in such commerce or not.

We quote from the opinion, written by Mr. Justice Vandevanter:

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intra-state traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intra-state traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intra-state, as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intra-state commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intra-state commerce."

Irrigation. *Irrigation Company may not Include Value of Water Rights in its Valuation made for Rate-Fixing Purposes.* U. S.

That an irrigation canal company engaged in diverting water from a river and conveying it to the lands of distant owners for sale for irrigating purposes, is not the owner of the water carried or the water right created by its diversion, and is not entitled to have the value of such water right included as property by the carrier in the valuation of its property for rate-fixing purposes, is the broad doctrine laid down by United States Circuit Judge Morrow in refusing the application of the San Joaquin Kings River Canal Irrigation Company for an injunction to restrain the enforcement of certain rates fixed by the Boards of Supervisors of three counties in California, for water for irrigating purposes. (*San Joaquin & Kings River C. & I. Co.* v. *County of Stanislaus et al.*)

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"The water right must," says Judge Morrow, "be the right of the consumer and attached to his land, and not the right of the complainant attached to its canal system. It follows that under the law of this state it cannot be valued as a property right upon which the complainant is entitled to an income from the water rate to be paid by the consumer."

Marriage and Divorce. *Desertion — Removal of Statutory Ground by Cohabitation during Portion of Three-Year Period.* Mass.

A statute permitting absolute divorce on the ground of desertion, it was held not to have been "utter desertion" for three consecutive years next prior to the filing of the libel, when the libelant, whose wife had left him, cohabited with her for four days during the three-year period. *La Flamme* v. *La Flamme*, 96 N. E. 62, Massachusetts Supreme Judicial Court, Oct., 1911.

Monopolies. *Restraint of Trade by International Harvester Company — Party to Unlawful Combination.* Mo.

The International Harvester Company of America was ousted from Missouri and fined $50,000 by the Supreme Court of that state Nov. 14. Judges Lamm, Brown, Ferris, and Woodson concurred in the opinion. Chief Justice Valliant also wrote an opinion, which was concurred in by Judges Lamm, Brown, and Ferris. It left the amount of the fine to be fixed by the court after the company made a showing that it would comply with the law.

The opinion found that competition was lessened and that practically all of the harvester business was done by the respondent company in the state. It held that it was contrary to the laws of the state of Missouri for one company to conduct the business of another, as in this case.

Judge Graves in his opinion said:

"The respondent was a part and parcel of this gigantic and nefarious scheme. For some years it has been the mere sales agent of the International Harvester Company — the New Jersey company. It was licensed in this state to sell its own goods, but it is now selling the goods of another. As such party to an unlawful arrangement or combination it should suffer the penalties prescribed by our laws."

Railway Rates. *"Long and Short Haul" Clause — Interstate Commerce Commission without Power to Make General Reductions of Rates.* U. S.

In the *Spokane rate* case (*Interstate Commerce Commission* v. *Union Pacific R. Co. and Atchison, Topeka & Santa Fe R. Co.*), the Court of Commerce handed down a decision at Washington Nov. 14, sustaining the validity of the long and short haul clause, but denying the power of the commission to make general reductions instead of fixing particular rates. The Court said:

"In so far as the Commission attempts to determine the relation of the long-and-short-haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it.

"The practical effect of the commission's order is to either compel a blanket rate from the entire East to the entire West, or to prevent the carriers from getting all the business which they now secure without loss by making rates which enable merchants to meet the market competition."

Judge Archbald, dissenting, took the ground that no guide is supplied by Congress for the determination by the Commission of the particular cases in which a higher charge may be made for the shorter haul.

The case has been appealed to the United States Supreme Court.

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The Editor's Bag

FEDERAL INCORPORATION

THERE is little doubt that Congress, under the interstate commerce clause of the Constitution, has the legal right to issue a federal charter of incorporation to a corporation which purposes to engage in interstate commerce. Hamilton's proposition for a United States Bank was met by the argument of Madison that the Constitutional Convention of 1787 had rejected the grant of a power to Congress to give charters of incorporation, and that the proposed incorporation of a federal bank would be unconstitutional. Doubts on this score were set at rest by the decision of Marshall in *McCulloch* v. *Maryland*,[1] upholding the constitutionality of the incorporation of the second United States Bank. Marshall held that Congress has the power to create a corporation whenever the corporation is a necessary or proper means for carrying into execution any power conferred by the Constitution upon the Government of the United States.

Inasmuch as regulation of interstate commerce cannot be carried out by more appropriate or efficacious means than federal incorporation, and such regulation cannot be complete without recourse to incorporation, the power to incorporate seems to be implied in the interstate commerce clause.

It is important to emphasize the fact that federal incorporation should not be looked upon chiefly as a device to afford a special class of corporations immunity from state restrictive legislation. While some of its advocates do lay stress on that consideration, one may easily fall into the temptation to forget that legislation can no more deprive the states of their constitutional powers than it can add to the delegated powers of the federal Government. The decisions of the Supreme Court are setting the boundaries separating federal and state powers, and Congress can only follow the trail blazed by the interpretation of the fundamental law. The advantages of federal incorporation are sufficiently numerous without any supposed immunity of greater extent than corporations now have the legal right to enjoy. The greater uniformity and simplicity of corporation law under a system of permissive federal incorporation, and the ease of its administration both in the interest of the corporation itself and of the public, are alone sufficient advantages.

Congress should not proceed upon the theory that the federal jurisdiction over federal corporations excludes at every point the state jurisdiction. The right of the state to exercise its own police powers for the protection of purely local interests should be freely admitted. A hint of the way in which it might be possible to determine the scope of this state jurisdiction may perhaps be found in *Missouri Pacific Ry. Co.* v. *Larrabee Mills*.[2] In this case the Supreme Court

[1] (1819) 4 Wheat. 316.

[2] 211 U. S. 612.

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made a distinction between "matters national" and "matters of local interest," holding that the latter are subject to regulation by the states in the absence of federal legislation. Another decision bearing upon the subject was rendered much earlier in *Brown* v. *Maryland*,[3] wherein Chief Justice Marshall said:

"The power to regulate interstate commerce is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior."

How far into the interior? Obviously not so far as to render the federal police power co-extensive with that of the state. However vaguely defined the limits of federal jurisdiction, the Supreme Court cannot repudiate the principle underlying the remark in *Gibbons* v. *Ogden*,[4] repeated in the *Employer's Liability* cases,[5] that the power of the federal Government does not extend to "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." The upshot seems to be that carefully drawn statutes of the states, relating to such subjects as taxation of corporate property within the state, labor disputes, and the public health, need not clash with federal laws incorporating and regulating interstate companies. Just what powers the states would retain over federal corporations is a problem which raises numerous constitutional questions. However these questions will be ultimately decided, the states must adequately protect their own interests by suitable laws unless our form of government is to undergo a radical transformation. And such state legislation kept rigidly within bounds by federal authority need not be detrimental to the interests of federal corporations, which should be able to look to the national authority for adequate protection from unreasonable interferences and variegated restrictions.

[3] 12 Wheat. 419, 446–7.
[4] 9 Wheat. 1, 194.
[5] 207 U. S. 463, 493.

VERBOSE INDICTMENTS

IT was De Quincey, we believe, who wrote of murder as a fine art; the United States too often treats it as a sport. In almost every state in the Union an indictment for murder contains words enough to fill a column of an ordinary-sized newspaper, and sound like the ravings of a lunatic. Here is an example:

"That the said A. B C. a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said A. B. C., then and there in his right hand had and held, then and there unlawfully, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said D. C., with the intent aforesaid, out of the pistol aforesaid by the force of the gunpowder aforesaid, by the said A. B. C., with the leaden bullets aforesaid, out of the pistol aforesaid, then and there shot off and discharged as aforesaid, him, the said D. C., in and upon the upper right side of the back of him, the said D. C., then and there. . ."

The example is genuine, and is not quite as meaningless as it looks. It expresses, in part, the sporting theory of justice, which turns a murder trial into a game of skill between opposing lawyers. The slightest variation from statutory form loses the game, and no fact is better known than the fact that

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crimes of the most heinous character have many times been set aside solely on account of trivial verbal omissions in the indictment.

In Canada they do things differently — and the doing stands to their credit. An indictment there reads like this: "The jurors of our lord the King present that A. B. C. on the tenth day of May, one thousand nine hundred and ten, at the city of Winnipeg, in the Province of Manitoba, murdered D. C." The procedure thus concerns itself with the offense, not with the possibilities of legal sport.

A QUESTION OF PROFIT

THERE is a certain Representative in Congress from Michigan who was once summoned as witness in a case being tried at Saginaw, the summons being based on his expert knowledge of the lumber business. It appears that the whole case hinged on whether or not merchantable lumber had been supplied a certain firm, as set forth in its contract with the party of the second part.

Representing the opposition there appeared a very vociferous lawyer who made up in noise what he lacked in argument. He would shout and roar and pound the table in front of him like an auctioneer.

"What," demanded counsel in stentorian tones of the witness, "what do you regard as merchantable lumber?"

"Lumber that may be sold at a profit," replied the imperturbable witness.

The lawyer pounded the table again, strutted about, shouted a good deal more, and finally came back at the witness in this wise:

"And what, sir, would you regard as merchantable grain?"

"I don't know anything about grain."

"Ah, you don't, you don't, eh?" Well, then, what about merchantable fruit?"

"Not fruit. I am a lumberman."

"Come now, my dear sir. As to slabs and culls — should you say that *they* were merchantable?"

"They are products of the mills."

"Oh, ho!" fairly yelled this lawyer this time. "Can you tell the honorable Court whether you have any ideas at all about any kind of merchantable goods?"

"Oh, yes," replied the redoubtable witness. "A lawyer, for example, who tried his case with his brains — I should call him a merchantable lawyer; but the one who tries his case with his mouth and his hands and feet I should call a cull!"

That closed the cross-examination.

LAWYERS AND CLIENTS

NOW and then a lawyer submits himself to the control of his client and goes contrary to his own judgment. The result is, of course, generally unsatisfactory to counsel, court, and client.

In a case tried before a New York court, the defendant's counsel, an amiable gentleman, allowed his client to persuade him to ask a number of irrelevant questions which the Court, of course, excluded. At last he asked another question so grossly out of place that the judge said, "That is certainly irrelevant."

"I know it, your Honor," answered the lawyer, looking up at the ceiling, "but I asked it to gratify my client."

"Well, sir," rejoined the judge, blandly, "during the rest of this trial the Court will endeavor to protect you from your client."

James T. Brady, of the New York bar, was once employed to argue a doubtful case in the Supreme Court

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of that state. The plaintiff in the trial of the case had rested too soon, stopping short in his proof, and had, therefore, been non-suited.

Mr. Brady told his client that he doubted whether he could get the Supreme Court even to consider the case, but that he would do his best. In arguing the case for an appeal, he stated the facts, and concluded his account of the evidence for his own side by saying:

"And hereupon the plaintiff rested."

"Rested, sir!" exclaimed the Chief Justice, who saw the fatal defect, "why did he rest?"

Mr. Brady, seeing that his fears were to be realized, shrugged his shoulders, and observed:

"If your Honor please, that question has given me much anxiety. I have devoted nearly two weeks to a search for the reason why, at so early and inconvenient a period in this case, the plaintiff rested, and I have arrived at the conclusion, the only one, in my judgment, that can be sustained on principle and authority, that he must have been very much fatigued!"

The judges laughed, but they dismissed the case without hearing the other side.

WITHOUT PRECEDENT IN LAW

THE humdrum grind of the average country County Court House is generally monotonous enough, but most of them are fortunately blessed with a wit of greater or less dimensions, usually among the minor officers, who takes it upon himself to let in a little genial ray of sunshine now and then to relieve the tedium. It is not surprising, then, that Essex County, Mass., the home of such legal lights as Rufus Choate, Caleb Cushing, Judge Story, Otis Lord and other notables, should produce in one Daniel Potter, a deputy-sheriff, a wit of sizable calibre.

Entering a newspaper office in Salem he leaned confidentially close to the city man and said: "Don't let this go any further, but I expect to go tomorrow where I never went before, and can never go again."

While the editor knew the timbre of his caller, yet his keen nose for news led him to ask for details that he felt might give him a good local leader, and he was all attention as he asked for the full "story."

"I am going," began Potter seriously, "into my fiftieth year."

The other day Mr. Potter hustled half out of breath into the office of a prominent and dignified lawyer and addressing the attorney in a decidedly hurry-up tone, said: —

"I want you to tell me, Mr. Lawrence, as quickly as you can, whether or not it is legal for a man to marry his widow's sister?"

"Well, I'll declare, Potter," replied the attorney, in all gravity, "that particular question never occurred to me before. I'll have to look it up. Sit down a moment."

The lawyer arose and went to his bookcase, from which he was in the act of removing a large volume when the real drift of the question flashed through his mind and as he whirled around the big tome flew from the lawyer's hand toward the disappearing form of the deputy-sheriff as he made his escape through the open doorway.

THE LAW AND FAITHLESS LOVERS

ALMOST every country has apparently come to the cold-blooded conclusion that cold cash is a fairly good remedy for a broken heart, but Great Britain is probably the best juris-

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diction, from the plaintiff's point of view, for breach of promise actions. It is almost a certainty that the English lass who can show that her affections have been seriously trifled with will receive a substantial award.

Breach of promise actions, as understood in this country, are unknown in Germany, a special law providing rules and regulations for love's young dream. When a couple desires to become engaged, they visit the town hall, declare their willingness to marry, and sign a series of documents, duly witnessed, which render a jilting on the man's part practically out of the question. Should either party discover that a mistake is being made, the couple again visit the town hall, and another series of documents is signed, and the engagement declared off. The municipal authorities settle the matter of financial compensation for heartaches, if any is claimed.

In France, Austria and Holland, the law requires that the plaintiff show that she has suffered pecuniary loss, directly or indirectly, by reason of the falseness of her lover.

In Italy substantial damages will be awarded if the allegation is proven, but inasmuch as proof must consist of a written promise to marry, in explicit terms, few cases are ever brought into court. As, however, the warm-blooded daughters of Italy are not indisposed to taking matters in their own hands, along with a stilettò, lovers are wary of showing a fickle disposition.

A QUAINT OATH

IN THE Isle of Man many curious and quaint customs still survive, especially in connection with the machinery of the law. The oath administered to the High Court judges is a good illustration. It runs: —

> By this book (a Bible) and the contents thereof, and by the wonderful works that God hath miraculously wrought in the heaven above and the earth beneath in six days and six nights, I do swear that I will, without respect of favor or friendship, loss or gain, consanguinity or affinity, envy or malice, execute the laws of this isle justly between party and party as indifferently as the herring backbone doth lie in the midst of the fish. So help me God and the contents of this book.

It will be observed that this is not merely an oath, but a declaration of Christian faith, and a reference to what was at one time the great industry of the isle — herring fishing.

A TOO INQUISITIVE JUDGE

IN THE city of Richmond, Va., all of the municipal courts have quarters in the City Hall, and commodious chambers are provided for the several city judges. One of these is very near the jury room for that court. We are indebted to a member of the Richmond bar for the story of a very funny occurrence.

On a certain day not many years since, the court referred to had been engaged during the morning session in the trial of a civil case. About the noon hour, it had been fully argued, and the court was ready to take a recess for lunch.

The presiding judge, an affable, popular and able man, had given ample instructions on the law in favor of the plaintiff, in what seemed to him a very plain case, and sent the jury to their room to agree upon a verdict. He was so confident that there would be no delay or trouble that he permitted all the court officers to leave, saying that he would receive the verdict, and then get his own lunch. However, contrary to His Honor's expectations, the jury kept him waiting a long time. As the minutes went by, his appetite grew, and so did his impatience.

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He heard loud voices coming from the jury room nearby, and at last curiosity got the better of him, and without further thought, he climbed upon the back of a chair, and, balancing himself with difficulty and craning his neck, looked over the transom of the door of their room to see what was the matter. There he beheld the foreman, one of his oldest and stanchest friends, standing in their midst, making a vigorous speech to the jury in deadly earnest against the court's instructions, and plainly heard this interruption of the speaker by a juror: —

"But, Mr. Foreman, you are advising us to go against Judge ——'s positive instructions," and the foreman's reply,

"Yes, I know I am; we all know Judge —— is a good fellow and that he knows the law, and that he is all right. But he is a d—d fool, he don't understand this case."

His Honor heard no more, but softly and quietly stepped from his unsteady position down to the floor.

In a few minutes the jury brought in a verdict for the defendant instead of the plaintiff, in accordance with the views of the foreman, which the Judge received without comment, dismissed them and proceeded to get his delayed lunch.

He never mentioned to either the foreman or any member of the jury what he had heard. But he let the verdict stand.

AFRAID OF HIM?

"YOU are not afraid of me, are you?" yelled the lawyer at the witness who had been scared speechless by his cross-examination.

"N-o, n-o," muttered the witness, and the lawyer had saved the point in the record.

LAW WITHOUT LAWYERS

WITH that unreasonable prejudice against lawyers that is frequently exhibited by miners, plainsmen, and other pioneers of civilization, the early miners of Pike's Peak region enacted this law:

"*Resolved*, That no lawyer shall be permitted to practise law in any court in this district, under penalty of not more than fifty, nor less than twenty lashes, and be banished from the district."

It is not known that any person suffered the penalty of this extraordinary statute, but it shows the strong prejudice of the new community against lawyers. This prejudice sometimes extends to the technicalities of the law, and even to those whose observance is necessary to the proper administration of justice. An amusing illustration of this tendency occurred in the early history of California.

The jurisdiction of justices of the peace was then limited to cases where the amount involved did not exceed two hundred dollars. One Watson sued a Mr. Dunham on a note for four hundred dollars.

As the suit was brought in a justice's court, Dunham's lawyer proposed to dispose of it by pleading "no jurisdiction." But, as he was willing to see how far justice would go, he reserved his plea until "his honor" had entered judgment.

"Ah, yes, just so," replied the justice. "The court has thought of that and discovered a remedy. The court enters judgment against your client for four hundred dollars, and issues two executions for two hundred dollars each!"

And he did it.

When Nevada allowed those who quarreled to settle their disputes in their own fashion, two men became angry

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over a wood claim, and one of them shot the other's head off. The best counsel in the state appeared for the shooter, when his case came up for trial before a Judge Adams.

The judge had his own views of the case, and at the proper time gave them utterance. When the evidence was all in he waved aside the prisoner's counsel and the prosecuting attorney, and said:

"Young man, seeing as this is your first offense, I shall let you off *this* time. But you must be very careful how you go shootin' round this way in future, for they hung a man over in Carson the other day for just doing the very same thing."

Kentucky once boasted of a judge who sympathized with the Nevada justice's method of administrating affairs. A young man, well dressed, was brought into court for trial on a charge of grand larceny. The judge, after looking at him intently, turned to the throng of spectators and said:

"Gentlemen, I do not believe that any man who dresses so decently and looks so handsomely as this man does, could ever be guilty of stealing. He looks like an honest man, and, notwithstanding the indictment, I believe he is one. All of you who are in favor of his going quits, hold up your hands!"

The hands were lifted up, and the judge turning to the prisoner, said:

"There, go now; you are unanimously discharged."

INSTRUCTION TO THE ACCUSED

THE recent death of old Colonel McIntyre reminds us of the following instruction he often gave to soldiers brought up before him for trial for desertion:

"Now, Marco D'Angelo, you are charged with dasartion. If you plade guilty, which you know you are and which the court will find you are, then you can expect the laniency of the court; but if you piade not guilty, which you know you are not, and which the court will find you are not, and which you are not, then the court will soak hell out of you. Now which way do you plade?"

Invariably the prisoner would begin to tremble with fear, his hands would twitch, and in a voice quivering with emotion, he would reply: "Guilty, sir, guilty."

GENERAL BREWSTER'S REPLY

HERE is an account told by Henry J. Erskine, of Philadelphia, of the only instance in which Benjamin H. Brewster, Attorney-General of the United States during General Arthur's administration, was ever taunted in court of the disfigurement of his face. It occurred during the trial of an important suit involving certain franchise rights of the Pennsylvania Railroad ie Philadelphia. Mr. Brewster was then the chief counsel of the Pennsylvania company. The trial was a bitterly contested affair, and Brewster at every point got so much the best of the opposing counsel that by the time arguments commenced his leading adversary was in a white heat. In denouncing the railroad company, this lawyer, with his voice tremulous with anger, exclaimed: "This grasping corporation is as dark, devious, and scarified in its methods as is the face of its chief attorney and henchman, Benjamin Brewster!" This violent outburst of rage and cruel invective was followed by a breathless stillness that was painful in the crowded court room. Hundreds of pitying eyes were riveted on the poor, scarred face

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of Brewster, expecting to see him spring from his chair and catch his heartless adversary by the throat. Never before had any one referred to Mr. Brewster's misfortune in such a way, or even in any terms, in his presence. Instead of springing at the man and killing him like a dog, as the audience thought was his desert, Mr. Brewster slowly rose and spoke something like this to the Court: "Your Honor, in all my career as a lawyer I have never dealt in personalities, nor did I ever before feel called upon to explain the cause of my physical misfortune, but I will do so now. When a boy, — and my mother, God bless her, said I was a pretty boy, — when a little boy, while playing around an open fire one day, with a little sister, just beginning to toddle, she fell into the roaring flames. I rushed to her rescue, pulled her out before she was seriously hurt, and fell into the fire myself. When they took me out of the coals my face was as black as that man's heart." The last sentence was spoken in a voice whose rage was that of a lion. It had an electrical effect, and the applause that greeted it was superb, but in an instant turned to the most contemptuous hisses, directed at the lawyer who had so cruelly wronged the great and lovable Brewster. That lawyer's practice in Philadelphia afterward dwindled to such insignificance that he had to leave the city for a new field.

—From the *Chicago Times*.

CONTINUANCE GRANTED

THE soldier was on trial charged with having been drunk and disorderly. The prosecution had closed its case and several witnesses for the defense had already testified. The counsel for the accused slowly rose. He coughed once or twice, and then with a tremor in his voice said:

"If the court please, the two principal witnesses for the defense have just arrived. They have been absent without leave, and I haven't had an opportunity to interview them, and I would like to have a continuance in order to enable me to do so."

"How long a recess do you want?" asked the president of the court.

"Oh, about thirty-six hours I should think would be sufficient."

"Why, sir, thirty-six hours? We are not going to sit here and listen to any three days' testimony on a drunk and disorderly case ——"

"But," he interrupted, "if the Court please, these are the star witnesses for the defense and the defendant has a right to produce all material evidence in his defense."

"That may be true," replied the president, "but we are not going to sit here ——"

"But, if the Court please," he again interrupted, "these soldiers have returned in such a drunk and disheveled condition that I cannot interview them, nor are they fit to come before the court."

"Well, that is different."

"Yes, sir," he replied. "I have had them locked up and I think in thirty-six hours they will be sobered up sufficiently to proceed."

"Very well, continuance granted," replied the president with a scornful look.

ACCORDING TO LAW

THE story is told that in the early days of the railroad in the West there was a farmer who owned two well-bred and useful dogs, named Major and Tige. The dogs one morning chased a stray hog down the road and stopped to play at the railroad crossing, with the result that Tige was struck by an

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engine and killed. The owner promptly brought suit for damages against the road.

Damage suits were a new thing at that time, and there were many neighbors and sympathizers present at the hearing. The engineer swore that he gave a sharp blast of the whistle as he approached the crossing. It looked as if the railroad company was "to go scot-free," but the attorney for the farmer knew his justice.

"Your Honor," he said, "it is required by the statutes in such cases made and provided, that when any person or domestic animal is upon a railroad and is seen by the engineer, he must sound his whistle. In this instance, your Honor, there were two domestic animals innocently playing on the track, and the whistle was sounded only once, when it is a positive legal requirement that it should have been blown twice, once for each dog."

So convincing was this argument that the country justice would not even give the railroad attorney a hearing, and awarded the plaintiff the full amount of damages sued for.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

"Do you take this woman for better or worse?"

"I do, jedge, I do. But I hopes we kin kinder strike an average."

— *Washington Herald.*

An attorney who was also secretary of a gas company was considerably amused at the remark of his little five-year-old daughter who told a gentleman in response to his query as to what her father did for a living that "my father is a lawyer and sells gas." —*Exchange.*

In most lands that maintain a court of justice the institution commands the respect of the public. It has in its hands the means of securing an outward show of respect under any circumstances. In Haiti this power appears to be made a source of revenue, according to a story told by Mr. H. Prichard in "Where Black Rules White."

A Haitian owed a trader twenty-eight dollars. A judgment requiring the Haitian to pay four dollars a week into court was given, and the trader agreed to send a messenger to the magistrate every week for the money.

In due time he sent for the first instalment, and was informed that the Haitian had not paid up, but that he should be put in prison for his failure.

Three weeks passed with the same result. One morning the Haitian went to the trader's store. What good, he asked, would come to the trader if he, the poor man, were thrown into prison? Let the trader forgive him his debt, and earn thereby untold rewards in a future state.

After some talk, the trader gave him a letter of remission, which he went off to present to the magistrate. The affair was settled, but the Haitian was struck by the bad grace with which the magistrate dismissed him.

He forthwith returned to the trader and asked him if he had received the eight dollars already paid into court. The trader looked surprised, and said that he had received nothing.

"Then, since you have remitted the debt, that eight dollars is mine," said the Haitian.

Accordingly he went to the court to present his claim. The magistrate at once committed him to prison. A consul who had heard the story asked the magistrate what the man was sent to prison for.

"For contempt of court," was the reply.

— *Youth's Companion.*

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The Legal World

Monthly Analysis of Leading Events

The Sherman anti-trust law has occupied for the past month the position of greatest importance in the public mind. The acquiescence of the Government in the plan for the reorganization of the American Tobacco Company is interpreted as in some degree counteracting the shock of the steel prosecution, and as indicating a more moderate tone on the part of the Administration. Too great significance is not to be attributed to this circumstance, however, for it is noticeable that some advocates of a broader governmental policy in relation to monopoly, Colonel Roosevelt and Samuel Untermyer, for instance, complained that the decree dissolving the tobacco trust was not sufficiently drastic. While evidently convinced that the tobacco trust was bad, Colonel Roosevelt has declared the harvester trust to have been a good trust, yet Mr. Wickersham has rejected the International Harvester Company's plan of reorganization as not radical enough. The Administration cannot be said to have become moderate on the trust question, even though the tobacco decree suits it.

Nor has much assurance come from President Taft's third annual message devoted to the Sherman act. He maintains, as he has ever since the Standard Oil and Tobacco decisions were pronounced, that the Supreme Court has interpreted the act as prohibiting all monopolistic combinations, and he confidently asserts that business men are in a position to determine definitely for themselves whether they are acting in conformity to the statute. He has failed to satisfy the business interests, for the reason that the latter will never be satisfied with an interpretation of the law which makes it an instrument of unrestricted individualism and sees in it no sanction for any legal suppression of competition. Mr. Taft, in fact, is at odds with the business world because he believes in free competition as necessary to preserve equality of opportunity among a free people. His doctrinaire position on an economic issue has its counterpart in his views of the common law, which are not those adopted in England to-day — in fact, he does not recognize the possibility of any lawful restraint of trade at common law, nor does he perceive in the Standard Oil and Tobacco decisions that elasticity and vagueness which makes it impossible to declare in such positive terms what the Supreme Court really decided in those great liberalizing opinions.

While Mr. Taft recognizes the need of more specific provisions defining wrongdoing and urges a supplementary statute permitting voluntary federal incorporation, he fails to see that such a statute, to be really useful, should be really an amplification and extension of the Sherman law, plainly making she latter no longer viewable as a drastic piece of legislation.

More light is to be looked for from other quarters. The hearings given by the Senate Interstate Commerce Committee in Washington may result in a report recommending some palliative measures, though in view of the political complexion of the committee little more, perhaps, can be expected. To assist the committee in its work, the National Civic Federation has sent out requests for suggestions to twenty thou-

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sand representative men throughout the United States. Judge Elbert H. Gary, appearing before the committee, advocated federal incorporation, with provisions forbidding overcapitalization and with a system of rigid regulation similar to that of interstate railroads, as a cure for trust evils, and he outlined a thoroughly reasonable and conservative program which was not hostile to great combinations of benefit to trade. Samuel Untermyer, while denouncing the Steel Corporation in unmeasured terms, favored supervision by a federal commission similar to that advocated by Judge Gary.

The Illinois Manufacturers' Association has appointed a committee of twelve eminent men representing all sections of the country, to draft a bill for presentation to Congress, which will clearly lay down a rule for the conduct of interstate business, the provisions of which will be equally fair to the men who furnish the capital, the consumer and the wage earner. The movement led by the National Civic Federation is thus likely to make a mass of valuable testimony available which cannot fail to have some influence on the situation.

The uncertainty of the business situation in its legal phases continues. Decrees have been entered in the federal Circuit Court at Toledo, O., against the electrical trust, and at Baltimore against the bathtub trust. The most disturbing development of the month, however, is perhaps the movement to abolish the new Commerce Court. A radical sentiment in the West appears to prefer an administrative tribunal somewhat hostile to the railroads to an impartial court of experts in business law whose judgments on distinctly commercial questions shall be accredited with the highest authority, leaving to the Supreme Court the primary function of interpreting the Constitution. The Commerce Court's order entered Nov. 10, enjoining rate reductions in the *Missouri River rate* cases, greatly aroused the West, and its decision shortly afterward denying to the Interstate Commerce Commission the power to make general orders has not helped the situation. The abolition of the Commerce Court, of which there is danger, would be a retrogressive step and would add to the perplexities of business men.

Some assurance regarding not only the outlook for the railways, but the general business situation as well, may be derived from the fact that there has been a drop of fifty-eight per cent in the number of railway laws passed in 1911, as compared with 1909, as shown in reports to the Railway Business Association from forty states whose legislatures met this year. The president of the association sees in this record not only a period of comparative legislative rest succeeding much regulation, but also a marked tendency toward a constructive policy as affecting railways, and in many instances affecting general industry as well. The number of laws passed directly dealing with the railways was cut down in the two years from 664 to 276. "It is evident," says the report of the Railway Business Association, "that at the present moment political leaders who advocate a far-sighted policy toward railroads do receive the support of the voters. We point out further that the railways and cognate industries have assiduously conciliated the public, and that toward the railways the growth of public friendliness is now shown."

In the field of criminal law, the country has been treated to the spectacle of monstrosities of criminal procedure in California, where the prolonged trial of the Los Angeles dynamiters has

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afforded the most flagrant illustration we have had for many years of the evils of our system of unregulated challenges of jurors. On the other hand, the picture is made less gloomy in view of the fact that at least two great criminal trials have been concluded after being conducted with fairness and dignity. The Beattie murder case was satisfactorily disposed of in Virginia, the prisoner being put to death four months and six days after the crime was committed, although the trial was somewhat more lengthy than under ideal conditions. The Spencer trial in Massachusetts resulted in a verdict of murder in the first degree, having lasted about ten days, the defense of insanity having been interposed. The machinery of justice did not work with such promptitude in this case as in Virginia, the crime having been committed in March, 1910. Moreover, the defense in the Spencer case has been given till January 1st to file exceptions.

The United States Supreme Court

The Oregon initiative and referendum case and the New York cotton corner case were among the most important argued before the United States Supreme Court in November. Instead of hearing arguments in only seventy-five cases before the Christmas holidays, as was done last year, the Court had presented to it before the Christmas recess this winter nearly twice that number. Indications now are that the Court will dispose of half as many more cases this year as it did last year. The change in pace is generally credited to Chief Justice White. His most potent rule in this direction is regarded to be the one recently adopted reducing the time for oral arguments before the Court.

The Supreme Court adjourned Nov. 20 until Monday, Dec. 4, without attorneys for the indicted beef packers in Chicago making any attempt before the tribunal to stay the packers' trial on charges of criminal violation of the Sherman anti-trust law.

Presentation of a Portrait of Dean John H. Wigmore

The annual reception of the Northwestern University Law School, on Nov. 10, was an occasion of unusual interest because of the presentation of the portrait of Dean John H. Wigmore, the gift of the class of 1911 to the Law School. The portrait of Dean Wigmore, which forms the frontispiece of this issue of the *Green Bag*, was painted by Arvid Nyholm, a noted Swedish painter, who since 1905 has made his home in Chicago. The presentation speech was made by Stephen S. Gregory, president of the American Bar Association, who said of Dean Wigmore: "His name and his work are familiar to lawyers throughout our country, and, indeed, beyond its borders. His frequent contributions to the literature of the profession, his active and influential participation in professional and other organizations calculated to advance the cause of enlightened jurisprudence, to promote Law Reform and to secure a better, more efficient, and more merciful administration of justice among men, have justly earned the gratitude and appreciation of his brethren in the profession. Nor can I omit to mention the important contribution to the permanent literature of the law which he has made in his most valuable work upon evidence, a monument of industry, learning, and discrimination, which has become a *vade mecum* to almost every lawyer in extensive practice."

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Pennsylvania Honors Great Federal Judges

In the presence of a distinguished gathering of men of national affairs, judges, lawyers, and laymen, the tablet erected to the memory of the late Chief Justice John Marshall, and nine portraits of Associate Justices of the United States Supreme Court and Judges of the minor federal judiciary, were unveiled with appropriate ceremonies in the United States Circuit Court of Appeals at Philadelphia Nov. 25. The ceremonies were opened by Justice Lurton, who presided. The first of the exercises was the presenting of the Marshall tablet by John Cadwalader on behalf of the Philadelphia and Pennsylvania Bar Associations. Appropriate addresses were made by those presenting the other portraits. Afterward an historical address was given by Hon. Hampton L. Carson, former Attorney-General of Pennsylvania, and historian of the United States Supreme Court, on the subject, "A Historical Review of the Sources of Federal Jurisdiction; the Origin, Organization, and History of the Federal Courts Constituting the Third Circuit."

Mr. Carson described with the vividness of the accomplished historian the part played by the third circuit in the formation and growth of the federal judicial system, and instanced many cases arising in this circuit which have great historical significance. He quoted Chancellor Kent's meaty remark that law reports are worthy of being studied even by scholars of taste and general literature as being authentic memorials of the business and manners of the age in which they were composed. We quote the following paragraph from his address:

"I confess to a feeling akin to awe when I contemplate the manner in which for a century and a quarter the Federal Judges have, with rare exceptions, upheld the independence of the bench, a doctrine which it cost our English sires six centuries of struggle to acquire, which is secured by the tenure of good behavior, which is safe from the odium of appointing boards and commissions and licenses and privileges which sullies the ermine by the blight of suspicion, whether just or unjust, and which the State Judges, through no fault of their own, are obliged to face under unwise constitutional provisions, lest the power be abused in other hands; that independence which knows no fear, which is no respecter of persons, which cringes to no Government officer, which quakes at no hurricane of popular clamor, which knows nothing about the parties but everything about the cause, which does nothing for the sovereign, nothing for a patron, but everything for justice, which dreads no consequences save the stings of conscience for violated duty, which pronounces judgment as it is given to finite human understandings to see the law; that independence which is the most precious jewel in the people's treasure chest, which dissipates by its light the darkness of ignorance, and which gives assurance that never will a sober, righteous, and self-respecting people with a full knowledge of its value, permit the measureless abomination and the unspeakable sacrilege of the judicial recall."

Dean Bruce now on the Bench

Andrew Alexander Bruce was sworn in as Justice of the Supreme Court of North Dakota Nov. 1. As Dean of the law school of the University of North Dakota Justice Bruce has long occupied a prominent position in the law-teaching profession, and his articles contributed to legal journals have shown him to possess unusual powers of keen

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and independent analysis. The state honors itself by elevating to the bench a man who is a jurist in the true sense of the word, "in a day when lawyers are many and jurists are rare."

Justice Bruce's appointment followed the resignation of Chief Justice Morgan, who has been in ill health for the last couple of years. This gives Judge Spalding the position of Chief Justice on account of seniority.

Two Great Law Libraries

A statement recently made that the Elbert H. Gary Library of Law at Northwestern University "is undoubtedly the most remarkable institution of its kind in the whole world" is disputed by Librarian John H. Arnold of the Harvard Law School Library, not with a view of lessening the importance of the Gary Library, but because of his desire "to call attention to the fact, perhaps not generally known, of the great growth and value of the Harvard Law Library."

Writing in the Boston *Transcript*, Mr. Arnold says:

"During the past year this [the Harvard] library has acquired the Olivart collection of international law, doubtless the most remarkable collection on this subject in the world. Our assistant librarian has just returned from Europe, after a remarkably successful search of, not modern Continental law, which is easily obtained, but of the old books in the various branches, getting as early editions as possible. We shall have added during the year upwards of 20,000 volumes to our collection, and it is safe to say that, on Jan. 1, 1912, the library will contain at least 150,000 volumes.

"Now, bigness is not a test of quality, but I think we can modestly say that in quality we have no fear of comparison with any law library in this country or abroad. . . . In this connection, I would quote what Professor A. V. Dicey of Oxford University had to say of our collection in his article in the *Contemporary Review* of November, 1899, on 'The Teaching of English Law at Harvard.' I quote his words: 'The Law School forms a sort of University within the University. Its library constitutes the most perfect collection of the legal records of the English people to be found in any part of the English-speaking world. We possess nothing like it in England. In the library at Harvard you will find the works of every English and American writer on law; there stand not only all the American reports — and these include, as well as the reports of the federal courts, reports from every one of the forty-five states of the Union — but also complete collections of our English reports, of our English statutes, and of the reports and statutes of England's colonies and possessions. Neither in London nor in Oxford, neither at the Privy Council nor at the Colonial office, can one find a complete collection, either of American or even, astounding as the fact sounds, of our Colonial reports.'

"I may add that it is my belief that no library in this country contains so full a collection of the reports and statutes of the Dominion of Canada as ours. It is possible that the Library of Parliament at Ottawa may have a more complete collection. I am credibly informed that our collection of modern Anglo-American law, international law, Roman and Civil law, ecclesiastical law, jurisprudence and philosophy of law, and Anglo-American legal history far surpasses the collection in the Gary Library."

That the library recently presented by Judge Elbert H. Gary to his alma mater is truly a remarkable library may, however, be seen from a bulletin describing it in detail. The library is said in this

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bulletin to comprise the following eleven collections:

Modern Anglo-American Law — Includes the modern law as contained in statutes, current session laws, decisions, digests, treatises, collections of leading cases, and journals of the United States, of England, of Ireland, and of Canada; official copies of all the briefs and records filed in cases before the Supreme Court of the United States.

Modern Continental Law — Now numbers some 12,000 volumes of the law of the twenty-three European countries, as contained in statutes, decisions, journals, and treatises, is more comprehensive in scope than any other collection in the United States. This collection is particluarly valuable to lawyers having a foreign clientage. It is in constant use by counsel from every part of the United States.

International Law — Numbers nearly 3,000 volumes, and includes a large quantity of printed material relating to American, to British, and to Continental Diplomacy.

Ancient, Oriental, Primitive, and Mediæval Law — Includes the Hindu, Mohammedan, Hebrew, Babylonian, Egyptian, Greek, Chinese, Japanese, and sundry other systems, as well as the mediæval European materials. It numbers 14,000 volumes.

Roman and Civil Law — Numbers 2,500 volumes, including the library of the late Moritz Voigt, of Leipzig, Germany, and contains many rare volumes.

Ecclesiastical Law — Numbers 1,500 volumes, containing a selection of the most useful texts, commentaries, and journals.

Jurisprudence and Philosophy of Law — Numbers 700 volumes, and includes all the important American, English, German, French, Italian, and Latin texts on this subject.

Criminal Law and Criminology — Now numbers over 2,000 volumes.

Anglo-American Legal History — Will include material relating to English Historical Legal Literature, complete sets of Colonial session laws (mostly reprints), revisions, contemporary and modern treatises on the laws of the colonies, and all other available material related to the history of the development of the common law in England and the United States. This collection now numbers about 2,500 volumes.

Latin-American Laws — Will include collections of the laws of Mexico, the Central American and the South American States, following the arrangement in the Gary Collections of Modern Continental Law; that is, a collection of the codes, ordinances, decisions of the Supreme Court, of the most important treatises, and of the leading law journals. Thus far the volumes installed number 1,500, and will be increased as rapidly as the material can be acquired.

Legal Bibliography — Numbers some 500 volumes and pamphlets, covering all topics and countries.

The McNamara Trial

The McNamara trial at Los Angeles, after costing the state what is estimated as about $200,000, came to an end Dec. 1, when James B McNamara pleaded guilty to murder in the first degree and John J. McNamara to that of dynamiting the Llewellyn Iron Works at Los Angeles. The trial began on Oct. 10.

The defense fought for delay. They raised the question of the legality of J. J. McNamara's extradition in the California courts; they moved for the quashing of the indictments on the ground that the grand jury was biased; they demanded a new judge. Clarence S. Darrow, their counsel, exhausted every possible technicality in his fight for his clients, but could not prevent their final arraignment on Oct 11. Then the prosecution announced its intention of trying the two prisoners separately, and elected to take first the case of James B. McNamara, the younger brother, who is accused of having been the more active partner in causing the actual explosions. He was placed on trial for the death of Charles J. Haggerty, a machinist, who was one of the twenty-one killed in the Los Angeles Times explosion.

Though the trial has come to an end before even the case for the prosecution has been opened, it will long be remembered in legal annals for the extraordinary length to which the process of the choice of a jury was carried. After seven weeks of continuous sessions only eight jurors had been finally selected, and the proceedings seemed intermin-

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able. It was noticeable that the defense rom the very beginning chose its tactics on the assumption that labor was on trial, and in their questioning of talesmen they insisted in inquiring into the views that each man held on trade-unionism and the open shop.

An Ohio Disbarment

In the Circuit and District Court of the United States for the Northern district of Ohio, Charles A. Thacher was disbarred on five charges of professional misconduct in a decision rendered by Federal Judge Killits on Nov. 11. Thacher had already been disbarred by the Supreme Court of Ohio. The chief charge was that of criminal libel committed against Judge Morris of the Court of Common Pleas. The Court carefully distinguished between the right of fair criticism of judges and judicial candidates, and the abuse of that right. In an extended opinion Judge Killits said:

"That an elector, be he an attorney or not, has the right to refer to the record of a judge who is a candidate for argument against his re-election and may publicly criticise such candidate's fitness for the position is too plain to be disputed. The right to do so becomes a duty when in the judg ment of such elector the unfitness of the candidate may be shown from his record. In the exercise of this privilege, the elector has the plain right to his own viewpoint, whereon he may stand with all the safeguards of free citizenship. This position is so palpably consonant with our institutions that to advance it would seem to be supererogation, were it not for the fact that it has been assiduously misrepresented, to the distress of many credulous souls all over the United States that the Supreme Court of Ohio held to the contrary and that judges were, in their view, immune from criticism. . . .

"Is it not easy to see that any assertion that a court is derelict in its duty to the whole people is bound to lessen in some degree that respect of the people for their courts which is essential to their usefulness and authority? A charge that a judge shows himself to be unfit for his exalted position involves in some measure loss of regard for the place he occupies. Undoubtedly it is often necessary to make such a charge for the purpose of removing an unfaithful officer, and the risk that judicial authority might be weakened thereby must be taken; but no lawyer, it seems to us, who possesses sufficient appreciation of what it involves to be an officer of a court of justice to deserve the confidence of a court and be useful thereby to his clients would venture to deliberately deceive and mislead the public as in this instance.

"The right to criticise judicial candidates, whether upon their judicial record or not, is not involved in this situation. The right respondent is contending for is the right to employ his professional standing in deliberate libel. In order to work out personal feeling and he claims the right, although to exercise it as he would involves a loss of respect for and a lowering of the proper influence of the very courts in which he undertakes to serve his clients. In our judgment, this conduct and the indifference and unconcern still shown by respondent to its character exhibit a fatal lack of appreciation of the functions and ethics of the office which he would hold at the bar."

Bar Associations

California. — In his annual address to the California Bar Association, which held its second annual meeting Nov.

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13–15, at Sacramento, President Lynn Helm of Los Angeles, speaking on the subject of "Our Progressive Judiciary," devoted most of his time to the recall measure recently adopted by the people of the state. So menacing will the new privilege become, he declared, that the people will repent of their acceptance of it and find relief in going "back to the Constitution."

The Committee on Criminal Law and Procedure recommended that the constitutional amendment providing for a three-fourths jury verdict in criminal cases, which was killed by the last session of the Legislature, and the other amendment providing for prosecuting attorneys being granted the right to comment on the refusal of an accused to testify, also killed in the last Legislature, be resubmitted to the legislators for adoption. The committee was instructed to report to the executive committee for further action at the next annual convention, which will be in time for the next regular session of the Legislature.

The delay in proceeding with the McNamara trial in Los Angeles was criticized in an address on "The Relation of Bench and Bar to Each Other," delivered by Justice Albert G. Burnett of the Appellate Court. "There is something radically wrong with our administration of the law," he said, "when it takes several months to impanel a jury, and especially with the prospect that after this mental and physical contest is concluded the guilt or innocence of the defendants will receive considerably less attention than many other wholly extraneous matters."

An address by John Currey, Chief Justice of the California Supreme Court from 1864 to 1868, and now aged ninety-seven years, which was read for him by James A. Gibson of Los Angeles, made a brief argument against the constitutionality of the judicial recall amendment.

A resolution urging amendment of the primary law so as to take the judicial candidates out of reach of partisan indorsement was carried after considerable discussion.

A striking feature of the meeting was a defense of the recall of judges by Governor Johnson, in reply to President Lynn Helm and other speakers. He showed plainly that he did not like the stand taken by members of the association. Governor Johnson also outlined his policies with regard to simplification of the statutes for the government of municipalities, changes in the Australian ballot laws, amendments of the direct primary, the referendum and initiative, the eight-hour law for women, and changes in criminal procedure.

Kansas. — At the annual meeting of the Kansas State Bar Association to be held Jan. 30, 1912, President Harry B. Hutchins of the University of Michigan is to deliver the annual address.

Oregon. — Declaring that it was not to the credit of the legal profession to be so far behind the times in reform of its methods of judicial procedure in an age when there is a general awakening in many fields to the need of reform, Judge Charles H. Carey, in a speech before the Oregon State Bar Association, attacked the delays and shortcomings in the administration of criminal and civil law. "I would have the court aim at ultimate justice, irrespective of anything in the pleadings, or anything omitted from the pleadings," he said. "I would have the court take the evidence offered by the parties, but not be confined to this source of information."

The annual meeting of the association was held at Portland Nov. 21–22.

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W. T. Slater, the retiring president, discussed the uncertainties of the judicial amendment to article 7 of the state constitution.

Mr. Slater's address was followed by the reading and discussion of a paper on "What Changes Should Be Made in Our Judicial System?" by ex-Justice of the State Supreme Court Will R. King. Most important of the changes suggested were the creation of a circuit court in every county, and the creation of an intermediate appellate court, with provision for the enlargement of this and the Supreme Court to guarantee swift dispatch of business.

On the second day Harold Preston of Seattle spoke on workmen's compensation. Mr. Preston drafted the present employers' liability law for the state of Washington.

Committees from the State Bar Association and from the Multnomah Bar Association will be appointed to confer for the discussion of the question of admission to the bar. The general opinion expressed at the meeting was that admission to the bar is too easy under the existing system of examination.

The following officers were elected: M. L. Pipes, president; C. J. Schnabel, treasurer; W. L. Brewster, secretary; the vice-presidents being Clarence Reams, J. W. Hamilton, Charles L. McNary, J. B. Bleland, F. J. Taylor, G. W. Phelps, E. N. Hartwick, L. A. Johnson, W. H. Brooke, Colon R. Eberhard, D. R. Parker, and Henry L. Benson.

South Carolina. — Judge Alton B. Parker of New York, has accepted an invitation to deliver the address at the annual banquet of the South Carolina State Bar Association on the evening of Jan. 19, 1912. The annual meeting takes place on Jan. 18–19, the annual banquet coming on the night of the 19th.

Vermont. — At the third annual meeting of the Vermont Bar Association at Montpelier on Nov. 7, Judge James M. Tyler of Brattleboro delivered the annual address, speaking on the Temple in London. He advocated the teaching of the rudiments of law in the schools of the country. If a law student has the funds he should by all means take a course in a law school. Lacking funds, study in an office is the next best thing.

Congressman D. J. Foster delivered the principal address, his subject being "International Arbitration." Other speakers were F. D. Thompson, Barton, on "The Supreme Court"; W. H. Taylor, Hardwick, on "The Superior Judge"; Alex Dunnett, St. Johnsbury, on "The United States Court in Vermont"; George Young, Newport, "Report from American Bar Association"; Levi Smith, Burlington, "Class of 1911."

The following officers were elected: president, R. E. Brown of Burlington; vice-presidents, C. C. Fitts of Brattleboro, J. G. Sargent of Ludlow, and F. G. Fleetwood of Morrisville; secretary and librarian, J. H. Mimms of Burlington; treasurer, E. M. Harvey of Montpelier; board of managers, Charles D. Watson of St. Albans, H. C. Shurtleff of Montpelier, Charles L. Button of Middlebury, Max L. Powell of Burlington.

Miscellaneous

Capital punishment is not to be restored in Rhode Island, the Legislative Committee on the Revision of the Criminal Laws declining to recommend it. The demand for its resumption was made soon after the slaying of a merchant in Pawtucket by a highway robber. The proposition was strongly opposed by leading citizens of the state, including Ex-Chief Justice John H. Stiness.

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The Ohio constitutional convention will begin Jan. 1 in Columbus. Many important questions will be brought up, including the initiative, the referendum, the recall, and the possible repeal of the local option system of regulating the liquor traffic. The last constitutional convention in Ohio was held in 1873–74. More than half of the 119 delegates are pledged in writing for the initiative and referendum. The business interests of the state are in favor of the classification of property for purposes of taxation. The matter came up during the last constitutional convention, the proposal being defeated.

According to Governor O'Neal of Alabama, the evil of lynching may be prevented by a simple remedy — the punishment of sheriffs. He said recently: "At present, in Alabama, a sheriff, for permitting a prisoner to be taken from a jail and put to death or mobbed, may, on the instance of the governor, be impeached by the Supreme Court. This provision has been so effective in preventing violence against suspects or convicted men, in prison or jail, that such violence has practically ceased. My predecessor secured the impeachment of the most popular sheriff Mobile ever had because he permitted a prisoner to be taken from a jail and lynched, although the lynched man was a murderer."

"From a lawyer's standpoint, the majority of judges are competent men," said Dr. Woods Hutchinson, recently, in Chicago. "That is just the point. A lawyer's education is narrow and he becomes a precedent worshipper out in practice. As a magistrate he doesn't know the conditions that he deals with every day. He makes decisions that touch closely industrial conditions, and he never has seen them. He looks at everything from the standpoint of the law, and the law he gets from a lot of dusty books. Before a man could go on the bench I would make him stay weeks and months in the hospitals, insane asylums, the slums, in the society of the '400,' everywhere, looking for the causes of things. Then, having acquired a knowledge of man, he would make a good judge. There ought to be a Supreme Court, but it should have no power to annul laws under any pretext."

A report submitted by the Committee on Judicial Procedure of the Philadelphia Law Association, which has for some time past had under consideration the subject of delay in the trial of causes in the county courts, contains some comparisons of the time it takes to reach a case for trial in different cities. In Philadelphia that time is from one to three years, but after a case is ordered on the list another year passes before it comes to trial. In New York the time it takes a case for trial is from one and one half to two years in ordinary cases to three to six months in cases preferred by law. In Brooklyn the period is from one and one half to two years. In Chicago, about three months in the municipal court and one year in the county courts. In St. Louis, from three to six months. In Boston, from six months to two years. In Baltimore, from four to eight months. In Cleveland and Buffalo, one year. In San Francisco, thirty days. In New Orleans, two to five months.

The New York Society of Medical Jurisprudence at its annual meeting, held Nov. 13, voted its disapproval of the proposed abolishment of the defense of insanity in murder cases, recommended by a committee of the

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New York State Bar Association. The vote stood 25 to 16. Unconstitutionality and inhumanity were two objections that were offered against the change. Too much lawmaking was another. The committee making the report had been asked to consider what attitude the society should assume toward proposed changes in the law providing for a verdict of "guilty but insane" in criminal cases and limiting the right of alleged insane persons to the repeated issuance of writs of *habeas corpus*.

Obituary

Cox, John F. — The Speaker of the Pennsylvania House of Representatives, John F. Cox, died at his home in Homestead, Pa., Nov. 6. He was born in 1852, in Mifflin township, and attended Westminster and Mt. Union Colleges, graduating from the latter institution.

Dryden, John F. — Ex-United States Senator John F. Dryden of New Jersey, President of the Prudential Insurance Company of America, died Nov. 24. Ex-Senator Dryden went to Newark, N. J., in 1873, when he was thirty-four years old, with the purpose of founding an insurance company to deal in industrial risks. He amassed a fortune estimated at $50,000,000.

Komura, Jutako. — Baron Komura, who died at Tokyo Nov. 22, was graduated from Harvard Law School in 1878, receiving the first degree ever given by that institution to a Japanese student. His legal education was partly continued with studies in the office of the late ex-Attorney-General Davenport of New York.

Moore, L. W. — Judge L. W. Moore, a prominent member of the Texas Bar Association, former Congressman, and an advocate of conspicuous ability, died at La Grange, Tex., Oct. 29.

Riker, Samuel. — Samuel Riker, a retired lawyer, died Nov. 19, in New York City. He first gained prominence in 1859, when he was concerned in the construction of the will of William Jay.

Robinson, William C. — The dean of the law school of the Catholic University of America at Washington, D. C., Professor William C. Robinson, was stricken with apoplexy Nov. 7. He was seventy-seven years old, and one time dean of the law school of Yale University. He was a noted writer of legal works.

Russell, William Hepburn. — William Hepburn Russell, who died Nov. 21, practised law in New York City, wrote legal articles and compiled a digest of United States Supreme Court Reports.

Williams, James. — James Williams, D.C.L., Fellow of Lincoln College, Oxford, and All Souls Reader in Roman Law, died Nov. 3, in his sixtieth year. He was a frequent contributor to the *Law Magazine and Review*, and wrote over one hundred legal articles for the *Encyclopedia Britannica*. Besides his legal writings, which included an edition of the Institutes of Justinian with a commentary, he wrote "Dante as a Jurist," "A Lawyer's Leisure," "Briefless Ballads," and "The Oxford Year." Yale University had given him the honorary degree of LL.D.

Wright, Carroll. — A leader of the Iowa bar, Carroll Wright passed away at Colorado Springs Oct. 28. He had been counsel for the Rock Island Railroad and prominent in Des Moines. He had served several terms on the Board of Regents of the State University.

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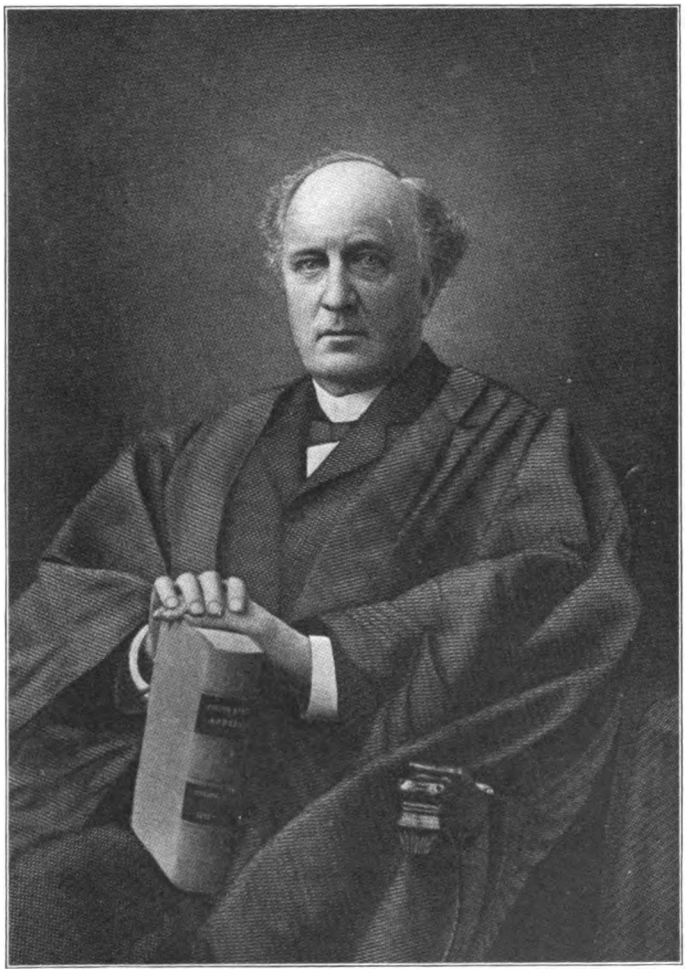

HON. JAMES G. JENKINS, OF MILWAUKEE

UNITED STATES CIRCUIT JUDGE, RETIRED

(From a steel plate engraved by L. A. Struck)

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The Green Bag

Volume XXIV February, 1912 Number 2

The Law in Milwaukee

By Duane Mowry, LL.B.

of the Milwaukee Bar

THE approximate number of admitted attorneys residing in the city of Milwaukee, the metropolis of the state of Wisconsin, is seven hundred. This includes those who are in the active practice of the law, as well as those who are engaged in other lines of endeavor, and those who are not actively engaged in any line of work at all. It is probably quite close to the actual facts to say that there are five hundred practising attorneys in Milwaukee who are using the profession as a means of livelihood, either in whole or in good part. Of the remainder, it may be said that most of them are engaged in mercantile pursuits; a few have drifted into other professions; and a few, on account of old age and having a competence, have retired to private life.

The number of lawyers who have made a financial success of the practice of the legal profession residing in Milwaukee is, indeed, quite small. There are a goodly number of well-to-do members of the Milwaukee bar, but their financial worth was secured outside of the legitimate practice of the law. Investments in real estate and in other ventures assisted in making the fortunes for these lawyers. One does not find the royal road to great wealth in the practice of the law in Milwaukee. But this is a digression.

The courts of Milwaukee consist of the United States Circuit Court; the United States District Court; six State Circuit Courts; two County or Probate Courts; one Municipal Court; one District Court; seven Civil Courts; one Juvenile Court; and Justices Courts, which are not courts of record, and which, on account of recent legislation, are not likely to do much business hereafter. The state courts of record abovementioned are all very busy in disposing of the litigation brought before them. The United States courts are not so busy, although the bankruptcy proceedings do bring considerable business into the district court.

The United States courts are similar to those elsewhere in the country and have like jurisdiction. Hon. William H. Seaman, a resident of Sheboygan, in this state, was promoted from district judge to the position of presiding judge of this court on the retirement of Judge James G. Jenkins, who had reached the age limit. Judge Seaman is a clean-cut, affable gentleman and of undoubted

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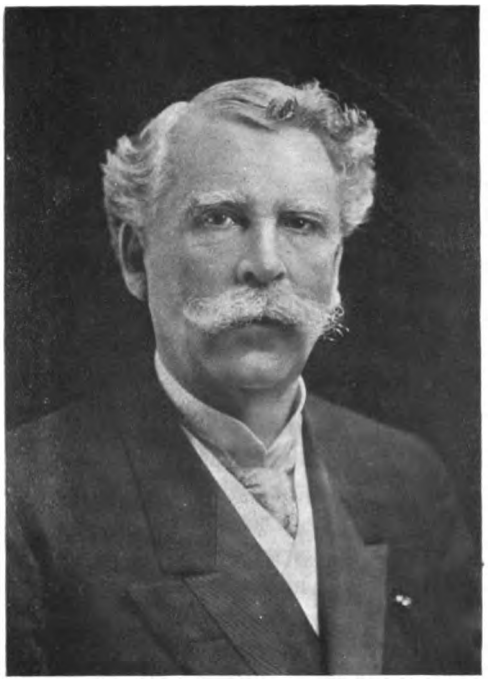
legal ability. His fitness for his present judicial position has been demonstrated on many occasions. The fairness and integrity of his decisions are unquestioned.

Since this article was begun the occupant of the district court bench, the Hon. Joseph V. Quarles, a resident of this city for many years, has died after a long and lingering illness. He was a well-known and able lawyer and politician. Prior to his holding the position of district judge, he was a United States Senator from this state. His reputation as an orator extended far beyond boundaries of his native state. He was known as "the silver-tongued orator." As a judge he was distinguished for his fairness and honesty.



THE LATE JOSEPH VERY QUARLES[1]
United States District Judge, Eastern District of Wisconsin

The jurisdiction of the six circuit courts is identical. They have original jurisdiction in both civil and criminal matters, and appellate jurisdiction from inferior courts, including the county, municipal, civil and justices courts, and also supervisory control over them. In civil matters, the amount involved is unlimited. Suits are the subject of the most vigorous contests in this court. It is undoubtedly the busiest court in the city. The calendars are large and work is generally behind. The demands of litigants and attorneys are certainly great in this court. The six judges of this court are all successful lawyers, and some of them have had a large experience at the bar in much important litigation. As trial lawyers they have demonstrated their fitness for this important promotion. Other duties which fall to this court are the issuing of writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and writs necessary to carry into effect its orders, judgments and decrees.

The county courts, which are presided over by two judges, are also courts of great importance to the people. The jurisdiction of this court extends to the probate of wills and to the granting letters testamentary and of administration on the estates of deceased persons residing in the county at the time of death; to the appointment of guardians of minors and others prescribed by law; and to trust estates created by will admitted to probate in the court. In a county of so much wealth as this one, the grave responsibility falling upon this court is at once apparent. A single suit has been known to involve over a million dollars.

[1] The half-tone portraits accompanying this article are from photographs by Stein, Milwaukee.

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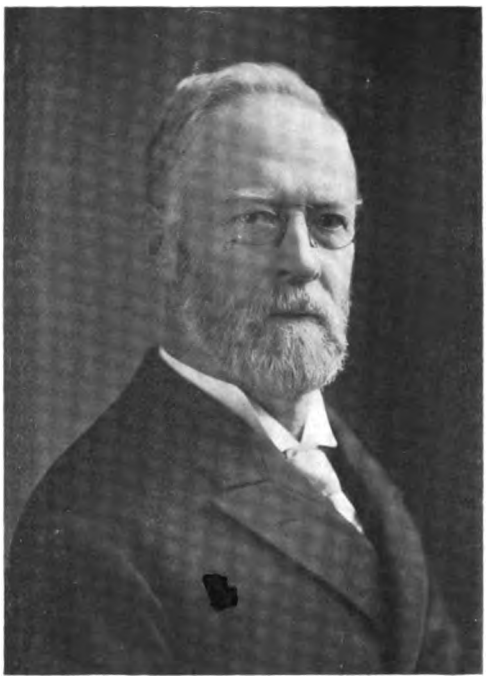
The municipal and district courts are in charge of the criminal matters of the city and county of Milwaukee, the district court having jurisdiction of matters arising under the ordinances of the city and of the preliminary examination of offenders. Change of venue may be taken from the municipal to the circuit court.

The civil courts were recently created courts by our state Legislature and are of limited civil jurisdiction. They were designed to afford speedy justice to litigants having small matters in dispute. Their jurisdiction is limited to two thousand dollars.



GENERAL FREDERICK C. WINKLER
Ex-President of the Wisconsin State Bar Association

The gentlemen occupying judicial positions in the Milwaukee courts are, with a few exceptions, counted among the best lawyers of the city. In most instances, they have proved their right, by test in open court, to hold their present places. And there is no well-organized movement to displace any of them. This is complimentary alike to the judiciary and to the constituency which elected its members.

To attempt anything like a comprehensive presentation of the personnel of the bench and bar of Milwaukee would far exceed the limits of this article. And no such attempt will be undertaken. There are, however, members of the profession, on the bench and off of it, who, by reason of their legal learning, large experience and great success in the actual practice, seem to tower above their associates. And to some of these reference will be made.

Judge James G. Jenkins, retired, is, confessedly, one of the leaders of the Milwaukee bar. He is no longer in the active practice, but his mind is still young. And he chooses to pass his declining years as Dean of the Law Department of Marquette University, a local educational institution. The work which he is doing in this field gives added luster to the honors which are already securely his. As an advocate, Judge Jenkins had few superiors in the city or state. And as a judge, he was painstaking, honest and just. As a platform orator, his reputation extended far beyond the boundaries of the state.

Hon. Francis E. McGovern, the present Governor of the state, is an active member of the local bar. And, although a comparatively young man, he has taken a ranking position as a successful lawyer in our midst. For eight years he was connected with the office of the prosecuting attorney of Milwaukee County, four years as assistant

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HON. FREDERICK W. VON COTZHAUSEN
Eminent Publicist and Retired Lawyer

and four years as the head of the department. It was largely during his administration of this important office that a large number of public officers were indicted by the grand jury, many of whom were afterwards convicted, or chose to plead guilty to all sorts of petty grafting and take their punishment. During these years he was, indeed, a terror to wrong-doers in public life and did much to clean the Augean stables. He is a graduate of our State University and for several years taught in the high schools of the state. He is largely self-made, and a bright political future awaits him. He is clear-headed, fair-minded, honest and eloquent.

Hon. Hugh Ryan, a son of the late Edward G. Ryan, the great Chief Justice of the Supreme Court of the state, resides in this city, and is an eminent member of the profession. He is, moreover, a court commissioner, and, in the discharge of the duties of that office, he has demonstrated that he possesses something of the judicial temperament and ability of his distinguished father. Mr. Ryan possesses a legal mind of a high order. He is a clear thinker and a sound reasoner. In a court of equity, particularly, he is a worthy antagonist.

Gen. Frederick C. Winkler, who retired from active practice only a few months ago on account of old age and a comfortable competence, is a lawyer of distinguished parts. He commands our attention because of his long, honorable and successful career at the bar of the city and state. His name has been identified with much important litigation in the local courts and the Supreme Court for nearly half a century. He has been honored by his associates as president of the local and state bar associations. His ability as a trial lawyer is conceded. His integrity is unquestioned. Few men go into retirement after so long a career at the bar as has been General Winkler's, who take with them in so large measure the good will of his brethren.

Hon. James G. Flanders is regarded as at the head of the practising attorneys of the city. He is alike strong before the court and as a *nisi prius* lawyer. His long and continuous practice at the bar and his great familiarity with legal principles make him an opponent worthy the steel of the ablest and best. A legal battle has no terrors for him. He is no longer a young man but has many years of service in the profession, if one were to judge from appearances. He recently served the state bar association as its presiding officer.

Hon. Joshua E. Dodge, at one time connected with the Attorney-General's office in Cleveland's cabinet, and re-

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cently a Justice of the Supreme Court of the state, is connected with one of the leading law firms of the city as counsel. He resigned his position on the bench to resume the practice of the law in this city. His opinions while on the bench were the subject of many favorable remarks from members of the profession because of the fine English used in them. His knowledge of the law is unquestioned but he has not been much known as a trial lawyer.

Hon. John C. Ludwig is the oldest judge in continuous service in the city. He is a man of even temper, patient, industrious and honest. Attorneys, generally, delight to try their cases before him because they feel certain that they will receive "a square deal" at his hands. It would not be true to say that he is "brilliant," but both litigants and attorneys feel that he is just, which is far better in a judge.

Hon. Thomas W. Spence is a good lawyer who has made a success of the practice in this city. He is clean-cut, bright and honest. Moreover, he is very attentive to the requirements of his clients. He has been identified with much important litigation and is a good lawyer before either court or jury.

Frank M. Hoyt, Esq., is a trial lawyer of more than average ability. He commands the respect and attention of the courts because of his careful preparation of his cases. He is still a vigorous attorney in middle life, and has been very successful. He has been connected with important suits and numbers some wealthy persons among his clients.

Hon. Frederick W. von Cotzhausen is a distinguished and able lawyer of the old school. He is no longer in the active practice, having long since reached the scriptural age limit. But he is well-preserved in both mind and body and takes a lively interest in current events. He is a forcible speaker and has prepared some very able briefs on important public questions; notable among these is one bearing upon the general question of taxation. His ability to quote the law offhand and without apparent preparation is remarkable. It has been the subject of favorable comment among the legal fraternity. He devotes his time to his private business.

George P. Miller, Esq., comes from a family of lawyers, his father, the late Benjamin K. Miller, having been a member of the same law firm of which he is now the head. And his grandfather, the Hon. Andrew G. Miller, was the first United States judge in this state. Mr. Miller is a trial lawyer, of considerably more than average ability. He is painstaking, studious and persistent. He wins his cases by a careful preparation before going into court.

HON. JAMES L. O'CONNOR
Former Attorney-General of Wisconsin

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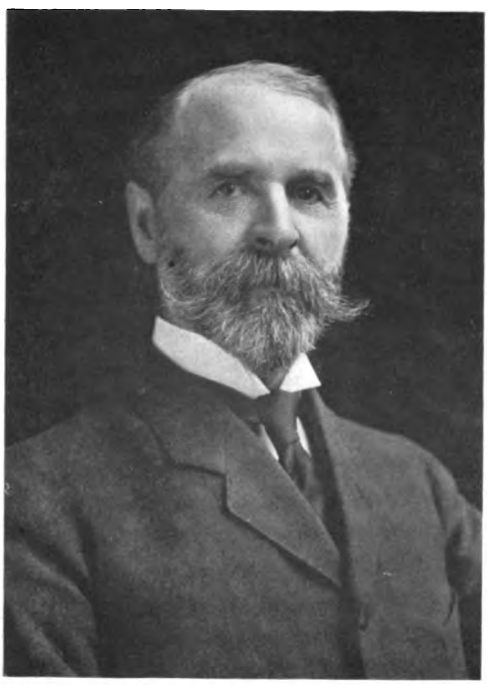
He counts among his clients some of the wealthiest families of the city as well as many of the most important corporations. He is conceded to be a leading member of the bar.

Horace A. J. Upham, Esq., is a well-read lawyer, whose financial interests and connections give him a prestige not



HON. GEORGE H. NOYES

General Counsel of the Northwestern Mutual Life Insurance Co.

enjoyed by some other attorneys equally able. He is particularly capable in matters pertaining to business affairs, and is regarded as an exceedingly safe and sound counsel. His actual participation in the trial of causes is limited to a comparatively few clients in whom he has a personal or pecuniary interest. Mr. Upham is a son of the late Hon. Don A. J. Upham, who was a prominent public man in the city and state in the early history of the city.

Hon. James L. O'Connor, a former Attorney-General of the state, is a trial lawyer of excellent parts. He is particularly able as a jury lawyer. But he is also strong before the court. He came into public notice by reason of his successful prosecution of ex-treasurers of the state for retaining interest money on trust funds. These suits were fought most vigorously, but the doughty little Irishman won out on all of them. He is an excellent platform speaker and is in demand for occasions other than those of a purely legal nature.

Hon. William H. Timlin, a Justice of the Supreme Court of the state, whose present professional activities are at Madison, the capital, is a resident of the city, and it is possible that he may resume the practice at no distant day. He is an exceedingly well-read lawyer. He is a man with positive convictions of right and wrong and of course he makes an excellent judge. He was, practically, the unanimous choice of the local bar for the judicial position he now occupies. And this, certainly, is high praise to his learning and integrity. Mr. Timlin is yet in middle life and has many years of usefulness before him.

Hon. George H. Noyes is General Counsel for the Northwestern Mutual Life Insurance Company, succeeding the late Judge Charles E. Dyer in that responsible position. He was, for a time, the judge of one of the local courts, but resigned to engage in the active practice of the law with a leading firm. He has taken a prominent part in much important litigation and is regarded as a safe counselor. He is a graduate of the State University and was, for several years, a member of its managing Board of Regents. He is public-spirited, reliable and honest.

Hon. William J. Turner is one of the judges of the Circuit Court of Mil-

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waukee County. He is one of the able judges of the local courts. He has had a long and varied practice in all of the courts of the state, and he comes to the discharge of the judicial function with a ripe legal experience to support him. He is past middle life and is eminently fair in his rulings. Judge Turner has taken an active interest in public education, having been a member of the Board of Education and of the State Board of Normal School Regents.

Charles H. Van Alstine, Esq., is a railroad attorney who lives at Oconomowoc, a suburb of Milwaukee, but who has his law offices in this city. He has long been engaged in the trial of actions for various corporations and is regarded as among the best of his class in the city or state. In negligence cases, particularly, he has no superior in this part of the country. Mr. Van Alstine has made a specialty of this class of law business and he has excelled in it. At present he is the attorney for the Chicago, Milwaukee & St. Paul Railroad Company.

Hon. Edward Q. Nye is a good trial lawyer, but his present position as Referee in Bankruptcy takes all of his time and attention. He was in the Civil War and is past middle life. He is a forcible speaker and has been in many political campaigns. As an officer of the United States courts he has shown himself to be fair, honest and capable. He is a creditable member of the public service.

The foregoing *résumé* of the bench and bar of Milwaukee, while admittedly not complete, touches upon many of the members in a somewhat free and easy manner. The purpose has been to call to public notice such of the members as have, by reason of long and distinguished service, received local recognition. This, it is true, may not always have been as lawyers or judges. But the recognition is there, nevertheless. And it is no disparagement of others not mentioned that they are not included in this list.

As a concluding remark, we feel fully warranted in saying that the law in Milwaukee is well represented by its bench and bar. It is free from the taint of corruption and its ethics are far above the average in cities of its class.

Milwaukee, Wis.

MR. BRYCE, in his biographical sketch of Sir George Jessel, late Lord Chancellor, relates that during his long and honorable career upon only three occasions did he fail to decide the matter presented to him at the termination of the case or of the argument. And yet in New York City trifling practice motions for amending answers, striking out portions of pleadings, making matters more definite and certain, etc., are taken under advisement for an indefinite time. The public naturally believe all this due to legal technicality, and think the law a mere Chinese puzzle, enacted by lawyers for the benefit of lawyers; the real fact being that, had the people always chosen to elect competent judges, and more clients represented by trained lawyers, a way could almost always be found to do justice without violence to those rules and precedents which are necessary in order to secure some degree of certainty and uniformity.

— *Frederic R. Coudert.*

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The Lawyer of Fifty Years Ago and the Lawyer of To-day[1]

By William L. Marbury
of the Baltimore Bar

GENTLEMEN of the Maryland State Bar Association: —

Several years ago, at one of the annual dinners of the Bar Associations of Baltimore city, I was called upon to speak to the toast, "The Lawyer of Fifty Years Ago and the Lawyer of Today."

I have always entertained the suspicion that what I said on that post-prandial occasion may not have exhausted the subject, whatever effect it may have had upon the audience, and it has occurred to me that this might be a fitting opportunity to proceed a little further with the same topic.

Some of the questions which I propose to discuss, with your kind indulgence, are these: —

Does the lawyer of today hold as high a place and exercise as commanding influence in this country as did the lawyer of fifty years ago?

If in any respect he does not, what is the reason, and how can he best be restored to his former position?

There can be no question as to the fact that in the ancient time the rank of the legal profession in this land of ours was a very high one, nowhere more so than in Maryland. It needs but to mention a few of the names familiar in the annals of the American bar to have the truth of this statement recognized: William Pinkney, "the boast of Maryland and the pride of the United States"; Patrick Henry, of Virginia, he of the prophetic vision — the far-seeing statesman; Daniel Webster and Rufus Choate of Massachusetts. You could scarcely mention a name familiar in the history of the country prior to the late Civil War which was not that of a lawyer. So that Mr. Bryce in the chapter devoted to the American bar takes occasion to say that "Some fifty years ago they had reached a power and a social consideration relatively greater than the bar has ever held on the eastern side of the Atlantic." There was no land under the sun where the lawyer stood for more than in this federal republic. The great prestige and power of the bar not only as an agency in the administration of justice, but as a powerful aid to the people in making a success of the experiment of self-government, was clearly recognized by DeTocqueville, the kindest yet shrewdest critic of American democracy. "The people," says he, "in democratic states do not distrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation because it does not attribute to them any sinister designs." And, speaking further of the American lawyer, he says: "I am not unacquainted with the defects which are inherent in the character of that body of men, but without this admixture of lawyer-like sobriety with the democratic principle I question whether democratic institutions could long be maintained, and I cannot believe that a republic could subsist at the present time

[1] The President's address delivered before the Maryland State Bar Association in June, 1911.

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if the influence of lawyers in public business did not increase in proportion to the power of the people."

If the views thus expressed by this political philosopher are correct — and experience has generally demonstrated the fact that his views were correct — so many of his predictions have been verified — then the question as to whether the American bar has lost any of its former influence, whether as a whole it has in any way declined in the respect and confidence of the people, is the question worth considering.

Some idea of the estimate in which the great American lawyers of early days were held may be gathered from what we know of the lives of William Pinkney and William Wirt. Both of these men were great lawyers in the truest and best sense of the word. Both of them were absolutely devoted to the profession. Both of them were justly celebrated for the conscientious thoroughness with which they prepared every cause which was entrusted to their care. Their professional labors were enormous. They did the kind and amount of work which only a man who is a true lover of the law and jealous of the ancient reputation of his profession can do. Neither of them ever a made a fortune, but each of them made a name which the mightiest multi-millionaire of modern times could not purchase. They enjoyed the unbounded confidence, the unmeasured admiration of their fellow citizens, not only because of their transcendent abilities, but because they were known to be men whose honor money could not buy.

When in 1829 William Wirt went to Boston to try a case in one of the courts of that great city, notwithstanding the fact that he was a Southern man and that sectional prejudices were already keenly alive, he was received by the people with an acclaim which was second only to that which they accorded to their own great Webster.

When Willaim Pinkney died, he was characterized by John Randolph in Congress as "the boast of Maryland and the pride of the United States."

Such was the lawyer of fifty years ago, and of one hundred and fifty years ago. To be a great lawyer was to attain the highest position offered to man's ambition in America. Nearly every lawyer of any distinction in those days took some part in public affairs.

The people of his neighborhood, of his county or of his state, and as his fame increased, people of the whole country looked to him for guidance and advice in their public affairs, as well as in the matters more strictly pertaining to his profession. While he was at the bar he was a leader of public opinion, and when he was transferred to the bench, his judgments received universal obedience as the settled law of the land.

The steadying effect which the influences of the legal profession exerted upon the minds of the American democracy is not overstated by De Tocqueville in the passages which I have quoted. Many a time was "passion's stormy rage" checked and stilled by the majestic voice of the Great Expounder, and but for the persuasive logic, the powerful reasoning of the great lawyers of the Federalist, it might well be doubted whether the Constitution of 1787 would ever have become the law of the land.

Come we now to the lawyer of today, the American lawyer of the twentieth century. In saying what I have with reference to the lawyer of fifty years ago, I have had little fear of contradiction.

In what I shall have to say with reference to the lawyer of today, it may be that I shall not have such plain sailing.

While I say it with much diffidence, and with utmost deference to those who

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may entertain a different view, I hold the opinion that the American bar, as a whole, has declined in popular confidence and respect in some very important particulars. If I believed that this decline was permanent and beyond remedy I doubt if I should have the courage to venture this opinion. But as I do not so believe, I shall proceed to state the grounds of my opinion with the less hesitation. In the first place, I do not wish for a moment to be understood as saying or believing that any loss of popular esteem which the profession may have suffered in these later years has been due to any deterioration in the character of the individual lawyer. It is true, of course, today, but no more than it was fifty years ago, that a certain percentage of shysters and tricksters are to be found at the bar. There is a certain percentage, and always has been, of men of this character in all professions, trades and lines of business. When I speak of lawyers in this paper I am not speaking of that class, and I entertain no doubt whatever that the typical American lawyer of today is no whit inferior in character or intellect to his predecessor of fifty or one hundred and fifty years ago. The phenomenon which I am discussing is due to altogether different causes.

What I shall have to say on this point refers almost entirely to the lawyers of the great cities. The status of the country lawyer has changed very much less.

The trouble with the average city lawyer is that he has become more of a business man than a professional man, and the more successful he has been in his profession, as a rule, the more he has tended to drift out of the professional life into the business life of his community. He makes more money by conducting and directing the business affairs of his clients than he can make by the discharge of his functions as an aid to the courts in the administration of justice; hence he develops a growing disinclination towards those functions.

A few years ago I happened to be asking a member of one of the most successful law firms in a western city something with reference to the procedure in his local court. "Oh!" said he, "I know nothing about that. We never go into court; when we have a case that must be tried we send one of the boys in the office to try it." That was his exact language. It made such an impression on my mind that I have never forgotten it.

Doubtless the case which I have thus cited is an extreme one — not all law firms conduct their practice in that way — certainly not in Maryland.

Nevertheless it is undoubtedly true that in the great cities of this country (and it is the cities that furnish the bulk of the litigation for our courts) there has been a steady drift in the direction of just such a practice.

The usual course of a successful city lawyer is something like this — he begins his career by making a reputation for ability and skill as an advocate in the trial of cases in court. As he advances in years this reputation, if accompanied by a belief on the part of the public in his integrity and trustworthiness, brings him an increasing business. Much of this business will be what is popularly called "office business," which means almost any kind of business requiring, or which is supposed by the layman to require, some knowledge of the law.

In fact it is a kind of business in which England is handled by the solicitors exclusively, and with which the bar proper in that country has nothing to do, and does not attempt to meddle, except to the extent of furnishing opinions touching the legal questions growing out of

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such business when submitted to them by the solicitors.

This office business, so called, is of course most varied. Some of it may be of a routine character, but much of it, on the other hand, is of the kind which requires for its proper conduct ability of a very high order, as well as enormous labor.

The business of the modern world is carried on through the agency of combinations and corporations of one kind or another to a vastly greater extent than in former times.

In the organization, the frequent reorganization, and daily conduct and guidance of the affairs of the corporation and business enterprises generally of the present day, problems are constantly arising which call for the employment of the trained intellect of the lawyer.

The average man of today, especially if he be the manager of the affairs of a corporation, is much less inclined than was the business man of fifty years ago to wait until he gets into trouble and becomes involved in litigation, before seeking legal advice and assistance. To the contrary he is more disposed to be in constant touch with his legal advisers. Nearly all the corporations of any size, as well as some of the larger business houses, have their general counsel or attorneys, to whom they pay a regular salary or retainer, and to whom they promptly apply for guidance in every situation of difficulty in order that in the light of his counsel and advice they may be so guided as to avoid the paths which lead to litigation.

As a natural result of the frequent habit of consulting their counsel, these business men fall into the habit of submitting to him and consulting him with reference to questions which are not of a strictly legal character, but are rather questions of business policy and judgment. A lawyer who has many clients of this kind, or even one or two who have extensive business interests, acquires in the course of time a very wide and varied knowledge of business affairs himself. If he be a man of intelligence, he is likely to become a business man of the highest order, because he has an opportunity of observing and becoming acquainted with more different kinds of business than the average business man; he has an opportunity to observe the methods of those business men who succeed, and the mistakes of those who fail, so that in the course of a long practice of this character he acquires a stock of information and is likley to develop a degree of business acumen and judgment which qualifies him in an eminent degree for the conduct of business enterprises himself.

His value in this respect comes to be recognized by his clients; he drifts into business connections and associations with them. He becomes financially interested in their enterprises, and active in all their business counsels. A lawyer of this kind may be engaged for days in his office, or in the office of his business associates, in discussing matters and handling affairs quite remote from the law. He may pass long periods of time without ever looking at a law book or considering a legal question. In other words he becomes absorbed in business; his best energies are required for the conduct of that business. Very frequently large financial interests are at stake, and when in the midst of one of these business operations he is suddenly called upon to go into court, he is frequently not in a fit condition to do so. If he did go, he would have to go with a jaded and distracted mind, and without any such preparation as is necessary to fit him for the discharge of the functions of an advocate and aid to the court in the

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administration of justice. For the sake of his own reputation, therefore, he not unfrequently adopts the practice of the western gentleman of whom I spoke. In other words, he sends a boy on a man's errand. There is much less of this in Baltimore than in other large cities, because there is much less of that kind of business.

Now an English lawyer handling such business as I am describing would not be expected to go into court to try cases; in fact, he would be a solicitor, not a barrister, and would not be permitted to attempt to unite the two functions, even though he were willing to do so. Under such circumstances, an English solicitor would first ascertain what fee his client could afford to pay for the services of a trial lawyer, or, as he there called, a barrister, and after briefing the case thoroughly himself, both as to the law and facts, would procure for his client the service of the very best advocate who could be had for that — one of the leaders of the bar if possible.

Now the function of the advocate is second only in importance to that of the judge in the proper administration of justice. Without the aid furnished by the labors of competent counsel not even the ablest judge can arrive at the merits of a case; certainly not without enormous labor on his part; and to a judge of mediocre ability the difficulties of such a task are insuperable. But the administration of justice is not work for boys alone. It is essentially "a man's job," and the courts are entitled to the aid of the very best abilities of the profession in the discharge of this greatest of civic duties. If they do not receive that aid, the "quality" of justice, as administered in the courts, will necessarily be "strained." It is plain to be seen that this will be the consequence of sending the "boys" into court to try the cases.

The so-called "boy," that is to say the young practitioner at the bar, is by no means to be despised; on the contrary he may be, and if he be a good one always will be of very great service as a junior in the trial of a cause. In fact no English barrister of any standing will undertake to try a cause without the assistance of a junior. It needs no argument, however, to show that this task should not be imposed upon the juniors alone.

But suppose the busy lawyer of whom I have been speaking, realizing the truth of the above considerations, undertakes to try all his cases himself. The result is just as bad, if not worse. Even in the day of Lord Coke, the law was a jealous mistress. In the nature of things she must be even more so now.

No man can permit his mind to be absorbed for days, weeks and months at a time in the consideration of purely business matters, entirely apart it may be from the law, to the entire exclusion of any legal questions, and then reasonably expect to find that mind in a fit condition to furnish to the tribunals of justice the light upon the difficulties of the law which those tribunals are entitled to expect from him. He ceases to think habitually in terms of the law, his mind has not been running on legal questions. He may have enlarged and strengthened that mind by his labors in the work of business, but he is gradually ceasing to be a lawyer, in the true sense. He is becoming a business man, a business man it is true of the highest type the world has ever seen, but nevertheless a business man, and not a lawyer.

Furthermore, it too often happens that he comes into court of necessity without proper preparation. It is often a terrible wrench for a man to transfer his thoughts from some business enter-

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prise in which he has his money at stake to the consideration of purely legal questions. Not infrequently he loses his taste for such questions, which is another way of saying that he loses his love for the law, and from the moment that a man does that he is no longer a lawyer.

No human being will ever render the amount and quality of service, undergo the enormous toil exacted by that mistress, unless for love. Such a lawyer, in any event, never goes into court except when he is obliged to do so. In other words he goes as infrequently as possible. As a natural consequence, he loses his intimate knowledge of the weapons of advocacy, and consequently handles them with less skill than one who is in the constant practice of that noble art.

As a further consequence, the trial proceeds with less promptitude and celerity, much greater time is consumed in the examination of witnesses and the discussion of legal questions, and from this cause also the administraion of justice becomes less efficient and loses respectability in the eyes of the litigants, and of the public. Thus the reputation of the bar suffers. While trials fifty years ago frequently lasted longer than the same kind of a case would now, yet it must be remembered that people had a great deal more time for them in those days than they have now.

But there is another and perhaps graver evil which results in the cities from our American practice of attempting to unite the functions of the business lawyer and the trial lawyer, of the solicitor and the barrister, in the same person, and that evil is *delay*.

As a result of nearly thirty years of observation and experience in the trial of causes, I am persuaded that, so far as the state of Maryland, at any rate, is concerned, at least one-half, and perhaps a much larger percentage of the delay in the administration of justice is due to postponements granted for the convenience of counsel.

These delays are necessarily incident to our system. The vast majority of them are in nowise attributable to any evil motives or unworthy character in the counsel for whose benefit they are granted.

Not many years ago there died in the city of Baltimore one of the most accomplished lawyers and one of the highest men who graced the Maryland bar, or for that matter, the bar of any other state or country; and yet during a certain period of his life there was current at the Baltimore bar the saying of some irreverent wag that the employment of this gentleman by the defendant in any suit in the courts of Maryland was "equivalent to the obtention of an injunction without bond." His engagements were very numerous, his health was precarious, and when a case in which he appeared was called for trial, the chances were about five to one that it would have to be postponed because of his being engaged in the trial of a case elsewhere, or because of indisposition, as he was a frequent sufferer from throat trouble at that time. I mention this case only because it is most conspicuous and illustrative.

Every lawyer, however, who pauses to reflect, will, I think, agree with me on this point. What is the experience as regards this matter of the average litigant in our courts? He no longer has to wait any great length of time before his case is first called for trial. A few years ago the dockets of our courts were much congested, and sometimes twelve months or even eighteen months might elapse between the institution of a suit and the time that it was reached for trial on the docket. That condition,

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owever, has been completely remedied y the increase in the number of judges, together with certain well known changes and improvements in the practice of the courts. After the case has once been tried and decided by law there is very little delay in the appellate court. Our Court of Appeals holds three terms during the year, and almost invariably disposes of every case on the docket before adjourning for the term. So far as that court is concerned we have "justice speedily and without delay."

It is in the bringing of the cause to trial in the court of first instance that he meets with delay in its most intolerable form. Suppose we take for illustration a typical case, familiar to us all.

A merchant brings a suit in one of the courts of Baltimore upon a promissory note. The defendant pleads the statute of limitations. The merchant relies upon a new promise. The case is called for trial within a very reasonable time after its institution. The merchant is on hand with his counsel and his witnesses. The witnesses are business men who are attending the trial at some inconvenience, but who would have no objection whatever to devoting a reasonable amount of their time to aid their friend, the plaintiff, in his effort to collect his debt. But instead of the case being tried, this is what happens: the defendant happens to have as his counsel a lawyer who has a large trial practice. He may be one who is a favorite with the plaintiffs in damage cases, or he may be one who is counsel for corporations, such as liability insurance companies, so-called, who has many cases on the dockets of the courts in which he appears for the defendants. In either case, the result is the same. When the Court, after calling the case, makes the usual inquiry as to whether the parties are ready for trial the plaintiff promptly answers in the affirmative, but a young man arises on the other side and states that he is from Mr. C's office, and that Mr. C., the counsel for the defendant, is engaged or about to become engaged in the trial of another case in the court at the other end of the hall, and desires that the trial of this case be postponed until the case which he is now trying or about to try shall have been concluded.

In the English court such an application would not be considered for a moment. The defendant would be told that the rules of practice did not permit the postponement of trials to suit the convenience of counsel; that the defendant must have other counsel ready to take Mr. C's place, or let the trial proceed under the management of the junior. The judge, being invariably a lawyer of the highest order and ample experience himself, would endeavor to see to it in such cases that the defendant suffered no injustice, even if he had to leave the case to the junior, something which the defendant, however, does not ordinarily do.

But what happens in the Maryland court? The application for postponement is granted as a matter of course. The defendant is entitled to it under the rules of our practice there prevailing. The witnesses who have been in attendance not infrequently for several hours before the case is called are "discharged until further notice." Mr. C. proceeds with the trial of the cause which has been the occasion of the postponement. At the close of that trial counsel for our merchant friend endeavors to bring his case on to trial, but finds it impossible to do so by reason of the fact that another case in the same court is on trial. He waits until the conclusion of that case and then announces his readiness to proceed. Thereupon the young man from Mr. C.'s office arises again, and states

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to the court that Mr. C. is engaged in the trial of another case, which has come in in the meantime, and asks for a further postponement.

Of course Mr. C. cannot be in two courts at the same time. It is not his fault that these causes conflict, and the witnesses, after having again remained in court for several hours expecting to have the case disposed of, are again discharged.

When the next opportunity to try the merchant's case is presented, Mr. C. is disengaged and announces himself ready for trial; but in the meantime another case in which his own counsel is employed has come on to trial, so that there has to be another postponement on that account. Again the witnesses who have been on hand at great inconvenience to themselves are discharged until further notice. There is hardly any limit to the number of times something like this may occur in any case under our system, and besides its frequency there is no form of delay which so disgusts and enrages the litigant and brings the administration of the law and legal profession itself into such contempt.

It is almost impossible to exaggerate the injury to the reputation of the bar among business men which results from these causes. From this injury the English bar is absolutely exempt.

There is still another class of delays incident to our American system. Suppose that when a case is about to be reached for trial counsel on one side or the other, or it may be counsel on both sides, have engagements of a business nature out of court. Counsel for the plaintiff goes to the counsel for the defendant and says, "If you force me to try this case tomorrow, I will lose an opportunity to make a large fee." Counsel for the defendant, realizing that he may have occasion in the future to ask similar indulgence, agrees to the postponement. Under our system, delays from this cause are almost inevitable, although not infrequently they are not justifiable on ethical grounds, clients not knowing anything about them. The only protection which the profession can have against injury such as this, is that which would be afforded by a system under which the courts would not allow the trial of causes to be postponed on any such grounds.

But in order to render such a system of court rules possible or practicable, it is absolutely essential that there should be a body of lawyers specially trained in the trial of causes, skilled in the art of quickly acquiring a knowledge and understanding of the case from a study of the brief and conference with the lawyer who prepared it, and who have not and are not allowed to have business engagements which would conflict with their duties as advocate, because they are not permitted at law or by the rules of the court to invade the province of the solicitor or business lawyer. In other words, we have got to develop a system under which the profession will — gradually, of course — be divided into two classes, the business lawyer and the trial lawyer, with statutes, or better rules of court prescribing the functions of each class, leaving every lawyer free to enroll himself in the class he prefers, but absolutely prohibiting a member of one class from undertaking any of the duties of the other.

It may be said that this would be adopting the English system, and the American lawyer instinctively shrinks from that suggestion. But while the division of the profession into two classes under the designation of solicitors and barristers, or any other designation, may be regarded as the distinguishing feature of the English system, it by no

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means follows that it would be necessary for us to adopt that system as a whole with all its ancient rules and restrictions, and in some respects, as it seems to us, absurd etiquette. Much of that would probably not be agreeable, nor even tolerable, to an American lawyer.

Neither would be it necessary to have the new system apply to lawyers who are already at the bar. Such reforms as this can never be accomplished suddenly or abruptly.

The rule making it compulsory to enroll in one class or the other could be made applicable only to those entering the profession hereafter, leaving each man already at the bar at liberty to retain all his present privileges until such time, if ever, as he might elect to enroll in one class or the other.

I am persuaded that to this measure must we come at last, if the bar of this country as a whole is ever to have again the reputation for efficiency as an agency in the administration of justice which once it had.

And there is yet another aspect of this matter which is perhaps equally important from some points of view.

Owing to the enormously increased extent to which the business of the country is now conducted by corporations and the vast number and wealth of those corporations, as compared with fifty years ago, it constantly happens that the ablest and best men of the profession are employed by the large corporations as their general attorneys or counsel, frequently on a salaried basis.

In the course of time a lawyer thus employed becomes so associated in the public mind with that corporation client as to be looked upon as practically a part of it. In fact, these lawyers — and it must be borne in mind that in the nature of things they are frequently the best lawyers in each state or locality — become indentified in the minds of the people with the special interests of their corporation clients. They are looked upon as representatives of these special private interests as distinguished from public interests. They are not looked upon as were the lawyers of fifty years ago, as men whose eminent talents are at the service of any or every citizen who may desire to employ them in the protection or enforcement of his rights. No matter how high the character or exalted may be the talents of lawyers of this class, of them it can no longer be truthfully said as a general rule, in the words of De Tocqueville, already quoted, that "The people do not distrust them, because it is well known that they are interested in serving the popular cause," nor that "The people listens to them without irritation because it does not attribute to them any sinister designs."

Unfortunately, as we know too well, in these days the exact contrary is too often the fact.

The consequence of all this is that a large part of the very flower of the American bar — great numbers of the very men who by reason of their talents and character would be best qualified to preserve and maintain in the minds of the people the ancient credit and prestige of the profession in the country at large — are to all intents and purposes withdrawn from that great service into the shadow of the great private interests of which, in the public view at any rate, they have become a part.

No profession could suffer the eclipse, total or partial, of such lights as these without some dimming of its lustre.

We, as lawyers, know that as a matter of fact a lawyer of the right sort may be the general counsel or attorney for the greatest corporation client all his professional life without surrendering

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his personal independence. We have had conspicuous illustrations of that in Maryland.

But we cannot blame the people at large for not being able to realize that such a thing can be. It is a view which can only be understood by those who have been bred in the highest traditions of the law.

It follows also that this class of lawyers is gradually becoming eliminated from the list of those eligible for election or appointment to judicial office. Fifty years ago the fact that a lawyer had been counsel for a corporation no more disqualified him in the popular mind for appointment to the bench than would the fact that he had frequently defended men charged with murder cause him to be considered unfit to sit in the criminal court. It is not so now. The leader of the Maryland bar today has probably never had a superior among all the great lawyers who have contributed to give that bar a national reputation, the great Pinkney not excepted. Yet there never has been a time within the last twenty years when his appointment to the bench would not have given occasion to more or less criticism, and only for the reason that he has been always the counsel in Maryland for the Pennsylvania Railroad.

Yet the exclusion, total or partial, of men of this calibre and character from judicial service cannot but be recognized as calamitous. Can the country afford to continue to maintain a system which operates in this way? Have we that much brains and character to spare from the pubiic service, and the most important of all branches of that service? If the gentleman to whom I have taken the liberty of referring were a member of the English bar, and held the relative position there which he does at our bar, as he probably would, not only would he not have been excluded from judicial office, but the Prime Minister who failed to recommend his appointment to the highest courts at the first opportunity which offered, would be the object of the severest public criticism.

It must be plain that the exclusion from the bench of so much of the brains and character of the legal profession will inevitably lead to some unfortunate result. The due administration of justice by courts which command the confidence of the people, courts which are presided over by men who are not only able and honest but whom the people believe to be able and honest, is absolutely essential to the perpetuity of any form of government, and particularly a democracy. Hear the words of Rufus Choate:

"One of the most specious objections to the free system," says he, "is that they have been observed in the long run to develop a tendency to some mode of injustice. . . .

"You remember that Aristotle, looking back on a historical experience of all sorts of government extending over many years — Aristotle, who went to the court of Philip a republican, and came back a republican — records in his 'Politics' *injustice* as the grand and comprehensive cause of the downfall of democracy. The historian of the Italian democracies extends the remark to them. That all states should be stable in proportion as they are just and in proportion as they administer justice is what might be asserted. . . .

"Whether republics have usually perished from injustice need not be debated. One there was, the most renowned of all, that certainly did so. The injustice practised at Athens in the age of Demosthenes upon its citizens and suffered to be practised by one another was as mar-

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velous as the capacities of its dialect, as the eloquence by which its masses were regaled, and swayed this way and that as clouds, as waves — marvelous as the long banquet of beauty in which they reveled — as their love of Athens and their passion of glory. There was no one day in the whole public life of Demosthenes when the fortune, the good name, the civil existence of any considerable man was safer there than it would have been at Constantinople or Cairo under the very worst form of Turkish rule. There was a sycophant to accuse, a demagogue to prosecute, a fickle, selfish, necessitous court — no court at all, only a commission of some hundreds or thousands from the public assembly sitting in the sunshine, directly interested in the cause — to pronounce judgment. And he who rose rich and honored might be flying at night for life to some Persian or Macedonian outpost to die by poison on his way in the Temple of Neptune."

Let the American citizen, if any here there be who is giving ear to the suggestion that we should adopt the "recall" for judges, look on this picture of a debased judiciary, and the consequences which resulted from placing the administration of justice in incompetent hands — this picture limned by the master hand of a great American lawyer of fifty years ago — and it may give him pause.

Perhaps there may be some other way of remedying these conditions, which I have thus faintly outlined, and I should be only too well pleased if what I have so imperfectly said this morning should cause some true lover of our noble profession to reveal to us that way.

For myself, so far as I can now see, what we should strive for is the establishment of a system which will develop out of the ranks of the profession a class of men who will be willing to forego the great emoluments which sometimes result from the successful conduct of the strictly business side of the law, in order that they may devote themselves to the more efficient discharge of its duties as an aid in the administration of justice in the courts. If it shall appear to any that this hope is chimerical, all I have to say is this: There are still in the ranks of the legal profession men who would rather have a moderate income coupled with the fame of a great lawyer than the larger emoluments which go with the reputation of a great financier. And I believe that the future standing of the bar in America will depend upon its ability to develop such a class.

The Duty of the Lawyer as an Officer of the Court[1]

By Christian Doerfler

IT now devolves upon me, as President of this Association, to deliver the annual address. Ordinarily, this address consists of a review of the various events that have transpired in relation to the Association during the past year, with recommendations by the President for the benefit of the Association in the future. The reports of the

[1] Taken from the President's Annual Address delivered last December before the Milwaukee County Bar Association.

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various officers and of the standing committees in themselves constitute a full and complete review of all transactions of the Association during the year past, and I will therefore content myself with a few general suggestions that have occurred to me during my occupancy of this office. . . .

When I assumed this office I made the statement that my primary object would be to bring about, if possible, a higher standard of the profession as far as the public is concerned. The profession of law is one of the most highly respected of all the learned professions. To successfully practice that profession requires, not only the highest of intellectual accomplishments, but the highest standard of morality and fair dealing. The profession does not, *in the eyes of the public*, occupy that high and dignified stand that it is entitled to, and I believe that this is due, not solely to a prejudice on the part of the public entertained towards the profession, but also to the law itself and to the members of the profession. While I have constantly had in mind the ideal which I set before me at the beginning of my administration, I am constrained to plead that I have done comparatively little to advance this high standard. Let us for a moment consider the cause or the reasons why the profession does not occupy morally in the eyes of the public the stand which it ought to. In the first place, attorneys generally are too closely identified with the success and failure of litigation. It has been my observation and also that of a great many members of the profession, that an attorney in a case is more interested in the outcome or results of litigation than is the client. *He has not only at stake to a great extent his fee involved, but his reputation as an attorney.* The result of this is that every possible point is strained by counsel to the utmost limit for the purpose of securing and acquiring the desired end. *The object of the attorney is to attain success.* While attending a lecture at the law school at the University while I was a student there, one of the most noted lecturers of that institution made the statement that "*A good lawyer wins lawsuits.*" Now, while that is, of course, a very desirable object to attain, it is oftentimes accomplished at the sacrifice of the highest purpose for which the profession exists. It must always be remembered that the profession of law is instituted among men for the purpose of *aiding the administration of justice.* A proper administration of justice does not mean that a lawyer should succeed in winning a lawsuit. *It means that he should properly bring to the attention of the court everything by way of fact and law that is available and legitimate for the purpose of properly presenting his client's case.* I have oftentimes thought and I still believe that the profession of law as it is now practised, and has been practised from time immemorial, is to a great extent at fault for the failure in securing justice. *As long as private individuals are at liberty to use an officer who is a quasi-public officer as a representative, and pay him out of their private means, so long will the ends of justice to a great extent be diverted from that source.* As stated before, an attorney at law is a *quasi*-public officer. His duty as far as his client is concerned is simply to legitimately present his side of the case. His duty as far as the public is concerned and as far as he is an officer of the court is to aid and assist *in the administration of justice.* How to obviate this difficulty is one to which I have given a great deal of thought and attention. I will simply make a suggestion and that is this:

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That the duty that counsel owes to the court and to the public be increased, and that the duty which he owes to his client be decreased proportionately, so that private interests shall not have the power to induce an officer of the court to trespass upon the rights of the public. In that respect I make this suggestion that it might be worthy of this Association and of the profession in general to consider the proposition to make the members of the profession officers of the public almost exclusively, and that remuneration be derived from the public in the same manner as judges are now paid. Then again, as part of the expenses of the litigation, the client engaging the services of an attorney could then be required to pay into the public treasury a certain sum of money for the services of counsel. Counsel would then be directly responsible to the public, and his only object in the practice of his profession would then be to aid in the proper administration of justice. I do not know whether this system has ever been suggested to the profession, or whether it is in practice in any community, but I am convinced that it is one which deserves careful attention, and one in relation to which the profession generally ought to take some action.

The condition of the law and the very law itself, as it has existed in our state and in nearly all of the states of this country, has been to blame for a great number of the gross abuses practised in the profession. Take, for instance, the subject of negligence. There is but one doctrine in relation to this subject which is just and fair, and that is the doctrine of comparative negligence. Now, the defendant may be guilty of negligence in a high degree, and the plaintiff, who is guilty of a slight want of ordinary care, it matters not how serious may be the injuries he may have suffered, is practically without redress. The question of negligence oftentimes depends upon the slightest scintilla of evidence, and it is a question for the court in numerous instances whether or not the question of negligence shall be submitted to the jury at all. Taking into consideration the case of a man who has been mutilated or injured for life, the temptation for a client or a witness to supply the missing link in the testimony is altogether too great, and therefore it has been my observation and the observation of the profession generally, that there is hardly a case of personal injury tried in our courts, but what there appears testimony which undoubtedly has been stretched to the limit, ***or is not well founded in fact.*** The charge is also made that counsel in many instances aid and abet the furnishing or supplying of this testimony. Then again, a practice has sprung up and is extensively followed in relation to the prosecution of cases for personal injuries which practically makes an attorney as much interested financially in the outcome of the case as the client himself, and in fact makes him in many respects more interested, because in addition to the financial interest, his personal reputation is also at stake. Quite a number of the members of our profession personally are charged with inducing the bringing of personal injury suits, or with sending out agents for soliciting personal injury cases upon a contingent fee. This practice is generally considered by the profession as reprehensible, and rightly so. No lawyer has the right, legally or morally, to instigate legal business of any kind, or to foster litigation. Especially is this so in relation to personal injury business. To me there can be no more deplorable fact than for an attorney personally, or by

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an agent, shortly after the happening of an accident, to visit a stricken person, or the members of his family, and give his advice, to the end that he may obtain litigation in relation thereto. There is no question in my mind but what this abuse can be readily remedied by an enactment of proper statutes, and by the setting of a high aim on the part of the Bar Association on this subject, and by creating sentiment amongst the members of the profession in relation to this subject.

I have known instances where as many as half a dozen lawyers have sought personal injury business at the same time under circumstances just mentioned. Imagine for a moment the moral effect that such acts on the part of the members of the profession have upon the public. In itself it is sufficient to lower the standard of the profession in the eyes of the public. Imagine, also, what effect it has for a lawyer to either directly or indirectly suggest the procuring of false testimony for the purpose of winning a lawsuit. Such a lawyer may be instrumental in having his client's case go to a jury and in securing a verdict; he may also be amply compensated financially for his work, but his client knows that he is not reliable; that he is not trustworthy; that he is not honest; and even though he may call upon him again if he is in a tight pinch and needs services of a similar nature, he has no respect for his honesty *and he has not been made a respecter of the profession.* Clients have a general impression that if they only entrust their cases to the right counsel, *they can accomplish any end.* Such an impression is, in my opinion, at the root of the failure on the part of the public to properly respect the lawyer in general, and prevents the public from holding that profession in the esteem to which it would otherwise be entitled.

There is another practice in the profession in vogue which I consider subversive to the administration of justice, and which requires remedy, and I refer particularly to the practice of large corporations, and particularly public service corporations, in obtaining affidavits of witnesses to accidents immediately after the happening of the injuries. It has been my observation that these affidavits are drafted by agents of the companies, and do not present a fair statement of facts, and are signed by the witnesses without scrutiny and without proper examination. When once these affidavits are signed they are used for impeachment purposes, and the testimony of witnesses who would otherwise be truthful is compromised and practically annulled. This practice ought to be obviated by the enactment of statutes by the state legislature, and I believe that a law passed, prohibiting the use of such affidavits so obtained for impeachment purposes, unless the statements are obtained by some public official, after due notice to the other party interested, would remedy the evil.

On the other hand, our courts and our judges have always occupied the highest moral standard in the eyes of the public. Seldom, if ever, do we hear of any charges against a judge for either partiality or abuse of office. There is a reason for this, and the primary one, in my opinion, is the fact that the judge exists solely to promote the administration of justice. *He is a purely public official and owes an obligation to no one outside of the public.* He draws his compensation from the public treasury; *he is no client's tool, nor is he subservient to the dictates of counsel.* Like the goddess of justice, he holds the scales blindfolded and administers the law according to the dictates of his

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conscience. Therefore, if the lawyer could be more of a public official, so that his obligation would rest more towards the public than towards private individuals and private interests, he would not only be a greater factor, promotive of the highest aims of the profession, but would, like the judges, occupy the highest position for morality in the eyes of the public.

Milwaukee, Wis.

The Devil and the Lawyers

THE devil came to the earth one day,
And into a courtroom took his way,
Just as a lawyer, with very grave face,
Was proceeding to argue the points in a case.

Now a lawyer his Majesty never had seen,
For to his dominion none ever had been;
"'Tis the fault of my agents," his Majesty thought,
"That none of these lawyers have ever been caught."
And for his own pleasure he had felt a desire
To come to the earth and the reason inquire.

Now, when the first lawyer had come to a close,
The counsel opposing him fearlessly rose,
And heaped such abuse on the head of the first,
That he made him a villain, of all men the worst.

Each claimed he was right and the other was wrong.
They sparred and contended and argued so long,
That, concluding he'd heard enough of the fuss,
"Old Nick" turned away, and soliloquized thus: —

"They have puzzled the court with their villainous cavil,
And I am free to confess they have puzzled the devil.
My agents were right; let lawyers alone.
If I had them, they'd euchre me out of my throne."

— *Docket.*

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Literature and the Bench

"LITERATURE and the Bench" was the subject of some witty discussion at one of the delightful dinners of the Authors' Club in London, Dec. 4, and Sir Frederick Pollock was the guest of honor. For the following report the *Green Bag* is indebted to a correspondent who very kindly sent us a clipping from the London *Daily Telegraph*.

His Honor Judge Parry, himself an author and dramatist of no mean repute, occupied the chair. Proposing the health of the guest, he said the Authors' Club has two interests in Sir Frederick Pollock. They could divide him scientifically into two parts. In the first place he was a fellow-author — (cheers) — and he had written books some of which it had been his Honor's duty to read — (laughter) — his pleasure to read. (Hear, hear.) He would say this about Sir Frederick's law books — and nobody had a greater detestation of law books than he — (laughter) — that there was a style and distinction about them which made them almost pleasurable to a humble layman like himself.

But there was a mountaineering book which must have appealed to some, a little, slim volume which though his Honor had just moved into a new house, he was able to find (laughter) — "Leading Cases done into English." That little book of poetry — it was poetry — contained a great deal of humanity, and it had often been a marvel to his Honor why a man who could write such charming occasional verse should have wasted the dreary years of his life on law books. (Laughter and "Hear, hear.") Did they know the story of Dixon and the Great Northern Railway? This was in the great work now edited by Sir Frederick Pollock, the Law Reports, a dreary work, but, done into verse as he had done it in "Leading Cases done into English," it was one of the most delightful ballads— a ballad of which Ingoldsby himself might have been proud. (Hear, hear.)

Judge Parry knew only one subject more painful than an editor, and that was a publisher. Sir Frederick Pollock, however, was not likely to be called upon to edit anything that they might write. His waste-paper basket was occupied by the judgments of the Court of Appeal, and his blue pencil with the irrelevant remarks of the Master of the Rolls. (Laughter.) It seemed to him to be a fine thing — he spoke as a county-court judge who suffered much from the court above — (laughter) — to be able to edit the Court of Appeal, and he said without hesitation that it was a great thing for the reputation of the Court of Appeal that they had Sir Frederick Pollock to edit them. (Hear, hear.) Sir Frederick was always very kind to the county-court judges. In the great work which he edited, when a county-court judge was overruled he was always referred to in the Biblical phrase of "a certain judge." (Laughter.) He should like to take that public opportunity of thanking Sir Frederick for his editorial kindness. The only suggestion he would make was that when the House of Lords overruled in some workmen's compensation case the Court of Appeal, and set back the judgment of the learned county-court judge, he then might mention one's name.

It entirely rested with Sir Frederick, said Judge Parry, what the judges were

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allowed to do and what they were allowed to say, because he edited the Law Reports, and if he chose to "basket" the whole lot of them their judge-made law would never reach the county court in which he (the speaker) sat, and he should not be at all sorry. If he liked, Sir Frederick could return the Lord Chief's Justice judgment "with the editor's compliments" — (laughter) — and not only were he (the speaker) and his colleagues satisfied with Sir Frederick, but he believed that even the judges whom he edited were equally satisfied. He believed the Law Reports made money. He did not say they deserved it — (laughter) — but he believed they did, and he thought that why they were recognized throughout the English-speaking world as being a great, a true, and a good record of the sayings of English judges and the judge-made law of his country was because they were splendidly staffed and magnificently edited. As author and as editor they in that club were proud to welcome their guest. (Cheers.)

Sir Frederick Pollock in reply declared that the chairman's remarks had been made with the intention of drawing him out about the Law Reports. It was true he had a blue pencil, but what he did with his blue pencil in the way of correcting the grammar of my lords the King's justices, not to mention that of the Lords of Appeal, which he might say, in confidence, was much worse, was a matter between his blue pencil and himself. (Laughter.) The chairman forgot that he (Sir Frederick) was only the servant of the Council of Law Reporting, and if he suppressed whole judgments the council would have something to say. Still, they did get the judgments edited, and he hoped that on the whole they were grammatical. But his was not such a monstrous claim as that any editor of them could turn them, taken with the lump, into literature. He was, however, asked to talk about law and literature. The obvious way of treatment would be to speak of the contributions made by judges and eminent lawyers of unprofessional literature. But this would be too extensive and miscellaneous, though it would be tempting to compare the performances of the different learned Faculties in this respect. Ome might set off Sir John Davies on the Immortality of the Soul against Sir Thomas Browne's Religio Medici, but later, if the Rev. Laurence Sterne might be taken seriously as a divine, both law and medicine would have to give place to the author of Tristram Shandy. Besides, there is a grave initial difficulty.

What about Bacon? He meant to prove some day that, so far from Bacon having written Shakspere, it was Shakspere who wrote Bacon's literary works. Bacon, being the wisest and also the meanest of mankind, paid Shakspere to write those works. It was of a piece with his meanness to make Shakspere take legal tips for the plays in part payment. Still, Bacon incurred heavy debts to Shakspere, and thus was driven to take bribes. The detailed proof not being yet fit for the public eye, they must avoid the whole topic. Moreover, he should be trespassing on a field in which their chairman, Judge Parry, was far more competent than himself. (Cheers.) Therefore, let them approach the relations of law and literature on a less familiar side, and see how much literature lay hid in law books whose very existence was hardly known to the general public.

In the legal works written in England in the Middle Ages (though not in the English language) there was much material for the social historian and the

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novelist (but Mr. Maurice Hewlett was probably the only novelist qualified to use it). A few of these nameless compilers, such as the collector of precedents for the Court Baron in the fourteenth century (published twenty years ago by the Selden Society) seemed to have had some literary faculty and sense of humor. But none of these books, on the whole, could be called literature. In the Elizabethan period they had several classics of the common law, but there were no classics of English letters. Coke was a pedantic, old-fashioned scholar (not illiterate, as one or two recent writers had unjustly said). Bacon's professional writings had no marked literary distinction. Sir Thomas Smith's "Commonwealth of England" was a political classic, but he was, properly speaking, not an English lawyer at all; his learning was civilian.

The handling of law in a scholarly and literary fashion by English lawyers began in the eighteenth century. A case might be made out for Lord Mansfield as a pioneer, which still had a European reputation. It was Blackstone, however, in 1765, who produced a doubly classical work. His Commentaries were a great literary performance. As his great adversary, Bentham, handsomely allowed, he taught jurisprudence to speak the language of the scholar and the gentleman.

From the latter part of the eighteenth century onwards they had reports of carefully written judgments in the superior courts (in books that only lawyers knew how to consult), many of them by good scholars, not a few of them serious contributions to political and historical science beyond legal technicality. Lord Stowell's judgments in the Admiralty, which made our modern law of nations in time of war, were models of English exposition. How many of our publicists who talk glibly of contraband and the Declaration of London had read them at first hand? (Laughter.)

Then, in the second and third quarters of the nineteenth century, we had a golden age of great English judges, handling the language partly with finished scholarship and partly with mother wit sharpened by long experience of affairs and advocacy. Not striving to adorn their plain business, they could rise to the height of great occasions. There had been infinite talk among authors about the principles of copyright. How many authors knew that the fundamental question of natural right was elaborately discussed (though not strictly decided) in a case before the House of Lords in 1854, and the arguments on both sides set forth in the opinions of the Lords and the judges, not only with learned reasoning, but with judicial eloquence?

Again, there was much talk just now of marriage and divorce. Half a century ago the marriage law of England before the Reformation was explained in an opinion given to the House of Lords, which was really a masterly chapter of historical research, expressed with great literary skill. The author of that opinion was the late Mr. Justice Willes. Another time a Judge of Assize committed a witness for contempt in refusing to answer, and the question was raised whether he had the powers of a superior court. Sir James Shaw Willes (who was not only a very learned lawyer, but an accomplished scholar in several tongues), wrote a judgment which, after fully fifty years, was a classical and, he believed, a faultless authority on the whole subject of Justices of Assize and their jurisdiction — surely a matter of students of English history as well as lawyers — and excellent English, too. He suspected very few historical stu-

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dents knew either of these great expositions.

It was certain that the great mass of law-books made no pretense to style, sometimes very little even to tolerable arrangement. It was also certain that the increasing press of modern business did not favor the writing of carefully finished judgments. But the proportion of legal writers who tried to write good English was increasing both there and in America. He could remember when it was very small. His lamented friend, F. W. Maitland, produced not only historical but strictly professional work of high literary merit, as all his readers acknowledged; and he ventured to say the same of two living learned friends, one on each side of the Atlantic, Justice Holmes, of the Supreme Court at Washington, and Professor Dicey of Oxford.

A Judge in Arms

By Arthur P. Chickering

THAT great jurist, parliamentarian and man of affairs, Lord Coke, has claims to consideration as a man of action in the field of arms as well as in the halls of Westminster and Parliament.

For a second wife he married the widow Lady Hatton, a woman much younger than himself; and the marital differences of the ill-assorted couple furnished the courts of Elizabeth and James I with piquant material for gossip. The lady never overcame the aversion with which, it is said, the first meeting with Sir Edward inspired her. She persisted always in spelling his name "Cook" as a reminder of his humble origin, and made use of the name and title of her former husband in all social relations. Matters between them came to a crisis when Coke contracted a marriage for their daughter, the Lady Frances, with Sir John Villiers, brother of the great Duke of Buckingham. The mother was not unnaturally incensed at being ignored in a transaction of this nature. Finding ordinary opposition to the match of no avail, she adopted the bold course of seizing the young lady and carrying her away under cover of night to Oatlands, a country place occupied by a relative.

It was when Coke learned of this *tour de force* that he forgot the peaceful procedure of law, if law there was for the emergency, and his dignity as Chief Justice of all England; and at the age of sixty-nine, donning armor and providing himself with a sword, he marched into the country at the head of his sons and a numerous body of servants and retainers. Coming to Oatlands, he called upon the keepers to surrender his daughter. Receiving no satisfaction, he first delivered in a high voice an exposition of law for the enemy's benefit. If, said he, any were slain by him in the enterprise that would be justifiable homicide; but if the defenders took life it would constitute murder, for their resistance was illegal. He then led an assault in force and form, broke down doors and forced windows, and after meeting less opposition than might have been expected, recovered his child and bore her away to his own place at Stoke Pogis.

Lady Hatton, while in possession of her daughter, had been active in negotiating a marriage with the Earl of

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Essex, for no other purpose it would seem than that of checkmating her husband. She found a powerful ally in Lord Chancellor Bacon, who with reason feared the ascendency which his rival, Coke, would acquire by an alliance with the family of the favorite duke. But Buckingham and King James espoused the father's side of the quarrel, and Bacon for very self-preservation was forced to abandon his policy, and to urge forward the nuptials with Villiers. Lady Hatton at this time making an more ill-advised attempt again to secure possession of her daughter at Stoke Pogis, Coke brought the matter before the Privy Council as a breach of the King's peace, and had the satisfaction of confining his wife in the Tower while the marriage of his choice was taking place. No further action was taken against the lady. Shortly after she was released, and the King himself induced her to join in making a marriage settlement on her son-in-law.

Boston, Mass.

Reviews of Books

CLARK'S LAW OF EMPLOYMENT OF LABOR

The Law of the Employment of Labor. By Lindley D. Clark, LL.M. Macmillan Company, New York. Pp. 340 + 33. ($1.60 *net*.)

THIS is not a law treatise, designed to supply a full statement of the law of labor, which is complicated and constantly shifting, but rather an elucidation of the principles contained in the law, aiming merely at a general treatment of the subject, and no doubt supplying lawyers, as well as laymen, with a useful handbook.

The writer discusses the principles of the common law in their most important phases as well as the nature and trend of legislation in so far as these are applicable to workmen and their employers in their relations as such. The subjects treated include the contract of employment, wages, hours of labor, regulation of the physical conditions of employment, employment of women and children, restrictions of employees, liability of employers for injuries to employees, workmen's compensation laws, negligence of employees, trade and labor associations and labor disputes. The book has good tone, and the legal citations are perhaps fuller than might have been expected of a work of this character.

WEHBERG ON THE ABOLITION OF PRIZE LAW

Capture in War on Land and Sea. By Hans Wehberg, Dr. Jur. (Düsseldorf). Translated from *Das Beuterrecht im Land- und Seekriege*. With an introduction by John M. Robertson, M.P. P.S. King & Son, London. Pp. xxxv, 191 + 18 (bibliography and index). (*5s. net*.)

THE author of "Capture in War on Land and Sea" is evidently a well qualified scholar, who in a volume of restricted compass has contributed a valuable discussion of maritime capture. For the principal part of the book deals with this subject, owing to the writer's polemical purpose. While he builds his argument on a basis of scholarly exposition, employing historical

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evidence largely, and conforming to the most approved standard of scientific treatment, his efforts are mainly expended in showing the advantages of the immunization of private property at sea. Capture on land therefore receives little attention, the argument being that the principle already adopted in war on land should be applied to maritime warfare. Mr. Robertson's introduction contains a vigorous plea in favor of the abandonment by Great Britain of its traditional attitude, in the interest of gradual disarmament, as the protection of private property at sea furnishes the chief reason for the maintenance of enormous fleets. The book, however, is really addressed to the enlightened international public opinion of all countries, to which it makes a timely and forceful appeal in view of the importance of the questions discussed.

FRANK'S BUSINESS ORGANIZATION

Commentary on the Science of Organization and Business Development; a treatise on the law and science of the promotion, organization, re-organization, and management of business corporations, with special reference to approved plans and procedure for the financing of modern business enterprises. By Robert J. Frank, LL.B., of the Chicago bar. 3d ed. Chicago Commercial Publishing Co., Chicago. Pp. 184 + appendix 81 and index 15. ($2.75 *net*.)

THIS work, which has reached a third edition as an indication of its usefulness, deals chiefly with the organization and financing of business corporations, and is addressed chiefly to business men, to whom it gives many excellent suggestions regarding those matters of which the officer of a corporation should have at least general knowledge, and in which he is likely to require the assistance of an attorney. The book is also useful to lawyers interested in corporation practice, because of the light which it throws on many details of business organization and management. It contains material of great value for both of the classes to which we have referred, and is sure to be of help to all in any way responsible for the safe management of a great business enterprise.

THE STORY OF A COUNTRY LAWYER

A Country Lawyer. By Judge Henry A. Shute, author of "The Real Diary of a Real Boy, Farming It," etc. With illustrations. Houghton, Mifflin Co., Boston. Pp. 431. ($1.25 *net*.)

THE story of an athletic young New Yorker who is induced by circumstances to take up the study and practice of law in an obscure New Hampshire town, and gets into trouble of various sorts with tough village characters and sordid political and business interests, extricating himself from all difficulties by his moral and physical force and finally getting elected County Solicitor, affords plenty of opportunity for dramatic incident, and easily holds the reader's unabated attention. Not only is the action rapid, but there is a love interest running through the story, and the homely happenings of a country court and eccentricities of rural life are described in humorous vein.

At the same time the mock heroism of the leading character, the exaggerated villainy and rowdyism of certain villagers, the melodramatic sensationalism of the country lawyer's extraordinary exploits, the superabundance of low comedy, and the constant sacrifice of plausibi'ity, tend to an unfortunate association of this book with the dime-novel order of fiction, and we cannot praise it, though the author's style is unusually animated and the character of the old lawyer Branch is well drawn. The book is a fair type of a species with which the literary market in this country is glutted, which reflects no credit on the publish-

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ing trade as it is conducted by those who are too often tempted to sacrifice literary to commercial considerations.

HUBBELL'S LEGAL DIRECTORY

Hubbell's Legal Directory for Lawyers and Business Men. Forty-second year, 1912. Hubbell Publishing Co., New York. Pp. 1465 + 446. ($5.35 delivered.)

THE new volume of this standard directory has been thoroughly revised and brought up to date, and a synopsis of the laws of Porti Rico has been added. All matter is presented in an accurate and accessible form and should prove of inestimable value to the legal profession. The general high standard of preceding volumes has been retained. Information covering a wide range is given of interest to lawyers everywhere, including the names of one or more of the leading and most reliable attorneys in over four thousand cities and towns in the United States and Canada; also a synopsis of the laws of the states, the provinces of Canada and Mexico.

NOTES.

The report of the sixth annual meeting of the Mississippi State Bar Association, held at Hattiesburg, May 2–4, 1911, contains much discussion of the reform of procedure and practice. Among the notable papers were those of Hon. W. H. Powell, in which he discussed noteworthy changes in statute law, and S. E. Travis, Esq., on "Uniform Legislation by the States." Resolutions were passed endorsing the acts prepared under the direction of the Commissioners on Uniform State Laws. The next annual meeting of the Association will be held at Greenville on the first Tuesday after the first Monday of May, 1912.

The proceedings of the Illinois State Bar Association, at the semi-annual meeting of Feb. 16, 1911, and the thirty-fifth annual meeting of June 23 and 24, 1911, contains three papers read at the semi-annual meeting dealing with Illinois legal history. The proceedings of the annual meeting contain papers by President William R. Curran, Hon. Charles J. Bonaparte (whose subject was "Judges as Law Makers") Hon. George W. Wall ("The Judicial Settlement of International Disputes"), Hon. Clarence True Wilson ("Oregon's Experiments in Self Government"), and Mary M. Bartelme ("A Woman's Place at the Bar").

The Conveyancer's Valentine

By M. L. Tyler

DEAR spinster, you alone can give, grant, bargain, or convey
The property I'd fain acquire! (It's neither clod nor clay—
Nor strictly incorporeal—it's personal, in a way—
And yet it's real—Oh pshaw) I pray
If you can give an unencumbered title, clear and free,
Your heart, with rights appurtenant, for life, convey to me!

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Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Adjudication. "The Length of Judicial Opinions." By Francis A. Leach. 21 *Yale Law Journal* 141 (Dec.).

A statute of Missouri provides that "In each case determined by the Supreme Court or Court of Appeals, or finally disposed of upon a motion, the opinion of the court shall be reduced to writing and filed in the cause, and shall show which of the judges delivered the same and which concur therein or dissent therefrom."

"California (*Houston* v. *Williams*, 13 Cal. 25, cited by Judge Lamm in *Turner* v. *Anderson*) and Arkansas (*Vaughn* v. *Harp*, 49 Ark. 160) have declared such provisions of their statutes unconstitutional. . . .

"Judges of today, with probably few exceptions, dictate their opinions to stenographers. Dictation is seldom conducive to condensation or conciseness of statement. . . .

"Judge Scott, one of the early and most eminent of the judges of the Supreme Court of Missouri, noted for his conciseness, once asked a member of the bar how long this lawyer thought it had taken him to write two lines of a certain opinion?

"On the lawyer's expressing his inability to answer the question, 'two weeks of hard labor,' was Judge Scott's answer."

See Judicial Precedent.

Admiralty. "Admiralty will not try Equitable Titles to Vessels." By James D. Newell, Jr. 21 *Yale Law Journal* 157 (Dec.).

"It may be said that the admiralty court is also a court of equity, which is no doubt true, but it cannot try questions involving merely the equitable title to a vessel.'

Aesthetic Regulations. See Municipal Corporations.

Agency. "The Real Estate Broker and His Commissions, III." By Floyd R. Mechem. 6 *Illinois Law Review* 313 (Dec.).

Continuation of article noticed in 23 *Green Bag* 644, 24 *Green Bag* 24.

Banking and Currency. "Everybody's Money." By Edwin R. A. Seligman, LL.D. *Outlook*, v. 99, p. 1055 (Dec. 30).

Professor Seligman, who is one of this country's half-dozen ablest economists, presents a very clear and informing discussion of the questions involved in the report of the National Monetary Commission.

Bankruptcy. See Fraudulent Conveyances.

Codification. See Roman Law, Marriage and Divorce, Sales.

Conflict of Laws. "Doctrines of Private International Law in England and America Contrasted with those of Continental Europe." By Arthur K. Kuhn. 12 *Columbia Law Review* 44 (Jan.).

"If the marriage status no longer exists as to one of the parties, it must, of necessity, be dissolved as to the other. As was said by Mr. Justice Brown in his dissenting opinion: 'It is of the very essence of proceedings *in rem* that the decree of a court with respect to the *res*, whether it be a vessel, a tract of land or the marriage relation, is entitled to be respected in every other state or country' (201 U. S. 562, 616).

"The cosmopolitan character of life under modern conditions would seem to demand a logical adherence to this principle. Without it, the development of an international community of interest in matters of private legal justice would be practically impossible. The trend of Private International Law on the Continent is in this direction."

Constitutionality of Statutes. "The United States Supreme Court as the Final Interpreter of the Federal Constitution." By W. F. Dodd. 6 *Illinois Law Review* 289 (Dec.).

Perhaps the most important article of the month. Professor Dodd discusses, in all its ramifications, the right possessed by the United States Supreme Court to review decisions of the state courts involving questions of the constitutionality of state statutes. He indicates the injustice of the rule which allows an appeal only where the constitutionality of the statute is sustained by the state court. He would have an appeal allowable in all cases, whether the decision of the state court is against the statute or in favor of it. Litigants would thus stand on an equality, and the federal Supreme Court — in construing such statutes as the New York Workman's Compensation law, for instance, which cannot now come before it on appeal from the decision of the New York court of final resort — would be able to assist in bringing about a uniform construction of the "due process" clause. Mr. Dodd, therefore, would change the provision in the new Federal Judicial Code taken from the Federal Judiciary Act as enacted in 1867. He does not make this proposal, however, without carefully considering the objections that might be offered against its adoption.

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This article was prepared during the summer of 1911 at the suggestion of some members of Congress who had become interested in the proposed amendment of the Federal Judicial Code. A recommendation identical to that contained in this article was made to the American Bar Association during the latter part of August by its special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation; and this recommendation was unanimously approved. The American Bar Association therefore now stands committed to the proposal to allow a general right of appeal on all questions of the validity of a statute under the Constitution and laws of the United States.

See Judicial Recall.

Constitutional Law. See Fourteenth Amendment, Judicial Recall, Workmen's Compensation.

Contracts. "Releases and Covenants Not to Sue Joint, or Joint and Several Debtors." By Prof. Samuel Williston. 25 *Harvard Law Review* 203 (Jan.).

"The subject of joint contracts is regarded as an elementary one in the law of contracts, yet its difficulties have received singularly little discussion either in treatises on the law of contracts or in essays. The fullest treatment of the matter is perhaps to be found in books on the law of partnership. But it is not always easy, where a partnership is concerned, to be sure how far peculiar rules of partnership may have affected the general principles of joint contracts."

Criminal Procedure. "Lynching Unnecessary: A Report of *Commonwealth* v. *Christian*." By Richard W. Hale. 45 *American Law Review* 875 (Nov.-Dec.).

"The proverbial law's delays and lynch law both merit condemnation." As a protest against the over-emphasis placed on these two evils by publicity, the author deems it a pleasure to submit to the public and the legal profession a report of this case.

"A Trial for Murder in England." 45 *American Law Review* 801 (Nov.-Dec.).

Conclusion of the *Dickman* case (see 23 *Green Bag* 644).

Educational Trusts. "Educational Trusts and Recent Decisions." By J. Edward Graham, K.C. 23 *Juridical Review* 243 (Oct.).

The effect of the transfer of educational trusts to school boards, under English law, is considered.

Equity. See Admiralty.

Evidence. "The Artificiality of our Law of Evidence." By Hon. Simeon E. Baldwin, LL.D. 21 *Yale Law Journal* 105 (Dec.).

An article full of shrewd common sense which should be read by everyone interested in the progressive reform of existing procedure.

"The starting point in disposing of an objection to proof of any fact should always be this: 'Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent.' The question, also, as to its reception is always one to be answered with a view to practical rather than theoretical considerations. Will or will it not tend to throw light on the justice of the case on trial? This the trial judge must determine largely as a matter of common sense. He must be armed with a pretty wide discretion.

"The present tendency of most American courts is in this direction. . . .

"Our jurors are now generally intelligent and fairly educated men. There is less and less need to guard them from hearing evidence which is objectionable because remote. They can themselves appreciate its remoteness and weigh it accordingly.

"To some extent all courts have met this change of conditions."

See Expert Testimony.

Expert Testimony. "Proof of Handwriting." By Albert S. Osborn. 6 *Illinois Law Review* 334 (Dec.)

The author proposes that wise rules of practice admitting proved standards of comparison be adopted, and that the appellate courts designate qualified experts who may be called upon to give evidence for the state or court when there is a conflict of testimony.

Federal Control. See Constitutionality of Statutes, State Control.

Federal Courts. "The Neglected Department." By Judge George C. Holt. *North American Review*, v. 195, p. 15 (Jan.).

"Nearly twenty years ago a change in the federal judicial system, more important than had ever occurred before, was caused by the establishment of the Circuit Courts of Appeals. The business of the Supreme Court had been for many years badly in arrears. To relieve the congestion it was determined to create a system of intermediate courts of appeal. The obviously proper thing to have done would have been to establish new and distinct courts, made up of a proper number of judges, having no connection with the courts subject to their appellate jurisdiction. What was actually done was to create courts of appeal to be held by the existing circuit judges, with power in them to call in any of the district judges when necessary. The number of the judges constituting these courts is usually three, and they habitually sit in review of each other's decisions. . . .

"Under the new act, going into effect on January 1, 1912, transferring the original jurisdiction of the circuit courts to the district courts, the district judges will continue to do substantially all of that work. In striking contrast with this spirit of parsimony in organizing these important appellate courts has been the action of Congress in establishing various special tribunals."

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The niggardliness of Congress in providing for the needs of the federal courts is shown, with special reference to New York City and the poor court house facilities there.

Fourteenth Amendment. "The Fourteenth Amendment and the Negro Race Question." By Charles Wallace Collins. 45 *American Law Review* 830 (Nov.-Dec.).

"It may be said the Amendment is the negro's Magna Carta — it is to him a perpetual guarantee of protection from discrimination. We have seen, however, that the validity of this assertion is reduced to an uncertain and undefined minimum by the facts."

Fraudulent Conveyances. "Fraudulent Conveyance Law and Bankruptcy." By J. M. Mason. 17 *Virginia Law Register* 657 (Jan.).

First instalment of a discussion of *Moore* v. *Tearney*, 62 W. Va. 72, 57 S. E. 263.

General Jurisprudence. "The scope and Purpose of Sociological Jurisprudence, II." By Professor Roscoe Pound. 25 *Harvard Law Review* 140 (Dec.).

Reviewing the first paper of this series (23 *Green Bag* 425), which appeared in the June number of the *Harvard Law Review*, we said that the series promised to be noteworthy, because of its exposition of tendencies now visible in the scientific investigation of fundamental problems, and of the present status of legal science in its higher forms. The second paper, which deals with recent phases of juristic philosophy, chiefly in Germany but also in France, is notably instructive, and will be appreciated particularly for its observations with regard to Ihering, who stands for the Social Utilitarians, Stammler, the typical Neo-Kantian, and Kohler, leader of the Neo-Hegelians, who is "without question the first of living jurists." The treatment is distinguished by qualities of breadth and solidity rare in contemporary English and American writing in this field.

"For sociological jurisprudence, the importance of Stammler's work is threefold:

"(1) Like Ihering he gives us faith in the 'efficacy of effort' as Ward happily puts it, and furnishes a philosophical foundation for the conscious endeavor to promote social justice in which the sociologists rightly demand that the science of law as well as the science of legislation co-operate.

"(2) He puts a social philosophy of law in place of the individualist philosophy theretofore dominant and formulates a legal theory of social justice.

"(3) He adds a theory of just decision of causes to the theory of making of just rules and thus raises the important problem of the application of legal rules, of which there will be much to say in another connection. Suffice it to say here that this has become a burning question in recent juristic literature. . . .

"Declaring that Stammler's Neo-Kantian philosophy of law is unhistorical, Kohler takes for his starting-point a *dictum* of Hegel that law is a phenomenon of culture. But he does not use this proposition as something from which to bring forth an entire system by purely deductive processes. He seeks instead to proceed empirically upon the basis afforded by ethnology, comparative law, and comparative legal history. Savigny held that law was a product of the genius of a people and was no more a result of conscious human will than is language. Kohler, on the other hand, holds that it is a product of the culture of a people in the past and of the attempt to adjust it to the culture of the present. He does not exclude conscious effort to make this adjustment. On the contrary, he holds that the 'jural postulates' of the culture of a people for the time being are to be discovered and that law is to be brought into accord therewith. Yet he recognizes, as the legal historian must, the limitations upon the 'efficacy of effort' in that we have to shape the material that has come down to us so that it meet the requirements of present culture, 'so that it further culture and does not check and repress it.' Moreover, this adjustment has to be made with respect to a constantly progressing culture. Hence law cannot stand still. . . .

"Thus Kohler's doctrine calls for an understanding of the social history of a people and of its relation to law, whereas in the past we have looked to political history and the relation thereof to legal systems. Moreover, he conceives that legal history affords generalizations which are fundamental for the philosophy of law."

Government. "The Parliament Act and the British Constitution." By Edward Jenks. 12 *Columbia Law Review* 32 (Jan.).

"The change will certainly not destroy the House of Lords as a legislative body. In the event (improbable, it is to be hoped) of the continuing a steady opposition to Liberal proposals, it will speedily be found, that a power to delay for two years the passing of a first-class measure is far from trivial."

See Constitutionality of Statutes, Judicial Recall.

Insurance. "Insurance of Property Subject to a Life Interest." By Robert F. Irving. 23 *Juridical Review* 221 (Oct.).

Treated from the point of view of English law.

International Arbitration. "Legal Limitation of Arbitral Tribunals." By Alpheus Henry Snow. 60 *Univ. of Pa. Law Review* 153 (Dec.).

This interesting and suggestive article contains the suggestion that the United States take the lead in offering to submit all controversies to arbitration, "on the understanding that the arbitrators were to regard themselves as legally limited by the principle of universal law that no person is to be deprived of his liberty or property by any political society or government without due process of law, and, subject to this law, by all the customary organic and regulative law of the society of nations, as the same is now formulated under the name of 'international law' and as it may be formulated by the authentica-

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tion of reasonable customs — the existence of customs and their reasonableness being determined by having regard to and respect for all existing accepted customs, the principles of all civilized systems of laws, and the precedents under these systems. . . .

"It seems probable that the question of limitation of arbitral tribunals will be open for discussion at the next Hague Conference, even if this nation should hold to the existing treaties. There seems to be a general desire among the nations that what is called 'codification of international law' shall be considered by the Conference. This will, it would seem, necessarily involve the question of legal limitation of states, governments and arbitral tribunals. As a result of these discussions, it will be made clearer to us what ought to be our permanent policy in the matter of judicial settlement of international disputes. The great danger to the cause of judicial settlement appears to lie in the adoption by the leading nations of an insufficiently considered policy which will subject them to legally unlimited power and will result in war rather than in peace, thus bringing judicial settlement into disrepute."

"The Pending Arbitration Treaties: An Appeal for their Ratification." By William Howard Taft, President of the United States. *Century*, v. 83, p. 459 (Jan.).

"Recent events in China and Tripoli have been cited as evidence against the pending treaties. Both citations are, to my mind, unfortunate. In the case of China it is urged that failure to cultivate the military spirit has been responsible, first for the loss to China of various of its provinces which, in effect, have been seized by foreign powers, and finally for the dire revolution from which that empire is now suffering.

"The ideal for which sincere advocates of universal peace are striving is an international court of arbitration before which a weak nation may summon one more powerful when the weaker believes its rights are being violated by the more powerful. If there has been unjust spoliation of China, such a tribunal would have disclosed the fact and would have forbidden such spoliation."

"The General Arbitration Treaties." By Prof. Charles C. Hyde. *North American Review*, v. 195, p. 1 (Jan.).

The author, who holds the chair of international law in Northwestern University, is in sympathy with the treaties, and discussing the various arguments against their ratification, he concludes that their terms should not be materially modified, unless with the idea of more clearly excluding purely political questions from the sphere of justiciable differences.

"The Place of Force in International Relations." By Rear-Admiral A. T. Mahan, U. S. N. *North American Review*, v. 195, p. 28 (Jan.).

These articles of Admiral Mahan's, though possibly laboring under the slight misconception that law and force are necessarily antithetical, are of interest for their historical review of the international politics of the United States, and for some sagacious observations on the function which economic and military power must continue to play in international affairs.

International Law. See Conflict of Laws, International Arbitration.

Interstate Commerce. "The Use and the Abuse of the Commerce Clause." By Frederick H. Cooke. 10 *Michigan Law Review* 93 (Dec.).

"The power of legislation that has been allowed to Congress under the commerce clause is a superfluous power of legislating on matters as to which ample power has been reserved to the states, as in case of legislation relating to (1) prohibition of transportation, (2) the conduct and liability of those engaged therein, (3) furnishing the means thereof, or authority to engage therein."

See State Control.

Judicial Precedent. "The Value of Precedent." By Judge Shackelford Miller. 45 *American Law Review* 857 (Nov.-Dec.).

"It is not within the scope of this paper to go into the doctrine of *stare decisis*, which requires a court to follow its own precedent. We are concerned only with those qualities which give value to a case as a precedent. That the law grows by means of precedents may be seen from a slight examination of any case book used in our modern law schools."

Judicial Recall. "The Recall and the Political Responsibility of Judges." By W. F. Dodd. 10 *Michigan Law Review* 79 (Dec.).

"There is some solid basis for the movement for the recall of judges. We have officers exercising large political powers without a corresponding political responsibility. . . . If state courts have abused their power to declare state laws unconstitutional on 'due process' and 'equal protection' grounds, it is possible to remedy the situation by two measures, the one involving a change in state constitutions, and the other an act of Congress.

"The states may strike the 'due process of law' and the 'equal protection of the laws' clauses from their constitutions. These clauses must mean the same thing in state constitutions as in the federal Constitution, although it must be said that they are often interpreted to mean different things. . . .

"If the 'due process' and 'equal protection' clauses are stricken from state constitutions, state decisions declaring state laws unconstitutional upon these grounds must be based on the federal constitutional provisions, and it should be possible without great difficulty to obtain a prompt and uniform interpretation of these federal clauses for the whole country by an amendment to the federal Judicial Code, so as to permit review by the United States Supreme Court of state decisions holding state laws invalid on federal constitutional grounds. . . .

"The suggestions made above would make conflicting interpretations impossible and prevent delay."

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See Constitutionality of Statutes.

Legal Cause. See Torts.

Legal Education. "Should the Law Teacher Practise Law?" By Albert M. Kales, with note by Dean Ezra R. Thayer. 25 *Harvard Law Review* 253 (Jan.).

Mr. Kales argues persuasively in favor of the affirmative side of this question. Dean Thayer would himself state the advantages of law practice with wider reservations, though in general agreement.

See Pleading, Roman Law.

Legal History. "Puritanism and the Common Law." By Prof. Roscoe Pound. 45 *American Law Review* 811 (Nov.-Dec.).

"It is, however, in application and administration of the law that Puritanism has produced the most serious results. The Puritan characteristic jealousy of the magistrate has taken an extreme form and has been developed in our legal procedure as a jealousy of the judge. 'There is,' says Bryce, 'a hearty Puritanism in the view of human nature which pervades (the Constitution). It is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut.' It is hardly too much to say that the Puritan ideal state was a permanent deadlock where the individual, instructed by a multitude of rules but not co-erced, had free play of the dictates of his own reason and conscience. For our legislation exhibits an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he realized the intrinsic sinfulness of human nature. Accordingly we have abundance of rules and no adequate provision for carrying them out."

"Central Courts of Law and Representative Assemblies in the Sixteenth Century." By W. S. Holdsworth, St. John's College, Oxford. 12 *Columbia Law Review* 1 (Jan.).

"In England and in England alone the mediaeval conception of the supremacy of the law was adapted to the needs of a modern state. That it could be thus adapted is due in part to the retention by the Tudors of the mediaeval machinery of local government, but chiefly to the maintenance of the old alliance between Parliament and the common law."

"The Mosaic Law." By Clarence A. Lightner. 10 *Michigan Law Review* 108 (Dec.).

"For us, the importance of the Mosaic law lies in its intimate connection with the Jewish religion and its relation to Christianity. It has, on this account, exerted an influence upon modern peoples out of proportion to its own merits, when considered simply as a system of jurisprudence."

Marriage and Divorce. "Shall Congress Establish Uniform Divorce Laws?" By J. C. Wise. 11 *Phi Delta Phi Brief* 299 (Dec.).

An argument in favor of unification.

Minnesota Rate Case. See State Control.

Monopolies. "The Recent Trust Decisions." By Henry R. Seager. *Political Science Quarterly*, v. 26, p. 581 (Dec.).

An able discussion, which if not so illuminating as Mr. Raymond's article in the *Harvard Law Review*, noted last month (24 *Green Bag* 29), as an analysis of the content of the decisions, nevertheless sets forth sound views regarding their value.

Municipal Corporations. "The Legal Aspect of Municipal Aesthetics." By Robert A. Edgar. 18 *Case and Comment* 357 (Dec.).

"If the reasoning of the *Copley Square* case [174 Mass. 476, affd. 188 U. S. 491] should be adopted, and it seems to be sound and to have met with approval whenever discussed, it would be constitutional for the legislature on making compensation, for purely aesthetic reasons, to authorize a municipality to limit the height and style of architecture of private buildings, where the purpose is a public one, such as to preserve the architectural harmony and beauty of a public square, or of the surroundings of a public park or building."

Other phases of the subject are discussed.

"Liability of Commissioners, Supervisors, etc., for Injuries on Highway." By William M. Rockel. 73 *Central Law Journal* 433 (Dec. 22).

A review of the authorities which shows under what conditions an available remedy at law is created.

Partnership. See Contracts.

Pleading. "Should Common Law Pleading be Taught in a Virginia Law School?" By Charles A. Graves. 17 *Virginia Law Register* 668 (Jan.).

This study "possesses such cultural and disciplinary value as to rank with logic and metaphysics."

Practice. "The Trial of Cases in Pennsylvania." By Henry B. Patton. 60 *Univ. of Pa. Law Review* 181 (Dec.).

Dealing with the points of practice that arise from the time a case is called until the verdict of the jury has been passed upon by the trial court. Outlined particularly for the benefit of the young member of the bar who has not yet tried his first case.

Prescription. "Acquisitive Prescription — Its Existing World-wide Uniformity." By Prof. Charles P. Sherman, D.C.L. 21 *Yale Law Journal* 147 (Dec.).

A study of the Roman law doctrines, showing to what extent they survive in contemporary law.

Procedure. See Criminal Procedure, Evidence.

Questioned Documents. See Expert Testimony.

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Race Distinctions. See Fourteenth Amendment.

Railway Rates. "Authorizing a Federal Commission to Fix Rates of Interstate Carriers Is not a Delegation of Congressional Legislative Power in the Constitutional Sense." By Paca Oberlin, D.C.L. 72 *Central Law Journal* 425 (Dec. 15)

"The act appears to prescribe a sufficient standard for the guidance of the Commission, in that it is not left to that body arbitrarily to invent a rule by which it determines what is right and proper according to its own understanding."

See State Control.

Real Property. "The History of a Title." By Uriel H. Crocker. 11 *Phi Delta Phi Brief* 315 (Dec.).

Bearing the subtitle, "A Conveyancer's Romance." First printed in the *American Law Review*, Oct. 1875.

See Prescription.

Roman Law. "The Value of Roman Law to the American Lawyer of Today." By Prof. Charles P. Sherman, of Yale Law School. 60 *Univ. of Pa. Law Review* 194 (Dec.).

"All civilized countries of the world, except Great Britain and the United States, have followed the example of Rome and codified their law, — France, Germany, Spain, Italy, Austria, the Latin-American States and Japan have adopted the Roman Emperor Justinian's solution of this problem, Our lawyers are being driven — whether they like it or not — to examine the means and results of codification. In the future — the immediate future — those in the legal profession who can do this work will reap its rewards."

See Prescription.

Sales. "Sales of Personal Property." 27 *Bench and Bar* 59, 109 (Nov.-Dec.).

A description of chapter 571 of the Laws of 1911 of New York, which is the Uniform States Act drafted by Professor Samuel Williston enacted without substantial change. Numerous New York citations have been annotated.

State Control. "The Limitation of State Control over the Regulation of Rates." By Jay Newton Baker, LL.M., J.D. 21 *Yale Law Journal* 126 (Dec.).

"No one can criticise the legal ability and logic displayed in the *Minnesota Rate* decision. It is heavier than the majority of people conceive. Legislation that favors the greatest good and benefits the greatest number should be the universal rule."

"State Taxation of Interstate Commerce, I." By H. J. Davenport. *Political Science Quarterly*, v. 26, p. 643 (Dec.).

In this instalment, a way is pointed out in which the states may burden the intangible property of corporations engaged in interstate commerce; which amounts to saying that the unearned increment of the tangible property may be taxed.

"Recent Federal Court Decisions Affecting State Laws Regulating Freight and Passenger Rates." By Hon. Grant G. Martin, Attorney-General of Nebraska. 21 *Yale Law Journal* 117 (Dec.).

"In the *Minnesota* case the Court assumes that the rates, both passenger and freight, fixed by the railroads prior to the Minnesota reductions, were lawful rates because the companies had filed their schedules with the interstate commerce commission. The companies have been carrying passengers over this same territory for a third of a century at three cents per mile. During that time the improvement in facilities and equipment have enabled them to lessen the corresponding operating expenses, and in the meanwhile this territory has quadrupled in population. If those rates fixed by the companies thirty years ago were compensatory, what must they now be under present conditions?"

See Interstate Commerce.

Taxation. See State Control.

Torts. "Legal Cause in Actions of Tort; I, II." By Prof. Jeremiah Smith. 25 *Harvard Law Review* 103 (Dec.), 223 (Jan.).

The most logical and thorough discussion of legal cause that has come to notice in a long time. Professor Smith examines a number of definitions of legal cause, and finds them untenable. He finally takes up the alleged rule of improbable consequence stated in this negative form, "that if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause."

Considering this rule in the light of authority, he finds it sustained by Pollock, Salmond, Cooley and Watson, and rejected by Beven, Bohlen and Street. The rule is exhaustively discussed, but is not favored: —

"It is better squarely to reject the alleged rule of non-liability for improbable consequences than to affect to maintain the rule, and then practically get rid of it in a large proportion of cases by applying qualifications which are not consistent with the natural interpretation of the rule. It seems absurd to retain it as nominally the general rule, and then explain that, if construed in its natural meaning, it does not apply in the majority of cases. Such a course does not tend to promote legal symmetry or clearness of thought; and it is especially perplexing to beginners in the study of law."

A third concluding instalment may be expected to deal constructively with the formulation of a theoretically sound rule.

Uniformity of Law. See Constitutionality of Statutes.

Wills. "Admissibility of Extrinsic Evidence in Aid of the Interpretation of Wills." By A. L. Cordiner. 23 *Juridical Review* 266 (Oct.).

"In England, an inquiry is not allowable to

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explain the will, but merely to explain what passes by the will by ascertaining the only property to which it could possibly have any reference. A much more definite result . . .has been reached than in Scotland."

Workmen's Compensation. "Workmen's Compensation Acts: Their Theory and Their Constitutionality." By Eugene Wambaugh. 25 *Harvard Law Review* 129 (Dec.).

"Nothing in the decisions of the Supreme Court of the United States appears to prevent legislative bodies from shifting the primary incidence of the financial burden of an employee's accident from the employee himself to the employer — that is to say, from one to the other of the two persons who jointly enter upon the industrial undertaking and who thus participate in creating the situation out of which will come the casualty and the resultant loss to society.

"The conclusion, then, is that, whether workmen's compensation acts are desirable or not, their essential features, both by reason and by the weight of decision, are constitutional. Apparently in large industrial enterprises the fellow-servant rule, assumption of risk, and contributory negligence are under sentence of death. That is a matter for the statesman and the legislator. To the mere lawyer it is clear enough that these old defenses are not rendered invulnerable and immortal by the Constitution of the United States."

See Constitutionality of Statutes.

Latest Important Cases

Employers' Liability. *Constitutionality of Federal Statute — Fellow-Servant Rule — Interstate Commerce.*

U. S.

The constitutionality of the federal employers' liability law of 1908 was upheld by the Supreme Court of the United States Jan. 15. The Court also decided that state courts may enforce that act when local laws are appropriate.

The question came before the Court in a number of cases heard together in February, 1911. The principal case was that of *Ora L. Babcock* v. *Northern Pacific Ry. Co.*

The decision was unanimous and a complete victory for the Government on every point. Mr. Justice Vandevanter declared that Congress had the right to regulate the relation of interstate railroads to their employees. Congress had not gone beyond its power by abrogating the common-law rule that an employer was not liable for the injuries resulting to employees by the negligence of fellow servants. "No one has a vested property right in the common law," said the Court, which found that the present law did not regulate intra-state commerce and therefore was not objectionable on that ground. No objection was found in the fact that the act did away with the doctrine of assumption of risk by employees and restricted the doctrine of contributory negligence.

The first law, enacted in 1906, was declared unconstitutional in 1908 because it embraced within its terms a regulation of intra-state commerce as well as interstate.

Inheritance Taxes. *Gifts inter Vivos — Fourteenth Amendment — Due Process and Equal Protection of the Laws.*

U. S.

The United States Supreme Court in *Kenney* v. *Comptroller of the State of New York* (Oct. term, no. 81) decided Jan. 9, held the New York inheritance law not violative of the Fourteenth Amendment in so far as it imposes a tax upon property transferred *inter vivos*.

The decedent, whose administrator brought the action, had executed a deed four years before her death conveying certain stocks and bonds to a New Jersey trustee, for the benefit of her three chil-

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dren and herself, with a provision allowing the property to be transferred to them upon her death. The Court (Lamar, J.) said: —

"There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes. . . .

"The Fourteenth Amendment does not diminish the taxing power of the state, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and value protection. It does not deprive the state of the power to select the subjects of taxation."

Literary Property. *Copies of Private Letters — Injunction to Restrain Use for Advertising Purposes.* Mass.

C. F. Libbie & Co. advertised for sale copies of private letters written by Mary Baker G. Eddy to her cousin about 1876, and the executor of Mrs. Eddy's estate applied for an injunction restraining the use of the letters for advertising or other purposes.

In the first decision rendered in Massachusetts regarding proprietary rights in ordinary private letters, the Massachusetts Supreme Judicial Court (*Baker* v. *C. F. Libbie & Co.*) held that no narrow exceptions could materially affect the general rule that an author has a proprietary right in his letters which will be protected by law. This right involves a right of the author to copy or to secure copies, as otherwise his right of publication might be lost. An injunction was therefore granted.

Railway Rates. *Unjust Discrimination in Freight Charges — Order by Interstate Commerce Commission Prerequisite to an Action.* U. S.

In *Robinson* v. *Baltimore & Ohio R. R. Co.*, decided by the United States Supreme Court in an opinion filed Jan. 9, the Court affirmed a judgment of the Supreme Court of Appeals of West Virginia, and held that the plaintiff was denied no right by the dismissal of an action against the railroad to recover a difference of fifty cents a ton between the freight paid on coal loaded into its cars from wagons and that which would have been paid had it been loaded from the tipple.

The Court said that the interstate commerce act contemplated an investigation and order by the designated tribunal, the Interstate Commerce Commission, as a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. A different procedure "would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure."

Railway Rates. *Findings of Interstate Commerce Commission Prima Facie True — Sufficiency of Substantial Evidence to Sustain an Order.* U. S.

In *Interstate Commerce Commission* v. *Union Pacific, Northern Pacific and Great Northern Railways*, October term, 1911, nos. 151, 152 and 153, the Supreme Court held in an opinion filed Jan. 9, that, as the Interstate Commerce Act makes the findings of the Commission *prima facie* correct, the courts, on a bill to enjoin the enforcement of an order,

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would not examine the facts further than to determine whether there was substantial evidence to sustain the order. In this case three appeals were brought by the Interstate Commerce Commission from a decree of the Circuit Court for the district of Minnesota, enjoining a reduction of lumber rates named in tariffs filed by the aforesaid railroads for lumber shipped from the coast to St. Paul, Omaha and Chicago. The railroads contended that the order was beyond the power of the Commission because entered without any evidence or finding that the rates fixed by the carriers were unjust or unreasonable.

Mr. Justice Lamar, delivering the opinion of the Court, said:

"The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience: *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof — but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Trial by Jury. *Separate Preliminary Trial of One or More Issues — Substance of Right Must Alone be Preserved.* N. Y.

The appellant in *Smith* v. *Western Pacific Ry. Co.* had sued to recover a balance claimed to be due on a contract for services. The respondent had set up a general denial, and had set up among other affirmative defenses the Statute of Limitations. The Supreme Court of New York ordered a separate and preliminary trial of the issues arising under this defense, and the Appellate Division affirmed the order. The appellant contended that his constitutional right of trial by jury was impaired by section 973 of the Code of Civil Procedure.

The Court of Appeals (Hiscock, J.), in a decision rendered Dec. 19, repudiated this view, saying: —

"It is well settled that the object of such a provision is to preserve the substance of the right of trial by jury rather than to prescribe the details of the methods by which it shall be exercised and enjoyed. Thus in *Walker* v. *Southern Pacific R. R.* (165 U. S. 593, 396), Judge Brewer, considering whether a statute of New Mexico violated the provisions of the United States Constitution on this subject, said: 'The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law.' "

N. Y. L. Jour., Dec. 28.

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The Editor's Bag

PUBLICITY OF COURT PROCEEDINGS

THE Richeson case in Massachusetts furnished the occasion of a demand for legislation empowering courts to exclude the public and the press from court rooms where evidence would be likely to be given injurious to the morals of the community. Many of the clergy appeared to favor such a measure. A bill aiming at such a reform was actually introduced on the petition of a Boston attorney.

We have already declared, in these pages, that secret trials are opposed to the spirit of our institutions, and we believe that publicity of all court proceedings is necessary not only to insure the rights of litigants being preserved but for the protection of the interest of the community in the just outcome of every controversy. The disclosures of the Richeson case, had it ever come to trial, would have been filthy, but as has been observed the openness of court procedure must be maintained at all costs.

At the same time, the publicity of court proceedings does not imply the publication of salacious details, and legislation could undoubtedly prevent abuse by the press of the right of publishing verbatim reports of evidence injurious to the morals of youth, or from commenting on the evidence in an objectionable manner. The facts of court proceedings can be presented in cold language without furnishing alluring details which pander to morbid curiosity. The Virginia statute forbidding publication of the details of executions has proved to be a dead letter, but there is undoubtedly a public sentiment which finds a greater evil in publication of details of obscene testimony, and would lend greater encouragement to the enforcement of a law designed to avert the greater danger.

THOMAS LEAMING

IT IS with deep regret that we record the death of Thomas Leaming, Esq., of Philadelphia, in his fifty-fourth year. He was an old-time contributor to the *Green Bag*, whose "Philadelphia Lawyers in the London Courts," recently issued, illustrated by his own charming sketches, contains probably the most attractive description ever written of legal institutions and professional etiquette in the mother country.

His gifts were of a kind pre-eminently worthy of the ancient and dignified profession of the law, and were well summarized in the following remarks by Russell Duane, Esq., at the memorial exercises held by the Philadelphia bar on December 29:

"That stately, dignified form was symbolical of the ordered mind within and of that aesthetic temperament which in his early days caused him to hesitate in his choice between the life of the artist and the life of the lawyer. Having chosen the career of the law, that same artistic

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impulse came to the surface in many characteristic ways — in his courtly manner, in his rigid adherence to the rules of etiquette, in the exquisite language of his oral arguments, and in the peculiar printing and arrangement of his paper-books in appellate courts. The late Justice Dean of the Supreme Court of Pennsylvania stated shortly before his death that Mr. Leaming's paper-books, in these particulars, outclassed those of any other lawyer then practising in the state. Another learned member of that court recently awarded the highest praise to the arrangement, brevity and conciseness of his oral arguments. I doubt whether any practising lawyer at the American bar surpassed Mr. Leaming in the ability to state a proposition of law correctly in the smallest possible number of words. His command of the English language and his power of clear and forcible expression were equaled by the logic of his reasoning and the soundness of the legal conclusions which he advanced in his arguments.

"In his professional progress he had reached a point where the future held great and certain things in store for him. He was continually adding to the list of important corporations which he represented. Had his life been prolonged no man stood a better chance of becoming in time the leader of the Philadelphia bar."

A QUESTION OF FEES

THE decree printed below is vouched for as absolutely authentic by a member of the faculty of one of our best-known law schools, who received it from the county attorney of an adjoining county who transcribed it from the record of the court. It comes to us with the suggestion that "it is worthy of a place in the *Green Bag's* museum of legal curiosities." With this suggestion we heartily agree, and we present it with entire impartiality, expressing no opinion as to whether the Attorney-General or the County Judge has the better *moral* right to the fees, the question of what the law *ought* to be obviously falling more naturally within the purview of the profound legal theorists whowrite for the *Harvard Law Review:*—

In the County Court of Gosper County, Neb.

Comes W. L. Reynolds, — and asks the Court to approve the bonds of the precinct assessors and turn them over to himself for safekeeping, and refers the Court to the opinion of the Attorney-General of the State of Nebraska, and says this is the law of the State until reversed according to law.

And now this 3d day of January, 1912, after reading said opinion, and upon consideration whereof, I find that the said Attorney-General did not know what he was talking about — I find said opinion in conflict with common sense— and not the proper way to do business — if a bond is presented to this court — the bond will be filed and fully considered and if approved will be recorded and a certified copy furnished if required. Why should the legislature give everything in the way of fees to one officer — Is one vault better than the other — Why should the County Assessors Bond be in the custody of the County Judge and not his assistants — We know the intention of the Legislature in regard to the County Assessors Bond because it is recorded in the same Statutes — the same reason may be applied to Precinct Assessors if not why not — After all the Bond of the Assessor is nothing but Tom foolery — who ever heard of the bondsman of an Assessor being held to account for the acts of the Assessor.

It is therefore considered — adjudged and Decreed that the opinion of the Attorney General of the State of Nebraska stating that the County Clerk should have the care and custody of the Bonds of the Precinct Assessors is unjust — unlawful and of no force and ought to be annulled and is hereby annulled and of no value in this court. Done under my hand and the Seal of the County Court, this 3rd day of January, 1912.

C. G. LEWIS, County Judge.

Recorded in Entry Record, Vol. 1 page 17.

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MR. SANS RECOURSE

AN ATTORNEY who had a claim against another attorney accepted with client's consent, the note of a third party to debtor endorsed "Sans Recourse."

A few days after maturity the note was placed by the holder with a bank for collection, and the usual notice sent by the bank to the maker. The maker brought the bank's notice to the collecting attorney, and asked him to tell the bank the note would be met later in the same day. This was done, and the bank's note clerk produced the paper, examined it, and said, "All right, we have Mr. Sans Recourse and the other endorser — do you happen to know where we could reach Sans Recourse if necessary?"

Explanations followed, and the note clerk said, "Gee whiz, I am glad you called. If that paper had come in before maturity, we might have included Sans Recourse in our protest."

AN OPINION OF ALEXANDER HAMILTON

THE extant opinions of Andrew Hamilton, we understand, are very scarce. Through the courtesy of John B. Daish, Esq., of Washington, D. C., we are able to publish the following *verbatim* copy of an opinion with reference to a contract of land between Sir William Kieth, Governor of Pennsylvania and the Province of Delaware, 1717–1726, and one John England. The original document is in the possession of Mr. Charles England, chairman of the Baltimore Sewerage Commission.

Sr: Wiln Keith Articles with one John England to convey to ye said John in ffee simple clear of all Incumbrances (except some money due upon the same to the Loan Office &c) sundry Lands and Tenements in New Castle County on Delaware upon part of which Lands there was a small Iron fforge and supposed to be a great Quantity of Iron Ore; in Consideration of which John England was at his own charge to Erect sundry chargeable works for carrying on the making of Pigg and Barr Iron if a sufficient Quantity of Iron Ore or Mine could be found on ye Land for supplying the said Works and Sr: Wiln was to have one sixth part of all the Lands Iron Works &c when finished &c.

But by the said Articles it was further agreed that if John England could not be supply'd with a sufficient Quantity of Iron Ore upon the said Lands for the Purposes aforesaid then he was to reconvey all ye Lands and Premises to Sr: Wiln Keith ye said John being ffirst repaid all the moneys paid for or on account of the said Sr: William

And by the said Articles it is agreed that ye Conveyance of the Premises by the said Sr: Wiln to be said John England shall be in Trust for the Uses in the Articles aforesaid and especially that if ye said John shall not within ye time limited in the Articles find a sufficient Quantity of Iron Ore for carrying on the said Works and shall be willing to reconvey ye said Lands to Sr: Wiln his Heirs or Assigns the said John shall have power and right to sell as much of ye said Lands &c. as will repay him the money he shall have expended in redeeming the said Lands or on or for Account of the said Sr: Wiln as in ye said Articles is agreed.

John England upon enquiry and tryal finds there is no Quantity of Ore to be got opon any part of ye Lands sold to him by ye said Sr: Wiln the mine of Ore being in the Land of one John Evans who lives near that place and who it was said had promised to sell his land to Sr: Wiln. But the agreement between Sr: Wiln and ye said John Evans (if any such was) not being reduced to writing John Evans denyed ye Bargain and will not sell the Land so John England is ready to reconvey ye Lands to Sr: Wiln or his assigns upon their repaying him the money he has advanced and laid out about the Premises which with Interest amounts to ffour hundred and seventy three Pounds, Six Shillings and seven Pence; but neither Sr: Wiln or any Person having right in said Lands or any Person representing them have repaid the moneys advanced as aforesaid for and on Account of the said Sr: Wiln and for redemption of the said Lands.

And John England having applyed to some Person or Persons representing ye said Sr: Wiln or his Assignees who owned it that John England should be repaid his money, agreed that he should have as much of ye Land valued and

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Appraized as would pay ye Debt & accordingly they chose four indifferent persons who appraised Eleven hundred and twenty acres of ye said Land at ffour hundred and ninety two Pounds but ye person representing Sr: Wiln apprehending ye Land was not appraized at its full value declined proceeding any further in that Affair.

Qu: How shall John England proceed to recover his money so by him laid out for the purposes aforesaid?

A. 1. He ought if he can to get Sr: Wiln Agents or Attorneys here to allow of his Account of the moneys advanced for Account of said Sr: Wiln.

2. To get the Persons who appraised the Lands to certify such their Appraisement and that they were mutually chosen by ye said John England and the Persons or Persons representing the said Sr: Wiln or his Assigns.

Then to request Payment of ye money of ye said Representatives of Sr: Wiln or his Assigns; which if they refuse to do, John England being in Possession of ye Lands may advertise his intentions to sell publickly at lest one month before ye time of the Sale and insert ye Scitatuation Quantity Quality and Conveinencys of ye Land to be Sold and ye Condition of Payment; and having done this, I think the Sale so made by him will be good according to Sr: Wiln Agreement

A. HAMILTON

Philada March 6th 1830.

NOT PREJUDICED

THE story of the honest Swiss who was too busy to leave his farm, and begged the neighbor who was bringing suit against him kindly to plead for both parties, has an amusing parallel in the judicial history of Connecticut.

A certain justice of the peace, wishing to bring suit against a citizen, consulted the statutes and found that suits of such a character might be brought before any justice of the peace. Accordingly, he concluded to try the case himself. Straightway he made out a writ against his adversary and signed it.

On the day set for the trial, the defendant appeared with counsel. Both gentlemen, not unnaturally, objected to the constitution of the court.

"Why," demanded the justice, "do you deny that I am a justice of the peace?"

The lawyer would not contest this point, but argued that such a construction of the law was against all sense and reason.

A vigorous altercation ensued, and then the judge remarked that not for the world would he have two gentlemen suppose him governed by any personal considerations. "I will therefore," he added gracefully, "render judgment against myself, and then appeal to the supreme court."

"But the curious part of it all was," said the justice, in relating the story afterward, "that when my judgment got to the supreme court it was unanimously re-affirmed."

A PRINCE IN CONTEMPT

SINCE earliest times the judiciary of England has maintained its prestige to a degree unequaled in any other land, stoutly resisting encroachments by both the Crown and the people, as represented in the House of Commons. Perhaps one of the most significant incidents on record is that of Henry V, when Prince of Wales, and Chief Justice Gascoigne.

A favorite servant of the Prince was indicted for a misdemeanor, and despite the promptly exerted influence of his royal master, was convicted and condemned. Enraged at the outcome of the trial, the Prince rushed into the chamber and demanded that the prisoner be instantly set at liberty. The Chief Justice mildly reminded the Prince of the reverence due the laws of the realm, and advised him, if he wished to be of assistance to the condemned man, to

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apply to the King, his father, for a pardon. In a still greater fury, Henry endeavored to take the prisoner from the hands of the court officers by force, but stopped short at sight of the stern face of the Chief Justice, who, rising, addressed him coldly.

"Sir," he said, "remember yourself! I keep here the peace of the King, your sovereign lord and father, to whom you owe double allegiance In his name, therefore, I charge you to desist from your disobedience and unlawful enterprize and henceforth give a better example to those who shall hereafter be your subjects. And now, for the contempt and disobedience you have shown, I commit you to the prison of the King's Bench, there to remain until the pleasure of the King, your father, be known."

Henry, by this time sensible of the insult he had offered the laws of his country, suffered himself to be conducted to gaol by the officers. His father, Henry IV, upon hearing of the incident, exclaimed joyously: "Happy is the King who has a magistrate possessed of courage to execute the laws; and still more happy in having a son who will submit to the punishment inflicted for offending them."

The Prince himself, when he became King, in speaking of Sir William Gascoigne, said: —

"I shall ever hold him worthy of his place, and of my favor; and I wish that all my judges may possess the like undaunted courage to punish offenders, of what rank soever."

This is the only incident in history where a Crown Prince was committed to prison for contempt of court.

Lord Chief Justice Holt was particularly watchful that the courts should not be intimidated by Parliament. In 1704, several persons who claimed to be freemen of the Borough of Aylesbury were refused the privilege of voting at an election for member of parliament, and brought an action against the returning officer for the penalties which the law imposed in such cases. The House of Commons, conceiving this appeal to the courts to be an evasion of their privileges, passed an order declaring it to be penal in either judge, counsel, or attorney to assist at the trial. The Lord Chief Justice and several lawyers, however, proceeded with the case in regular course. The House, highly indignant, sent their sergeant-at-arms to command the judge to appear before them, but the command was ignored. A second order was sent by the Speaker, attended by a number of members. The Speaker's summons was retorted to as follows: —

"Go back to your chair, Mr. Speaker, within these five minutes, or you may depend on it I'll send you to Newgate. You speak of your authority! But I tell you I sit here as an interpreter of the laws, and as a distributor of justice; and were the whole House of Commons in your belly, I would not stir one foot!"

The Speaker was prudent to withdraw, and the House, with equal prudence, let the matter drop.

DEFENDANT RESTS

THE soldier was up on a summary court-martial before the Colonel on a charge of neglect of duty. When the prosecution was in, the Colonel turned to the accused and growled at him:

"Have you any witnesses?"

"No, n-o," muttered the accused.

"You rest then, do you — you want to rest then do you — you want to rest?" yelled the Colonel.

"Yes — yes — I would like to, Colonel," he replied, glancing around behind

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him. "My legs are pretty tired — I would like to rest, yes, sir; but I don't see any place to sit down."

THE WISDOM OF LAWYERS

IT APPEARS that judges and lawyers have contributed a liberal share to the stock of popular sayings.

It is Francis Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "Knowledge is power," and who utters that solemn warning to enamored Benedicts, "He that hath a wife and children hath given hostages to fortune."

We have the high authority of Sir Edward Coke for declaring that "Corporations have no souls," and that "A man's house is his castle."

The expression "An accident of an accident" is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Bentham, but as an acknowledged translation from the jurist Beccaria.

To Leviathan Hobbes we owe this maxim, "Words are wise men's counters, but the money of fools." It is John Selden who suggests that by throwing a straw into the air one may see the way of the wind; and to his contemporary, Oxenstiern, is due the discovery "With how little wisdom is the world governed."

Mackintosh first used the phrase "A wise and masterly inactivity." "The scholmaster is abroad" is from a speech by Lord Brougham.

In the familiar phrase "A delusion, a mockery, and a snare," there is a certain Biblical ring, which has sometimes led to its being quoted as from one or other of the Hebrew prophets; the words are, in fact, an extract from the judgment of Lord Denman at the trial of O'Connell.

HAPPENINGS IN COURT

RECENTLY one of the Adjutant-Generals of the Army, whether through oversight or because of a humorous mood, appointed a Colonel, a Major, a Captain and a Lieutenant, all of whom stuttered, to act as a General Court, Martial. In a trial before them when a witness was asked his name, he also began stuttering: "Hen-he-he-hen-he —"

To relieve the witness of embarrassment, the young Lieutenant stuttered: "If you can't sa-sa-sa-say it, wri-ri-ri-ri-ite it."

The face of the witness reddened with anger. The Captain preceiving this quickly reproved the Lieutenant with "If you can't ta-ta-ta-talk plainly, ke-ke-ke-keep quiet. Don't insu-su-su-sult him by stut-tut-tut-tuttering."

Then the Major to break their parley cried, "Gentlemen." Then turning to the witness, he calmly said, adding injury to insult: "If you can't sa-sa-sa-sa say the first name, sa-sa-sa-say the last one."

The crowded room exploded with a roar. The old Colonel jumped to his feet, and like a savage, above the shouting tand laughter, yelled, "Orde-de-de-der: Orde-de-de-de-de-der!"

ELLENBOROUGH'S SARCASMS

IT IS said that Lord Ellenborough, as Chief Justice of England, was pitiless in his severity to lawyers who attempted to display eloquence while they lacked wit or brains. His sarcasms were as frequent as they were terrible. He interrupted one barrister, who, soaring to a poetical flight, exclaimed, "This may be found in the large volume of nature," by saying, "Pray, at what page, sir?"

An Irish barrister, beginning a fine figure about an eagle, was confused by

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his lordship's contemptuous look and lost his way, when the judge commented, "I would advise you, sir, to clip your eagle's wings the next time you bring him into court."

An ambitious young lawyer, striking a pathetic vein, and repeating the phrase, "My unfortunate client, sir," was silenced by the remark, "Go on, sir; the Court is with you so far."

A barrister, having wearied the court by a tedious plea, was interrupted by adjournment, and said: "I shall have the pleasure of addressing the Court, then, on Friday." Very quickly came this response from the Chief Justice: —

"The Court will hear you on Friday, but pleasure was out of the question long ago."

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

Correspondence

THE FORM OF INDICTMENTS — WEST VIRGINIA'S WAY

To the Editor of the Greeen Bag:

Sir: In your January (1912) issue you compare the old common law form of an indictment for murder, which is in use in a great many states of the Union, with the brief Canadian form — to the credit of Canada. West Virginia compares favorably with Canada in her progressiveness of pleading in criminal cases. The statutory form of an indictment for murder, approved by the Supreme Court of Appeals of this state, is as follows:

State of West Virginia, Monongalia County, to wit:

The grand jurors of the state of West Virginia, in and for the body of the county of Monongalia, upon their oaths present that John Doe, on the 22nd day of January, nineteen hundred and twelve, in the said county of Monongalia, feloniously, willfully, mailciously, deliberately and unlawfully did slay, kill and murder one Richard Roe, against the peace and dignity of the state.

A homicide in West Virginia is presumed, as a matter of law, to be murder in the second degree, and if the state would elevate it to murder in the first degree it must be proven that the act which caused the death was wilfully designed, and premeditated, with malice aforethought — hence the use of the words, "willfully, maliciously and deliberately." The word "feloniously" is used as a technical word and must according to our Supreme Court decisions be used in every felony indictment. The word "unlawfully" is used from the fact that one indicted for murder in the first degree, in West Virginia, may be convicted, under that indictment, of

1. Murder in the first degree,
2. Murder in the second degree,
3. Voluntary manslaughter,
4. Involuntary manslaughter,
5. Assault and battery,
6. Assault.

Involuntary manslaughter, assault and battery, and assault are misdemeanors in West Virginia.

The form of an indictment for man-

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slaughter in West Virginia, under which one may be convicted of

1. Voluntary manslaughter,
2. Involuntary manslaughter,
3. Assault and battery,
4. Assault, is as follows:

State of West Virginia, Monongalia County, to wit:

The grand jurors of the state of West Virginia, in and for the body of the county of Monongalia, upon their oaths present that Richard Roe, on the 22nd day of January, nineteen hundred and twelve, in the said county of Monongalia, feloniously and unlawfully did kill and slay one John Doe, against the peace and dignity of the state.

The old common law form of indictments should be embalmed, cremated and buried, and each state should adopt a "Code of Criminal Law and Procedure" separating the civil from the criminal practice, and in this "Code of Criminal Law and Procedure" prescribe the form of an indictment for every offense. This would materially assist the prosecution, and prevent the delays usually incident to the trial of one charged with crime.

C. WILLIAM CRAMER.

Chancery Row,
Morgantown, W. Va.
January 22, 1912.

USELESS BUT ENTERTAINING

History Teacher. — "What was the Sherman act?"

Bright Pupil. — "Marching through Georgia."
— *Pathfinder.*

"The district attorney is willing to take a plea of *nolo contendere*," whispered the attorney to Judge Sanderson in the superior court, yesterday.

"Yes, I am willing to accept *nolo*," whispered "Joe" Pelletier.

"Astur Jager," began Clerk Manning, "you don't wish to contend with the commonwealth?"

"Nicht guilty, nein, nicht guilty," replied stalwart Astur, keeper of a sailors' lodging house.

Consternation for a moment. Attorney whispers to client, "You plead *nolo*."

"Yaas," breathed Astur in attorney's face.

Attorney again faced the judge, picture of assurance.

"All right?" said Clerk Manning sweetly. "You say you don't wish to contend —"

"Ich bin not guilty, nein, not guilty," roars Astur.

Judge wields a fountain pen nervously. Clerk still patient and sweet-smiling. Pelletier sinks heavily on a little chair.

Attorney resurrects handkerchief, mops brow and goes to defendant.

"Now you say nolo. Get me? *Nolo, nolo contendere*, or better, just *nolo*. Now do it?"

"Vat? How iss dot? You say, vat iss, vonce more."

"*No-l-o*, very simple."

"Astur Jager, you —" begins Clerk Manning.

"Yaas," put in Astur.

"You say you will not —"

Great chest expansion on part of Astur Jager. Lower jaw of Astur makes rapid and ominous drop. Right arm rises, denoting impending exposion and decisive speech.

John Manning sees approaching danger, so starts again with simply:

"You want to plead *nolo?*"

"Ooloo, oololoo." So yodels Astur with mightly and musical voice. Clerk, district attorney, attorney, Court, all relax. Clerk Manning scribbles the open-voweled plea on the papers.

Then the judge fined Jager $60 for having a revolver in his possession in his lodging house. Jager was in his own house, but pleaded guilty yesterday. He got a month in the lower court.

"Like to see that tried out," said more than one attorney. — *Boston Herald.*

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The Legal World

Monthly Analysis of Leading Events

Following the Government activity hostile to great commercial combinations, there are significant symptoms of a growing sympathy with the project of federal supervision of corporations, with the sanction of combinations for lawful purposes that such supervision implies. Attorney-General Wickersham in his annual report suggests that the federal Bureau of Corporations, even in the absence of a statute for federal incorporation, be raised to the dignity of an administrative agency "under whose supervision consolidations or mergers for lawful purposes might be formed." Secretary Nagel of the Department of Commerce and Labor, in his annual report, urges the creation of a permanent federal supervising agency and the Secretary also recommends that the Bureau of Corporations be developed to take up the form of supervision he suggests. Andrew Carnegie, appearing before the Congressional Committee, has advocated such federal supervision as that favored by Col. Roosevelt.

The evils of dilatory procedure in the courts of New York City have been engrossing the attention of the bar. Justice John W. Goff of the Supreme Court gave the lawyers something to think about when he said that there was a general understanding between the attorneys in forty cases on the day's calendar to put them off, so that not one of them could proceed to trial, and thereafter, by consent, have them restored to the calendar. Justice Goff referred directly to a little group of lawyers who are commonly known at the county Court House as the "Accident Trust." This group has a monopoly of about 80 per cent of the prosecution and defense of accident cases. This monoply of the legal work on both sides of accident cases, the Justice said, is what is responsible for the long delays. It means that cases cannot go to trial, he said, because the counsel on one side or the other is busy in another courtroom. At the meeting of the New York County Lawyers' Association on Jan. 4, the law's delays were discussed, there being some difference of opinion as to whether the bench or the bar was mainly responsible. The Association finally adopted a resolution introduced by Abraham I. Elkus, calling upon the Justices of the Supreme Court to appoint a committee which would co-operate with a committee of the Association in order to improve the present calendar practice. In consequence some improvement in the calendar practice is likely to be secured, but the English principle that the making up of the calendar is in the discretion of the court, rather than of counsel, and that counsel not prepared for trial must be ready to have judgment entered against him by default, has hardly the slightest chance of adoption.

Progress has been made in the difficult work of unearthing evidence regarding the dynamiting conspiracy within the ranks of organized labor, and the federal grand juries at Indianapolis and Los Angeles have accomplished something toward the discovery of the confederates of the McNamaras. The depressing feature of the investigation, however, has been the fact that the labor-unions, while repudiating the McNamaras, have not furnished the Government

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with the co-operation it has had the right to expect in ferreting out the criminals. Some signs of an awakening of the labor-unions from their moral lethargy would have been only normal developments, but the results of the month have disappointed expectations.

The Richeson murder case has happily been disposed of in Massachusetts without the unsavory experience of a public trial, by the prisoner's confession and plea of guilty. At the same time, this case furnished an illustration of the unsatisfactory state of our criminal law and procedure, for there can be little doubt that if it had gone to trial it would have been a long and expensive litigation, in which the defense of insanity would probably have been employed in the clumsy and unscientific manner characteristic of our present-day procedure, and a shocking mass of salacious testimony would have been spread broadcast throughout the land. Our criminal procedure still lacks the delicacy and precision which should insure swift and certain justice in such cases.

Personal

Edgar Allan Poe qualified as Attorney-General of Maryland Dec. 19, just twenty years after his father, the late John P. Poe, took the oath for the same office.

Judge John M. Kennedy of Common Pleas Court No. 3, at Pittsburgh, retired from the bench Dec. 30, after a service of twenty years. A meeting was held by the Allegheny county bar at which an appropriate testimonial was presented to Judge Kennedy.

Judge Edward C. O'Rear, for the past eleven years a Judge of the Kentucky Court of Appeals, and during the last campaign the Republican nominee for Governor of Kentucky, handed in his resignation Dec. 19, thenceforth to practise law as a private citizen in Frankfort, Ky.

Chief Justice Arthur P. Rugg of the Massachusetts Supreme Court was given a hearty and enthusiastic welcome by over two hundred members of the Massachusetts Bar Association at a banquet given in his honor in Boston, Dec. 28. Chief Justice Rugg gave a eulogy of former Chief Justice Knowlton and then proceeded to give a history of the judiciary of Massachusetts.

Judge Joseph W. Donovan of Detroit, Mich., retired from the bench Dec. 31, to devote himself to the private practice of law. Judge Donovan was elected to the Wayne circuit bench in 1893 and had served continuously ever since. In the past eighteen years he has heard 15,330 cases and contested matters. Judge Donovan is the author of several widely read legal books, including "Tact in Court," "Speeches and Speechmaking" and "Modern Jury Trials."

Exercises in memory of the late Francis Cabot Lowell, for thirteen years a Judge of the Uuited States Circuit Court, were held on Jan. 3 under the auspices of the Bar Association of Boston, Moorfield Story presiding. Joseph B. Warner gave the story of Judge Lowell's life and work. Other speakers were Samuel J. Elder, John Lowell, James D. Colt, son of Judge Colt; Thomas Nelson Perkins, Dean Thayer of the Harvard Law School, and H. S. Jelalian. Afterward the five members of the Circuit Court — Judges Colt, Putnam, Hale, Aldrich and Brown — together with Judge Dodge of the District

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Court, took their places on the bench, and Judge Putnam uttered a tribute on behalf of the court.

Nine judges of the Supreme Court of New York State and many prominent lawyers attended a dinner given Dec. 29, by the Rochester Bar Association in honor of Justice Pardon C. Williams, who retired from the Appellate Division of the Supreme Court, having reached the age limit of seventy years, after a long and honorable career. Judge William E. Werner, of the Court of Appeals paid a particular tribute to the independence and strength which had characterized Judge Williams' term of service, and said that a predominant characteristic of his life, as he saw it, was his freshness and youthfulness of spirit.

Prof. George W. Kirchwey, for several years Dean and at present Kent Professor of Law in Columbia Law School, speaking at the Mount Morris Baptist Church in New York Dec. 10, said:— "The law is not a thing to be reverenced; it is not static or fixed. It should command our respect and the respect of the bench and bar, and that is all. The Supreme Court of the United States is recognizing this fact and is taking cognizance of the prevalent conception of right and wrong, and is finding a construction of the old iron-bound Constitution of the United States which will meet this social conception of right and wrong, and so we are enabled, when we have an intelligent court, to keep fairly abreast of the times and to command in a greater or less degree the respect of the people. The time is coming, and that very shortly, when it will be realized that the old Constitution of the United States, framed over one hundred years ago, is entirely out of date."

Massachusetts Bar Association

At the annual meeting of the Massachusetts Bar Association, held Dec. 2, the subject of Workmen's Compensation received much discussion, but no action was taken in favor of any definite policy. While some sentiment favorable to a compulsory system expressed itself, the friends of compulsory compensation were in a minority, and the evident feeling of the Association, as a whole, seemed to be that the subject of workmen's compensation was in a confused state, and that the complicated political and economic phases of the question need not receive the attention of a legal body.

President Alfred Hemenway, in his annual address, referred to the successful meeting of the American Bar Association in Boston last August, when the Masssachusetts Bar Association were the hosts, paid a tribute to former Chief Justice Knowlton, who recently retired, urged the importance of a high standard of professional ethics, and advocated uniform state laws.

The recent Massachusetts workmen's compensation act was denounced as a system of "unprincipled political opportunism" and as an evidence of no progress in the solution at all by P. Tecumseh Sherman of the legal committee of the National Civic Federation. He said in part:

"By your Massachusetts act is formed practically a state corporation. In it you have needlessly crossed the line between state initiative in private affairs and state regulation. In short, you have adopted a system of unprincipled political opportunism, and have not established a sure and sound system. I don't believe you have made any real progress in the solution of this problem at all, and I suggest that you should go no further until you discover absolutely

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what is a just relation between employer and employee in this field."

Elective compensation acts, he declared, have proved a serious disappointment, and he stated that a compulsory, exclusive compensation law should be the goal. The constitutional difficulty, he suggested, can be evaded by such taxation that the state can establish a fund to pay the damages.

He suggested that an exclusive act is a reasonable safeguard against accidents in hazardous trades, and is in the nature of an exercise of the police power of the legislature under a constitution interpreted in the light of reason. It is dangerous, he said, to place the whole responsibility on the employer, for dangerous conditions and their remedy depend on the co-operation with him of his employees.

The Legislative Committee made a report on the subject of workmen's compensation, in which it expressed sympathy with the objects sought to be attained by the Massachusetts act of last year. The Committee was not in entire accord as to the details of a compensation system, and in view of the unsettled state of the question in all parts of the country, was not prepared to recommend any definite change in the general principles of the act. Certain specific amendments, however, of a minor nature, designed to perfect the working of the statute, were recommended. Three of them were quickly passed upon by the Association, but the fourth excited long debate.

The fourth recommendation was aimed at the repeal of section 3, part v, of the act, reading in part as follows: "Any liability insurance company authorized to do business within this Commonwealth shall have the same right as the Association to insure the liability to pay the compensation provided for by this act."

Chairman James A. Lowell of the state Workmen's Compensation Commission expressed his firm belief in the industrial accidents board feature of the act, and thought a thorough-going compulsory system impracticable in Massachusetts for the present. Chairman Hollis R. Bailey of the uniform laws commissioners expressed the hope that his board would eventually favor a compulsory system.

George W. Anderson urged the repeal of the provisions giving liability insurance companies the right to insure liability, placing the enforcement of the act in the hands of a board instead of in the courts. He also urged that compulsory state insurance be substituted for the form of insurance provided for by the act.

Mr. Anderson's proposals excited considerable debate, but no definite outcome being attained the meeting adjourned until December 28 for further discussion of the general topic of workmen's compensation.

At the adjourned meeting, the Association failed to go on record on the amendment aimed at the liability insurance companies. After two hours' discussion the advisability of any action on the repeal of the section was questioned, and the matter was laid on the table for an indefinite period.

At its first day's session the Association authorized its executive to adopt a code of ethics. It also recommended to Congress the enactment of legislation for an additional federal judge for Massachusetts. By unanimous vote provision was made for painting protraits of the two surviving ex-Chief Justices of the Supreme Court, Oliver Wendell Holmes and Marcus P. Knowlton, the portrait of the former to be placed in Boston and that of the latter in Springfield.

The annual banquet was attended by

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over two hundred lawyers, remarks being made by Chief Justice Rugg of the Supreme Judicial Court, former Attorney-General Herbert Parker, ex-Governor John D. Long, federal Circuit Court Judge Hale of Maine, and Justice R. W. Irwin of the Superior Court.

The following officers were elected: President, Charles W. Clifford of New Bedford; vice-presidents, William H. Brooks, James E. Cotter, James R. Dunbar, Samuel K. Hamilton, John C. Hammond, Herbert Parker; secretary, Robert Homans; treasurer, Charles E. Ware; executive committee, Hollis R. Bailey, Henry H. Baker, Paul R. Blackmur, Loyed E. Chamberlain, Robert G. Dodge, William H. Dunbar, Lee M. Friedman, T. Hovey Gage, Frederick L. Greene, Charles E. Hibbard, Henry F. Hurlburt, Andrew J. Jennings, Robert A. Knight, John W. Mason, William H. Niles, James M. Swift, George S. Taft, James H. Vahey, Joseph B. Warner, Alden P. White, Frederick N. Wier.

Bar Associations

American Bar Association. — Lord Justice Sir William Rann Kennedy of the English Court of Appeal will make the opening address before the American Bar Association at its next annual meeting, which is to be held in Milwaukee, Wis., Aug. 27–9, 1912.

Alabama.—The dates for the next annual meeting of the Alabama Bar Association have been fixed as May 17–18, at Montgomery.

North Carolina. — The annual meeting will held June 25–7 at a place later to be announced.

Oklahoma. — Notable changes in procedure were proposed in the report submitted to the Oklahoma State Bar Association by the committee on judicial administration and remedial reform, at its meeting late in December. The committee would abolish hypothetical questions in criminal actions, would allow the accused to remain silent, but make his silence a fair subject for comment, and would greatly shorten and simplify the form of indictments.

Pennsylvania. — The Pennsylvania Bar Association will hold its eighteenth annual meeting at Cape May June 24–7.

Rhode Island. — A portrait of former Chief Justice Pardon E. Tillinghast, for a short time head of the Rhode Island Supreme Court, was presented to the state Dec. 4 by the Rhode Island Bar Association at its annual meeting. Prof. George Grafton Wilson, Professor of International Law and Political and Social Science at Harvard University, spoke on "A Law for the Nations," taking up the work of international agreements for the settlement of disputes without resort to arms, and giving a description of various cases, from the arbitrament of the Pius fund case between Mexico and the United States, decided in 1902, to the broader application of international law to the settlement of more recent disputes.

William Dudley Foulke of Richmond, Ind., former chairman of the United States Civil Service Commission, followed with an address on "A Court for the Nations."

The officers were re-elected as follows: President, Albert A. Baker; first vice-president, Cyrus M. Van Slyck; second vice-presedent, William P. Sheffield, Jr.; secretary, Howard B. Gorham; treasurer, James A. Pirce; executive committee, Dexter B. Potter, William A. Morgan, Amasa M. Eaton,

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Charles C. Mumford and Chester W. Barrows.

Procedure

Under new rules enforced from Jan. 1, attorneys for plaintiffs before the United States Supreme Court must file their briefs three weeks before their case is called for oral argument. Defendants' attorneys must file their briefs one week before the arguments are made. In all cases, the Clerk of the Court is instructed to receive no briefs where counsel have not served copies on opposing counsel. The latter provision is designed to put an end to counsel appearing before the court unprepared to answer arguments on the opposing side.

The Federal Judicial Code went into effect Jan. 1, when the seventy-seven federal circuit courts throughout the country were all abolished, all their business being transferred to the federal district courts. The twenty-nine Circuit Judges will now be chiefly engaged in the work of theCircuit Courts of Appeals, though permitted to sit in the federal court of first instance. Another result of the new act is an increase in the salaries of the Chief Justice of the United States from $13,000 to $15,000 and of the Associate Justices of the Supreme Court from $12,500 to $14,500.

"To reform our procedure," said Lieutenant-Governor McDermott of Kentucky before the Kentucky Circuit Judges' Association at its annual banquet Dec. 28, "we must not merely resort to tinkering with our code. A complete and radical revision is necessary to put us abreast of England and Germany. Our code ought not to do into details; it ought to be more flexible as to mere practice and to leave more discretion to the trial judge." Other speakers were Judge B. J. Bethurum, who deprecated mob-violence and lynching, Judge McKenzie Moss, Judge Charles L. Kerr, Judge Fleming Gordon, and Judge W. E. Settle.

The superior court judges of Georgia, meeting at Atlanta, Dec. 19, were unanimous in the declaration that some judicial reformation should be brought about to improve the administration of justice in Georgia. The judges met in response to a legislative resolve asking for the submission of their views. Judge Felton, the chairman, deprecated the evils of delay and technicality. A vote was passed that a committee be appointed to consider suggestions which may be made to them by the bench, the bar or the public and to formulate these suggestions in the form of a report to be submitted to the convention at another meeting to be held on April 29.

Divorce

Divorce bills which were recommended to the Missouri legislature at its session last winter, but were not made into law, partly owing to the burning of the State Capitol, were taken up and again approved by Judicial Conference of Missouri Dec. 29. The bills are not only for making divorce more difficult to obtain, but also are to prevent courts from being imposed upon and deceived in the granting of decrees which ought not to be granted. The following officers were elected: President, Presiding Justice George D. Reynolds (re-elected); first vice-president, Judge James Ellison; second vice-president, Judge Argus Cox; secretary, Judge Alonzo D. Burnes, of Platte City (re-elected).

A "divorce proctor" has been appointed in Missouri, whose duty it is

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o examine into all divorce cases, and where he is suspicious that there is collusion between the parties or an attempt is being made to obtain a snap judgment he is to act as an attorney for the defense. As the office was not created by the statutes, several reform organizations bound themselves to pay his salary. So favorably has the plan been received that the Missouri Bar Association is working on a plan to have it incorporated into the laws that it may be applied in every county in the state. A similar plan has already been adopted in Illinois. Judges of the Superior and Circuit courts in Chicago on Jan. 6, approved Judge Charles A. McDonald's suggestion that the courts be protected from imposition in divorce cases by a proctor or special investigator.

Workmen's Compensation

The National Civic Federation is planning to push in the states whose legislatures meet this year the adoption of its model bill for the compulsory compensation by employers of death or injuries due to industrial accidents. In this the Federation is co-operating with the Workmen's Compensation Committee of the Uniform State Law Commissioners and a similar committee of the American Bar Association, and especial activity is reported in West Virginia, Texas, Colorado, California, Maryland, Michigan, North Dakota, Montana, Connecticut, Rhode Island, Missouri, Indiana and Iowa. The principles of the bill have been adopted by the Congressional Commission on Employers' Liability and Workmen's Compensation.

The report of the Congressional Commision, expected shortly, will embody a bill providing a graduated scale of compensation through Government instrumentalities for injuries to employees of railroads engaged in interstate commerce, whether due to negligence or not. A fundamental feature of the proposed plan is that it provides an exclusive remedy for workmen or their families in cases of injury or death, and except in cases already in litigation takes away the right of appeal to the courts. The bill was drawn by Senator Sutherland, chairman of the Commission, and he will introduce it in the Senate.

Miscellaneous

A Massachusetts branch of the American Institute of Criminal Law and Criminology has been organized, presided over by Justice Henry N. Sheldon, of the Supreme Court. Associated with him are such men as Justice Charles A. DeCourcy, also of the Supreme Court; Chief Justice Bolster of the Boston Municipal Court; Judge Harvey H. Baker of the Boston Juvenile Court; Professor Roscoe Pound, Arthur D. Hill, and Dr. Morton Prince, the well-known neurologist and psychopathologist. Of these Justice DeCourcy and Dr. Prince are also vice-presidents of the national Institute of Criminal Law and Criminology.

The French Government has promulgated a ministerial decree regulating aërial navigation in France. It constitutes the prelude to the measure regulating aërial navigation elaborated by an extra commission, which will have to be voted by the French Chamber and Senate before it becomes law. The bill, or charter, was issued to protect the public against inconveniences and risks which may result from aërial navigation and also the aviators from the dangers entailed by their own imprudence and daring, or by the imperfection of their flying machines. This will give full authority to the French Minister

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of Public Works to act officially until the aërial navigation law becomes an actual fact.

Charles Elliott, president of the Ontario Bar Association, deplored the lack of adequate remuneration to lawyers, in an address delivered at the annual meeting, Dec. 27–28 in Osgoode Hall. He pointed out that the average net earnings of lawyers in the Province were about $1,000 per year. The meeting adopted a recommendation, after long debate, favoring the establishment of a divorce court in Ontario. These officers were elected: Hon. President, E. F. B. Johnston, K.C., president; W. C. Mikel, K.C.,; vice-presidents M. H. Ludwig, K.C., F. M. Field, K.C., W. J. McWhinney, K.C.; recording secretary, George C. Campbell; corresponding secretary, R. J. Maclennan; treasurer, A. McLean Macdonell, K.C.; historian, Col. W. N. Ponton.

The thirteenth national convention of the legal fraternity of Phi Delta Phi was held at the Sinton Hotel at Cincinnati on December 27 and 28. Delegates were in attendance from forty-three active chapters, established in as many law schools in the United States and Canada. Petitions were considered from six law schools in which there are no chapters at present and charters were granted to petitioners from the state universities of North and South Dakota and Oklahoma and Tulane University, where chapters will be installed in the near future. The following general officers were re-elected: President, Earl G. Rice; secretary-treasurer, Emmett A. Donnelly, Milwaukee; Cataloguer, George A. Katzenberger, Greenville, O. Phi Delta Phi is the oldest graduate fraternity among law students, having been established at the University of Michigan by Thomas M. Cooley in 1869. A quarterly magazine known as *The Brief* is maintained by the fraternity and edited by Albert B. Chandler of St. Louis.

The Law Division of the Library of Congress is making a systematic effort to bring its collection of foreign law to a state of high efficiency. In May, 1910, Mr. Edwin M. Borchard, the Law Librarian, was appointed as expert in international law to the American Agency in the North Atlantic Coast Fisheries Arbitration at the Hague. Taking advantage of his presence in Europe, Mr. Borchard visited the principal countries of western Europe, in order to secure information from lawyers, judges, professors and law librarians as to the important legal literature of their respective countries. This information thus secured is made the basis for the purchase of the most important foreign legal works. The Law Librarian is to undertake the preparation of guides to foreign law and critical surveys of the important lietature. The first publication, a guide to the law and legal literature of Germany, is to appear in January. The surveys for Austria-Hungary, France, Italy, Spain and the other countries of Europe are to follow, it being proposed to publish two or three monographs a year. The enterprise has met with the heartiest endorsement of the Comparative Law Bureau of the American Bar Association.

The first annual meeting of the trustees of the Carnegie Endowment for International Peace was held at Washington, D. C., on Dec. 14. A budget was adopted which authorizes an expenditure in the fiscal year beginning July 1, 1912, of $487,270. The division of International Law, under the direction

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of James Brown Scott, has already under way a number of important projects. Prof. John Bassett Moore of Columbia University has been invited to undertake the preparation and publication of a collection of all known international arbitrations. This plan contemplates the establishment of a basis for future arbitrations similar to that furnished by ordinary law reports. The Division of Economics and History, under the direction of Prof. John Bates Clark, has already advanced a long way in the formulation of a program of scientific study of the historical and economical causes of war, with a view to their prevention in the future. The Division of Intercourse and Education, which has been placed under the direction of President Butler of Columbia University, has before it the whole field of propaganda, publication, international conciliation, and the education of public opinion, with a view to the permanent establishment of friendly international relations.

The destruction of the Law Library of 35,000 volumes was one of the unfortunate features of the recent burning down of the Equitable Building in New York, which deprived a thousand lawyers and law clerks of their offices. When the building was first completed the renting agent reported to Henry B. Hyde that it was impossible to find good tenants for the upper stories, which were too dark. For a moment Mr. Hyde Hyde bent his head in thought, then said: "We will organize a lawyers' club on one floor, an insurance men's club on another floor. We will provide a free law library and a free insurance library for both, and provide dining rooms in which the members can meet and take their meals in the daytime. That will give us an income for those floors, and make the rest of the building more desirable for lawyers and insurance men." That was the origin of the famous Lawyers' Club. The Insurance Club was not a success and was soon merged with the other. It resulted in one of the most unique organizations in the world. The Lawyers' Club at one time had 1,820 members, 1,200 resident and 520 non-resident. Their annual dues aggregated $156,000, all which of went into the Equitable treasury in place of rent. The club was organized in 1887. William Allen Butler, of Wallace, Butler & Brown, was elected president then and still holds that position. George T. Wilson, vice-president of the Equitable, is secretary and treasurer of the club. The Governors are: William Allen Butler, William C. Gulliver, George T. Wilson, Henry Rogers Winthrop, Frederic R. Coudert, Henry D. Macdona, William Curtis Demorest, Alton B. Parker, William Butler Duncan and R. A. C. Smith.

Obituary

Allen, Col. Ethan. — Col. Ethan Allen, who died in New York Dec. 7, managed Horace Greeley's campaign for the Presidency, practised law in New York City, and wrote many books, the best known of which is "The Drama of the Revolution."

Bigelow, John. — John Bigelow, the venerable lawyer, diplomat and author, died at his home in New York Dec. 19, at the age of ninety-four. Mr. Bigelow was born at Malden, N. Y., and educated at Union College. In 1849 he purchased a third interest in the *New York Evening Post.* He became United States Consul at Paris in 1862, and later Minister to France. In 1875 he was elected secretary of the state of New York, and after his term expired devoted himself to his farm and to literary

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pursuits, later being named as a trustee of the estate of Samuel J. Tilden. His literary works included "Biography of Benjamin Franklin by Himself" and "Retrospections of an Active Life."

Farman, Elbert E. — Judge Elbert Eli Farman, author of "Along the Nile with General Grant" and "Egypt and its Betrayal," and United States Diplomatic Agent and Consul-General at Cairo in 1876–1881, died at Warsaw, N. Y., on Dec. 30. He was a member of the International Commission to revise the judicial codes of Egypt in 1880–1881, and Judge of the mixed tribunal of Egypt in 1881–1884.

Grantham. — Sir William Grantham, senior judge of the King's Bench Division of the English High Court, died at his London residence on Nov. 30. Born in 1835, he was educated in King's College School and called to the bar at the Inner Temple in 1863, receiving the honor of "silk" fourteen years later. Meanwhile he had sat in Parliament. He was promoted to the bench in 1886.

Holloway, William R. — Col. William Robeson Holloway, formerly Consul-General to Russia and to Nova Scotia, and author of "Holloway's Local History of Indianapolis," died in Indianapolis on Dec. 30, at the age of seventy-five. He had been editor and owner of the *Indianapolis Journal* and postmaster of Indianapolis.

Leaming, Thomas. — A prominent member of the Philadelphia bar, artist, and author, Thomas Leaming died on Dec. 14, having been ill since last September. He was chief attorney for the Philadelphia Rapid Transit Company and had a large and enviable practice. He wrote several books on legal subjects, but his literary fame rests chiefly on "A Philadelphia Lawyer in the London Courts," in which the origin of the expression, "That's a case for a Phidelphia lawyer," was first satisfactorily explained. Several of his paintings had won commendation in art exhibitions before he became absorbed in the work of his increasing law practice. He had devoted his attention especially to the law of negligence, and at the time of his death was very generally recognized as one of the foremost authorities upon the subject in Pennsylvania.

Lewis, Sir George. — The eminent solicitor Sir George Lewis died in London, Dec. 7. Royal personages had been his clients, and he was employed in the notorious *Tranby Croft* baccarat case in which the Prince of Wales, afterward King Edward VII, figured. He was the prosecutor of Slade, the alleged medium, and conducted the famous case of Parnell and his supporters against *The London Times*.

Lindsley, Phillip. — Judge Phillip Lindsley, a prominent lawyer of Dallas, Tex., died on Dec. 4. Judge Lindsley was an author of note, having written "Humor of the Court Room" and "History of Greater Dallas and Vicinity."

Murphy, Bernard D. — Bernard Daniel Murphy of San Francisco, for fourteen years mayor of San José, for two years assemblyman, five years state senator, and four years Bank Commissioner, died on Dec. 28. For half a century he was a leading figure in the Democratic party in California.

Tripp, Bartlett. — Having been Chief Justice of the territorial Supreme Court of Dakota, president of the first constitutional convention of Dakota, and Ambassador to Austria under President Cleveland, Bartlett Tripp died at Yankton, S. D., Dec. 8. Since 1902 he had been associated with the University of South Dakota.

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WILLIAM NOTTINGHAM

PRESIDENT OF THE NEW YORK STATE
BAR ASSOCIATION

(Photo. by Ryder Studio)

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The Green Bag

Volume XXIV March, 1912 Number 3

William Nottingham

THE portrait facing this page suggests a man of well-rounded and attractive character, and the record of William Nottingham of Syracuse, who has been elected president of the New York State Bar Association, bears out the impression of many solid virtues.

Mr. Nottingham was born and bred on a farm, and the substantial success he has earned at the bar is rooted in the self-reliance which procured him a broad education entirely through his own labors. He walked to and from the farm near De Witt, where he was born Nov. 2, 1853, to attend the Syracuse public schools, and later, having earned the money for necessary expenses, he continued his studies in Syracuse University, from which he was graduated in 1876. He determined upon the practice of law as a life work and studied as a law student in Syracuse from October, 1876, until June, 1879, when he was admitted to the bar in Buffalo. Locating for practice in Syracuse, he has remained there continuously ever since, and in 1881 became junior partner of the law firm of Goodelle & Nottingham, which in course of years gained wide fame. The partnership was maintained until 1900 and many of the younger members of the bar now prominent in legal circles prepared for the profession in his office.

In 1900 the firm of Goodelle, Nottingham Brothers & Andrews was organized, maintaining a continuous existence until April, 1907, when William and Edwin Nottingham withdrew to form the present firm of Nottingham & Nottingham. Almost by leaps and bounds this firm has sprung into national prominence. It makes a specialty of corporation and banking law, yet combines it with general practice. Their clientage is now very extensive and of a most important character.

Mr. Nottingham, who is pre-eminently a man of business sense, has organized upon a safe and substantial basis more than fifty gigantic concerns. Examples of his powers of organization are the Commercial National Bank of Syracuse and the Syracuse Trust Company, dating from 1891 and 1903, respectively. He has organized thirty-five or forty industrial and transportation companies, including six interurban railway companies and two great steamship companies, one of which is the Great Lakes Steamship Company, operating on the Great Lakes and owning and controlling a large fleet of immense vessels. Mr. Nottingham is also a director in this company and is its general counsel. He likewise organized the Globe Navigation Company, with headquarters at Seattle, Wash., owning and operating

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steam and sailing vessels on the Pacific ocean. He is likewise a director and general counsel of this company, is vice-president and director of the Syracuse Trust Company, and a director of the Commercial National Bank.

Mr. Nottingham is of Holland Dutch descent on the paternal side. His father was Van Vleck Nottingham, the family having been represented in the Revolutionary War by several members. Three brothers of the name arrived in the new world early in the eighteenth century, one settling in New York and another in Virginia. The mother of our subject, Abigail Maria (Williams) Nottingham, was a representative of the Williams and Stark families, who figured largely in the Revolutionary War.

The subject of this sketch was also for many years a lecturer on corporation law at the law college of Syracuse University, and was also a trustee of the University until elected a member of the Board of Regents of the University of New York State, which office he has held since 1902. Recently he was made a member of the executive committee of The Trust Companies Association of the State of New York. He received the Master of Arts degree in 1877, the Doctor of Philosophy degree in 1878, and the Doctor of Laws degree in 1903 from Syracuse University, and in 1885–6 he was president of its alumni association. He was president of the Onondaga County Bar Association in 1910 and 1911, and a vice-president of the New York State Bar Association in 1910.

Mr. Nottingham was married Oct. 26, 1881, to Miss Eloise Holden, a daughter of Erastus F. Holden, a prominent coal merchant of central New York.

In politics Mr. Nottingham is a stalwart Republican and a deep student of the political movements and questions of the day. He has been solicited to become a candidate for nearly every political office in Syracuse, but has always refused, saying that he cannot be a lawyer and a politician at the same time. Mr. Nottingham belongs to the Pilgrims' Club of New York and London, to the Lawyers' Club of New York, the Citizens' Club and Century Club of Syracuse, the Delta Kappa Epsilon and the Phi Beta Kappa. He holds membership in the First Methodist Church and to a large extent co-operates in the good work that is done in the name of charity and religion. In manner he is extremely modest and unostentatious.

The Courts and the New Social Questions[1]

By Edward Q. Keasbey, of the New Jersey Bar

After bidding the members of the Maryland Bar Association welcome to New Jersey, Mr. Keasbey referred to the fact that Maryland and New Jersey have this in common — that they were both proprietary colonies and were both established with the purpose of securing civil and religious liberty under the control of legal authority; both were organized after the pattern of the government of England and both inherited English laws and the English

[1] An address delivered before the Maryland Bar Association at Cape May, N. J., June 30, 1911.

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traditions of individual liberty expressed in East and West New Jersey in the fundamental agreements of the Proprietors of the two provinces and in Maryland in the charter granted to Lord Baltimore.

Continuing, Mr. Keasbey said:

These declarations of the early adventurers in Maryland and New Jersey are examples of the fact that the English settlers of what has now become the United States of America brought with them, and publicly affirmed as the fundamental law of the state in the new world, the principle which had become the heritage of Englishmen in their own country, that the individual has rights which he is entitled to have maintained against the power of the government. This principle established in England as the result of the struggles between the barons and the King, and afterward of the alliance between the people and the King as against the barons, is without legal guarantee against the power of Parliament wielding the whole power of the state. In this country, however, the declaration of this principle was embodied in the constitutions of the several states and of the United States, and has become the warrant for the authority of the courts to maintain the rights of the individual not only against executive officers, but also against the law-making power of the people exerted in the legislature itself.

In our day it is the will of the people or the political majority that is kept in check by the courts in giving effect, under new conditions, to these constitutional provisions which had their origin in the struggle of the people to protect themselves against the power of the King. It is hard for the people to understand why they should be met with a phrase taken from Magna Carta when they ask for a law limiting the hours of labor or providing for compensation to workmen injured by machinery in a factory. The need that is felt by the common man just now is not so much protection against political oppression or the power of government officials as protection against the oppression of long hours of labor and hard conditions of life. In the gradual shifting of the centre of the controlling power of the state we have come to the point where the voice of the wage earner is almost compelling in its demand for legislation in favor of his peculiar interests, for the protection of his personal safety, and the improvement of the conditions of living for himself and his family. Democracy has reached the stage in which the emphasis is not upon the need for the protection of the rights of the individual either with respect to person or property, but rather the satisfaction of the desires of whole classes for a larger share in the products of human activity, whether in property or in the enjoyment of all that life has to offer.

There is intense and widespread sympathy with these aspirations of the working men, and earnest and thoughtful men and women have taken upon themselves with passionate earnestness the cause of those who are oppressed by the conditions of modern industrial life. There has come a great reaction against the comfortable doctrine of *laissez faire*, and there is a prevailing conviction that, taking human life and conditions as they are, it is the duty of the government to do something to equalize conditions and to prevent the privilege and oppression which have been found to result from individual activity unrestrained. From out of a long period during which the laws and the judicial opinions were based upon a public opinion impregnated and dominated by the

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idea of individualism, seeking the protection of the rights and the promotion of the character and the happiness of the individual, we have come into a time in which the tendency and the progressive movement is toward the idea of social welfare and the duty of the individual to strive not only for his own rights or even the development of his own character, but for the welfare of the community of human society. It has become a sort of religion, and religion itself has shown the same tendency.

This change in the tendency of public opinion did not take place until long after the beginning of the industrial changes which were caused by the introduction of machinery, but it was produced by those changes and intensified by the rapid accumulation of industrial capital, and when it was found that individualism had failed to solve the problem of the new industrial life, men were ready to take a trial at least of some new plan.

It is the contrast between the present social and industrial conditions and the public opinion of the present day, with those of the times when the words of Magna Carta were adopted in their fundamental agreements by settlers of New Jersey and inserted in the charter of Maryland, that makes it interesting and useful to enquire how and to what purpose these same words, used in the charters of King John and Edward III, are now applied by the courts in determining the rights of individuals as against the legislative powers of American republics.

Recent decisions on the hours of labor and on compensation for injuries to workmen have called forth earnest and indignant protest, not only from men speaking on behalf of the workingmen directly affected, but also and especially from men interested in the cause of democracy, as asserting the right of the people to control the government and to make such laws as they think will best promote the general welfare.

On the part of some the protest is made only against the mode of interpretation and application of the terms of the Constitution. It is a plea for a further appreciation of the social and industrial facts, a better understanding of the real purpose of a constitution and wider outlook upon the course of human progress; but there are others that passionately insist that the obstacles to the carrying out of the popular wishes shall be wholly removed, and they demand either that the Constitution be amended or that the power of nullifying legislation by means of judicial decision shall be done away with.

It is insisted that the courts, in deciding questions arising under those clauses of the Constitution which relate to protection of liberty and property, apply to social and industrial questions, doctrines which were formulated under the influence of the economic and social opinions of a time that is past. Complaint is made that judicial opinion based upon precedent tends to stand still and does not keep itself informed of new social and industrial conditions and the new conceptions of the rights and duties of the individual and society and of the relative importance of the rights of property and so-called human rights. On purely legal questions the opinions of the courts are accepted without question, but when they involve the decision of social or industrial problems they are challenged by students of those subjects and by the people whom they most nearly affect.

On the other hand, the very fact that the authority of the courts has been brought in question has stirred up those who appreciate the tremendous con-

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sequences that would follow from the breaking down of the protection afforded by the courts under our Constitution to the rights of the individual with respect to his personality as well as to his property. This tendency of democracy to throw off the obligation of a rigid constitution was earnestly condemned by Mr. Justice Lurton in his address to your association at your meeting in Virginia last summer, and there is no need for me even to remind you of the propositions which he presented or of the chain of reasoning by which they were powerfully enforced.

It is because the preservation of the obligation of our Constitution is so important a feature of our government that the seriousness of the struggle of democracy for greater freedom of legislation should be fully appreciated, and that it should be met in such a way as not to prejudice the minds of the people against the guarantees which our form of government pre-eminently has secured for the protection of the people, whether individuals or groups, against the arbitrary exercise of power on the part of the governing power of the state, whether it be the king or the vote of a majority. The rights of individuals, or rather their immunities against the government, are substantially the same in all modern constitutional states, but in the United States alone is there an effective legal guarantee of those immunities against the government. In England the whole sovereign power of the state is in Parliament, and there is no legal power to restrain Parliament from invading the domain of the individual into which it is generally recognized that the government should not penetrate. For the enforcement of this guarantee against the legislature as well as the executive, we are indebted to the decisions of the courts in cases between parties on the question whether or not an act of the legislature is in accordance with the fundamental law. How valuable this has been to us in the preservation of personal liberty and of the sense of justice as between the government and the individual we cannot too fully appreciate. During the whole course of our history the courts have corrected the injustice done by ill-considered laws passed with the best intentions, and there have been many times when the strong desire of a majority to accomplish a much-needed reform has led them to ignore the injustice of the incidental effect of the means they take to accomplish it. There is no need for me to emphasize before this body of lawyers the importance of these constitutional guarantees, nor the duty of the courts to perform the onerous duty which the frame of our Constitution has imposed upon them. These guarantees are vital to our institutions and to the character of our people, and the duty of the courts in this respect is supreme. How they are discharging that duty will appear in their decisions, some of which I will refer to.

What I wish to call attention to now is the fact that at the present time the struggle over the obligation of the Constitution is concerned, not so much with the relation of the states to the federal government (though that question, with sides reversed, is still a vital one), as with the demand of democracy for freedom of action in dealing with changed conditions and new social and industrial problems. The provisions of the American constitutions, the interpretation and application of which are now challenged, are those which were adopted as a part of our heritage from the conquests of English freemen over the arbitrary power of an unlimited monarchy, and modern democracy chafes

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at being held by fetters intended for the few rather than for the many, and they do not clearly understand why democracy in the United States of America should not have the freedom of legislation which it has long since acquired under the British monarchy. The restraining principles of the American constitutions over which the contest is now waged are found in the provisions of Magna Carta and the Statutes of Henry II and Edward III forbidding the rights of freemen to be taken or impaired except by the law of the land or without due process of law. It is out of these that have been developed the doctrine now well established in our law, that statutes, both state and federal, are invalid if they arbitrarily deprive the individual of his property or of his liberty of contract as well as the liberty of his person, and the restraint has been applied, not only to the executive, but also to the legislature itself.

It is under the Fourteenth Amendment, restricting the power of the states in the very language of these English charters, that most of the questions have arisen in which the courts have checked what is called progressive legislation adopted to modify individual rights in view of new social conditions and new conceptions of the relations of individuals to the social welfare.

The recent decisions which I have especially in mind are typical of classes of decisions which have been severely criticized — were made in cases relating to the hours of labor of certain classes of laborers or in certain kinds of employment, and to cases on the validity of statutes providing compensation to workmen for injuries arising from accidents in the course of their employment and without fault on the part of the employer.

One of these is the *Bakeries* case in New York, *Lochner* v. *New York*, 198 U. S. 645. The Appellate Division and the Court of Appeals of New York maintained the validity of a statute limiting the hours of labor of men of full age in bakeries and manufactories of confectionery, and the Supreme Court of the United States reversed the decision, holding the statute to be an arbitrary interference with the liberty of contract guaranteed by the Fourteenth Amendment and not to be sustained as a *bona fide* exercise of the police power to protect the public health, safety, morals, or general welfare. The opinion of the majority of the court was read by Justice Peckham and concurred in by the Chief Justice and Justices Brewer, Brown, and McKenna. Four judges dissented. Justice Harlan read an opinion concurred in by Justices White and Day, and Justice Holmes read a dissenting opinion of his own.

These three opinions express three differing views of the duty of the courts in dealing with the effect of constitutional limitations upon legislation restricting liberty of contract. The majority opinion concedes that liberty of contract is limited by the police power and that the exercise of the police power is in the discretion of the legislature, but the judges are strongly imbued with the ideas of the individualist theory of the duties of the state, and do not give full consideration to the actual conditions of modern industrial life, and find, as a matter of fact, that there is nothing in the case on which to base any reasonable opinion that the statute is an honest exercise of the police power. They hold that it is merely an arbitrary interference with individual liberty such as is forbidden to the states by the Fourteenth Amendment. Justice Harlan and Justices White and

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Day are impressed with the results of expert examination of the conditions of modern labor and refer to decisions of the Supreme Court itself to the effect that regulation of the pursuit of any trade or business is within the police power of the states unless they are utterly unreasonable and interfere in a manner wholly arbitrary with the rights of the citizen, and they conclude that this statute regulating the hours of labor in bakeries is not invalid. Justice Holmes sees clearly the change that has taken place in social conditions and economic theories. He says: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to enact their opinion in law."

He insists that the courts should not let the meaning of the liberty of contract guaranteed by the Constitution be determined by the prevailing opinion of a particular period and says, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics.' "

The diversity of opinion in the case arose, not out of any difference with regard to the duty of the courts to maintain the Constitution as the law of the land, and to enforce it against the will of the majority expressed in acts of the legislature, but out of differences between the judges in their information with regard to the effects of long hours of labor in bakeries and in their views with regard to the relations between the individual and society and the true limits of individual liberty. The majority gave it a meaning which it had acquired in a period of the prevalence of the individualist philosophy, and Mr. Justice Holmes took a longer view both backward and forward. He was thinking, perhaps, of the meaning it had in the days of King John, as well as that which it was likely to have if the modern tendency toward the organic relation of the individual to the state should prevail.

There is an earlier case in the Supreme Court which shows how the decision of such questions is affected by the information in the mind of the Court with respect to the industrial conditions. *Holden* v. *Hardy*, 169 U. S. 366, 1898, was a case relating to the hours of labor of men of full age engaged in mining or smelting metals. A statute of Utah limited their labor to eight hours a day, and the Supreme Court in a strong and lucid opinion by Justice Brown (Justices Peckham and Brewer alone dissenting) held that such a statute was within the police power of the state and was not an unconstitutional interference with the liberty of contract nor a denial of due process of law. "The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself."

This suggestion was not acted upon in the *Lochner* case, nor was there proof in that case of the conditions of modern industries by reason of which the workman, because of the competition of other laborers and because the raw material and the tools are in the hands of others, is not on an equality with the employer in making contracts with respect to the length of his day's work.

There are later cases in the Supreme Court relating to legislation limiting

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the employment hours of women in laundries. The Supreme Court of Oregon had affirmed a conviction under such a statute, *Muller* v. *Oregon* (48 Oreg. 452; 85 Pac. 855), and the United States Supreme Court sustained the decision (208 U. S. 412). There had been some decisions of state courts against the validity of such statutes, notably *Ritchie* v. *People*, 155 Illinois 98, 40 N. E. Rep. 454, 29 L. R. A. 79. On the argument of the *Oregon* case in the Supreme Court the results of investigations made in many countries with regard to the effect of long hours of work upon the health of women were presented to the court and American and foreign statutes with extracts from over ninety reports of commissioners and inspectors were submitted with the brief and are referred to in the opinion.

Mr. Justice Brewer, who dissented in *Holden* v. *Hardy*, read the opinion of the court, and while reaffirming the general rule that the right to contract is a part of the liberty of the individual guaranteed by the Fourteenth Amendment, he said this liberty might be restricted in many ways by a state without conflicting with the provisions of the amendment, and it was held that because of woman's physical structure and her maternal function, and having in view not merely her own health but also the wellbeing of the race, the legislature might well be justified in restricting her power to contract with respect to industrial labor, and the conclusion was that a statute limiting her work in laundries to ten hours a day should be sustained.

After this even stronger pressure of fact and argument was brought to bear upon the Supreme Court of Illinois, which had in 1895 vigorously condemned a statute restricting the work of women in laundries to eight hours a day. The results of the investigation made by Miss Josephine Goldmark in the *Oregon* case were presented in the briefs and arguments of counsel W. C. Calhoun and Louis D. Brandeis, and upon the facts and arguments so presented the Supreme Court of Illinois refused to be bound by its former decision, and held that the limitation of women's work in mechanical establishments to ten hours a day was not an arbitrary or unreasonable limitation upon women's liberty of contract. The case was *W. C. Ritchie Co.* v. *Wayman*, 244 Ill. 509; 91 N. E. Rep. 695.

In these decisions the question was whether there were special conditions by reason of which the legislation limiting the hours of labor could fairly be said to have been an exercise of the police power for the protection of public health, safety, or morals, and whether there was anything peculiar in the condition of the mine or of the bakery or in the position of women to justify special regulations affecting liberty of contract. Any general control of the right of a man to work was emphatically denied, and the courts have firmly maintained that in the absence of special and peculiar conditions legislation limiting the freedom of grown men with respect to their hours of labor is unconstitutional.

It is, however, strongly urged on behalf of the labor unions that modern industrial conditions make it reasonable that the hours of labor even of full-grown men when they are working for wages in manufacturing and similar establishments should be subject to limitation for the purpose of protecting them against overwork and underpay. There is a feeling openly expressed that in this and other instances the courts are permitting the industrial oppression of the people under the guise of the pro-

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tection of their liberty, and bitter complaint is made that in maintaining the freedom of the individual workman to work as long as he pleases, the courts have mocked the man earning wages in the factory by offering him the phantom of a liberty the substance of which he cannot obtain because he is bound fast by his necessities to the relentless wheels of machinery kept in motion by the capitalist and can earn no more than living wages no matter how long he may work.

How far this is true in fact depends upon what the actual conditions are. To a man who is his own master the control of his hours of labor is intolerable, but it is quite possible that in modern industrial conditions the legal liberty of workmen in certain industries is virtual slavery, and that there is no real liberty of contract in such case unless the legislature gives the workingman some protection against the economic advantage of his employer and the stress of his own necessities, and it may well be that the courts, without yielding in the least the vital principle that neither liberty nor property may be taken without due process of law or by the law of the land, may yet decide that the legislature may regulate the hours of labor more generally than they do now if the results of the experience and further investigation should show that long hours of labor for wages and under employers are injurious to the health and efficiency of the laborers, and so affect the public welfare.

It is, indeed, less likely that such protection will be required by the individual if the workers are highly organized, and the more effective the organization becomes, the less need is there of legislative interference on behalf of the individual, and on the contrary this principle of the Constitution must be the more vigorously maintained for the protection of the individual against the tyranny of organized numbers. This is a tyranny quite as real as that of the ancient tyranny of kings and eternal vigilance against tyranny of any kind is still the price of liberty. The danger is a menace to independence of character and the self-respect and efficiency of the individual. It is to be hoped that we may never come into a time when, as suggested by a cartoon in *Punch* the other day, it would not be surprising that a man before deciding to be a soldier should ask, "How many hours do they have to fight?"

Judicial decision on these questions of the hours of labor depends very much upon the views of the judges and the established public opinion as to what constitutes the liberty guaranteed by our Constitution, and as to what is the true line of division between the individual liberty and the power and duty of the state to protect the public health, safety, and morals, and to promote the general welfare. The boundary between the liberty of the individual and the police power of the state is an indeterminate zone rather than a definite line. It is not for the courts to draw that line, but only to call a halt when the legislature has passed over the zone. It is for the legislature to decide whether the conditions call for the exercise of the police power and for the courts to protect individual liberty when it is unmistakably invaded.

The other decision which I have had in mind and which has called forth even stronger protest is that of the Court of Appeals of New York upon the Workmen's Compensation Act.[2]

A plan adopted in most of the countries of Europe to relieve the workingmen of the risks of modern industry,

[2] *Ives* v. *South Buffalo Ry. Co.*, 94 N. E. 431.

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and of avoiding wasteful litigation and strife, has been declared to be impractical in democratic America because it deprives the employer of his property without due process of law. The court acknowledges the cogent economic and sociological arguments urged in support of the statute, but it finds that when our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another, and says: "This statute imposes such a liability which was unknown to the common law, and we think it plainly constitutes a deprivation of liberty and property under the federal and state constitutions unless its imposition can be justified under the police power." The decision was that it cannot be so justified.

This decision is regarded by many as the culminating injury done by the courts to the workingmen in a long series of decisions unfavorable to their interests and throwing upon them risks they are unable to bear. It has been denounced in some quarters in unmeasured terms and in others it has been condemned in earnest and temperate argument as a public misfortune and as "a mistaken interpretation of the constitution which is, unconsciously, a futile attempt to fasten upon the workingmen an unjust and intolerable burden from which all other civilized nations except one have relieved him."

Into this argument I cannot enter here. The decision is but another illustration of the conflict that has arisen between the people and the courts out of the efforts of the court to preserve the rights of individuals under the Constitution against the will of the majority expressed in legislation.

The subject of the constitutional guarantee in this case is not liberty, but property. In the former case it was not the liberty of person plainly intended in Magna Carta, but the liberty of contract which is a conception of modern commercial society. So also the property involved in this case is not the goods or lands named in Magna Carta and in the Constitution, but money paid as damages for an accident without fault, and the decision is that because by the law of the land when the Constitution was adopted no such payment could be required, this is an immunity of the citizen protected by the Constitution against the power of the state. On the other hand, it is insisted that there was and is such liability in maritime law by which the ship is made responsible for accidents to sailors in the course of the voyage, and that the state may well make it a condition of the carrying on of industries, at least in large establishments using machinery, that the industry shall bear the loss of accidents to men as well as to goods. It does not solve the problem, however, to personify the industry. The real question is whether you may make a man pay for a loss that was no fault of his. You do so when you make a man liable for the acts of his servants although he has used due care in selecting and managing them, but that is a case of imputed fault, and the law and even religion is familiar with that conception. In New Jersey and elsewhere there has been an attempt to avoid the issue by means of imputed consent, and the later statutes have provided that both employers and employees shall be presumed to consent to the plan of compensation unless they give notice that they will not. We, as lawyers, need not commit ourselves in advance upon a knotty question like this. It may become our duty to present as strongly as we can the reasons

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on one side or the other and to meet the reasons urged on the contrary part. It is doubtful if the decision against the validity of the statute can be sustained on the point taken by the New York Court of Appeals, that it was the established law when the Constitution was adopted that no man can be held liable without fault. The constitutional guarantees of liberty and property do not require that the rules of law, even though of a fundamental character, shall remain unchanged. The common law itself is subject to be abrogated by legislation, and even the doctrine of vested rights which has grown up out of the constitutional guarantees of property, can hardly be extended so as to insure the unchangeability of established rules of law. It is only the rights of property that have been acquired under existing laws that are protected against subsequent legislation. There is a taking of property in making a man pay for injuries which were no fault of his, but it is quite possible that this liability may, without gross injustice, be made a condition of employing men to work for you under conditions of a certain character. It is the question of injustice that is at the bottom of the case, for it is the violation of accepted opinions as to what are the individual rights which the state is bound to respect, that is the duty of the courts to maintain. To the modern mind there is a sense of injustice in liability without fault and the modern law of torts is, as Professor Wigmore says, "A rationalized adjustment of legal rules to considerations of fairness and social policy,"[8] but this was not so at the beginning. "The primitive Germanic law," in which our law of torts had its origin, "knew nothing," as Professor Wigmore says, "of those refinements; it made no inquiry into negligence, and it based no rule on the presence or absence of a design or intent."

We cannot pursue the important questions involved in these statutes called the "Workmen's Compensation Acts." The pertinency of them in the present discussion is the fact that, like the statutes limiting the hours of labor, they involve the courts in burning social and industrial questions with property rights on one side and the interest of large masses of people on the other, and that they are examples of other popular movements which involve the same antagonism.

One of the remedies suggested for judicial conservatism on such questions is the recall of the judges by popular vote. Such a remedy would impair the self-respect of the judges and the respect of the people for the courts. The very attempt to recall any public officer inflicts upon him a personal disgrace before he has had an opportunity of being heard, and when applied to judges whose position compels them to keep silent, the proceeding is intolerable. It is admitted by its advocates that the plan is only a last resort and only to be insisted upon because the judges by their training and traditions cannot accept the new conceptions of liberty and property and the power of the majority to make the laws.

The true remedy is rather for courts and lawyers to keep themselves in touch with the facts of life as they are; to know the conditions under which men and women work and to study with sympathy as well as with knowledge the facts which determine what sort of legislation is needed for the promotion of the public health, safety, and welfare, and so to understand what is in truth

[8] Wigmore on Tortious Responsibility, 7 *Harvard Law Rev.* pp. 315-342, 383. Select Essays in Anglo-American Legal History, v. 3, p. 475.

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the opinion of reasonable men on the question what is a *bona fide* exercise of the police power and not an undue invasion of individual liberty. The courts and the bar must understand also that there are steady and irresistible changes in public opinion as to what constitutes property and what is the nature and what are the true limitations of individual liberty, and that public opinion firmly established must in the end become law. It is only by knowing actual conditions and recognizing established changes in the meaning of property and liberty that the constitutional guarantees of the essence of property and liberty can be fully maintained, and the importance of maintaining both these ideas is of the utmost importance for the development of human character.

By public opinion I do not mean the vote of a majority, and I am fully convinced that individual liberty is of the essence of our institutions. To maintain the principle that there is a limit in republican government to the power of the majority to make the laws is one of the most valuable functions the courts have to perform. There is nothing in human government more important than the preservation of the sense of individual personality. This sense, which was almost crushed out under the Roman Empire, was given new life by Christianity. It was the whole power of the imperial idea that was withstood when Athanasius against the world maintained the doctrine of the divinity of Christ, which gave to humanity that sense of the dignity and value of the individual human soul which is the germ idea of universal democracy. This sense was preserved and intensified by struggle against the power of rulers and the oppression of the powerful. It was expressed in Magna Carta by the feudal lords themselves as against the King, although little thought was there then of liberty of contract with respect to the hours of labor. Laborers by the statute of Edward III, from whose reign we have the phrase "due process of law," were compelled under pain of imprisonment to work at the old wages for any man who might require them. The sense of individuality was expressed again when Lord Coke, in his struggle with King James endued Magna Carta with sovereignty for the protection of British subjects under the laws of Parliament. The same sense of individual rights was strongly imbedded in the minds of our early settlers, and they expressed it in their quotations from Magna Carta in their charters and fundamental agreements. It was expressed again in the constitutions of the several states and in that of the United States, and finally it was declared in the Fourteenth Amendment in a clause limiting the power of the states. In all these there was the expression of the deep-seated sense that individual man had rights and immunities which he would not surrender to any government. This sense of individuality is the product of our religion and of the struggles of centuries for civil liberty, and it is as dear to men now as it ever was. It is of the utmost importance that it should be maintained though the struggle for civil liberty had ended in the supremacy of the people themselves and the champions of the people are demanding that their government be unrestrained.

We are fortunate in having by reason of our written Constitution and a chain of circumstances peculiar to ourselves found in the courts a means of defense against the danger of which we are warned by John Stuart Mill, the tyranny of "Society collectively over the separate individuals who compose it."[4]

[4] Mill on Liberty, p. 15.

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A law is not justified by the mere fact that it is the will of the majority, unless it is also such as to do injustice to none. There will be the greater need for judicial review if the movement for direct legislation should prevail. In such legislation the purpose of attaining the principal object overrides considerations of injustice in the details, and there will be the greater value in the restraining power of the courts.

It is because of the great value of this power of our judiciary that the true position of the courts in our system of government should not be misunderstood, and that the confidence of our people in the judiciary should not be impaired through fear of undue exercise of power. The power of the courts to declare acts of the legislature invalid was not given to them in express terms, nor is it inherent in the fact that the Constitution is written. There are nations having written constitutions in which such power is not recognized. That there was such a power was not understood when our first state constitutions were adopted, and the case in which it was first declared was *Holmes* v. *Walton*, in New Jersey, in 1780. The power of the courts, though strongly asserted before, was not generally recognized until after the logic of it had been formulated by Chief Justice Marshall. The exercise of the power, as Prof. James Bradley Thayer pointed out, in his Essay on Constitutional Law,[5] grew out of the fact that in our colonies acts of the legislature under written charters were subject to judicial review by the Privy Council, and this power of judicial review was naturally assumed by our own courts when they came to deal with statutes not in accord with the new fundamemtal laws. That the legislative and judicial powers must be kept distinct was one of the fundamental political doctrines of the time and there was no thought of usurping the functions of the legislature.

It is the duty of the courts, however, to declare the law judicially in suits between parties, and the Constitution, whether expressly made so or not, is the supreme law of the land. The inevitable result is that the courts have the power, not merely to interpret the statutes, but also to declare that they have not the effect of law, and so it has come about that the courts have in effect a veto power over legislation if in their judgment it is contrary to the Constitution of the state or the United States. It was Mr. Justice Holmes that quoted to Prof. John C. Gray what Professor Bradley calls the sagacious remark of Bishop Hoadley, made nearly two centuries ago: "Nay, who ever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them."[6] This was said long before there was any question of the relation between the laws and the Constitution. The difficulty is inherent in all judicial power in the application of statutory law and the difference is only one of degree. The remedy lies in the attitude of the courts towards the power of the legislature, and we have assurance in the history of judicial decision in this country that our courts fully appreciate the peculiar responsibility that is thrown upon them in the exercise of judicial functions, when not merely the interpretation, but also the validity of acts of the legislature is to be determined by them. They fully understand the truth of what was said by Chancellor Waties of

[5] "Legal Essays." By James Bradley Thayer, pp. 1–4.

[6] *Harvard Law Rev.* p. 33, Mayer's Legal Essays p. 33.

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South Carolina, in 1812, that "the interference of the judiciary with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges and so of the best preservative of the Constitution,[7] and they have adopted the rule laid down by Chief Justice Tilghman in Pennsylvania, who said: "For weighty reasons it has been assumed as a principle in constitutional law by the Supreme Court of the United States by this court and by every other court of reputation in the United States, that an act of the legislature is not to be declared invalid unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt."[8]

The accepted rule of the United States Supreme Court was expressed by Mr. Justice Day, in *McLean* v. *Arkansas*, a few years ago (211 U. S. 599), when he said: "If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

That individual liberty includes liberty of contract with respect to labor as well as business has been settled beyond question by the decisions of the Supreme Court, but it is also the established doctrine of the Court, said Mr. Justice Day, in this same case, that "the liberty of contract is not universal and is subject to restriction by the legislative branch of the Government in the exercise of the police power to protect the safety, health, and welfare of the people. It is also true that the police power of the state is not unlimited and is subject to judicial review and when exerted in an arbitrary or oppressive manner may be annulled as a violation of the Constitution."

The courts are not unaware of the changes in social and industrial conditions nor of the trend of thought toward collective action for the public welfare. They are willing to agree with Mr. Justice Moody, when in his dissenting opinion in the *Employers' Liability* cases he said, "The economic opinion of judges and their views of the requirements of justice and public policy even when crystallized into well-settled doctrines of law have no constitutional sanctity," and while willing to bear the burden that is put upon them by the Constitution, they appreciate the fact that it is not well that the legislature should shift upon the courts all responsibility for correcting the injustice involved in the ill-considered remedies attempted for the cure of public evils.

While they keep in mind the principles clearly expressed in these decisions, the courts even in time of sharp conflict of social forces will not be likely to arouse jealousy of their power, and I think we may rest assured that, while leaving to the legislatures free scope to make provision under new conditions for the public health, safety, and welfare, the courts will preserve our ancient heritage of the immunity of the individual against arbitrary power, whether of king or people, and of the right of every man to his liberty and his property, and so shall be maintained, not the rule of the majority, but the sovereignty of the organic state with the immunities reserved to the individual citizen.

[7] *Adm'rs of Byrne* v. *Adm'rs of Stewart*, 3 Des. 466.
[8] *Com.* v. *Smith*, 4 Bin. 117.

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Report of an Adjudged Case Not to be Found in Any of the Books

By William Cowper

With Addition by J. B. Mackenzie
of Osgoode Hall, Barrister-at-Law

[Our contributor has added verses of his own in order to fill up a gap in Cowper's whimsical poem, and to report more fully the arguments of counsel. Cowper's stanzas are here printed in italics, the seventh being omitted, and the eighth concluding one being put at the end. Mr. Mackenzie is an old-time contributor to the *Green Bag*, the author of numerous verses and articles in volumes 14, 15 and 16. — *Ed.*[

BETWEEN Nose and Eyes a strange contest arose,
The spectacles set them unhappily wrong;
The point in dispute was, all the world knows,
To which the said spectacles ought to belong.

So the Tongue was the lawyer, and argued the cause
With a great deal of skill, and a wig full of learning,
While Chief Baron Ear sat to balance the laws,
So famed for his talent in nicely discerning.

"In behalf of the Nose, it will quickly appear,
And your lordship," he said, "will undoubtedly find,
That the Nose has had spectacles always in wear,
Which amounts to possession time out of mind."

Then holding the spectacles up to the Court,
"Your lordship observes they are made with a straddle,
As wide as the ridge of the Nose is; in short,
Designed to sit close to it, just like a saddle.

"Again, would your lordship a moment suppose
('Tis a case that has happened, and may be again)
That the visage or countenance had not a Nose,
Pray, who would, or who could, wear spectacles then?

"On the whole, it appears, and my argument shows
With a reasoning the Court will never condemn,
That the spectacles plainly were made for the Nose,
And the Nose was as plainly intended for them."

MR. SERGEANT HEAD (OF COUNSEL FOR THE EYES), *CONTRA*

The Head, Eyes' true champion, did here interpose —
Liberal his contempt for those arguments slim —

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Hardy Tongue might the Court, *him* should never bull-doze.
What, *vox et praeterea nihil* for him!

He would first to my lord's jurisdiction except;
The Nose and himself being of kindred so close,
Affection might warp his rich-stored intellect,
Pestle Eyes in that mortar a somewhat vile dose.

Owed the spectacles quite no insignificant debt
To the Ears, which assisted to keep them in place;
So, if Nose be their saddle, 'twas safe enough bet
That, minus girth, they would slip from the face.

Conceiving a suit by the Ears had been brought
Against these utensils (perhaps to annoy meant),
For injury claimed through the Nose to have been wrought,
He defense would set up of a common employment.

They must hold, in this view, Ears and Nose, equal rank,
Each being of the Eyes made a worthy auxiliar;
So what has full oft turned an enemy's flank
Would scarce avail here — the *respondeat superior.*

Discovering, then, anatomic propinquity
(Itself ground sufficient to make out his plea)
And — what he alleged before — use's affinity;
Nose, in brief, Tweedledum, and Ears Tweedledee,

It must have to all grown amazingly clear
(While none may the lore of that jurist impeach)
That palpable interest Chief Baron Ear
Will a judgment impartial by no means let reach.

Every just code of law doth the maxim enshrine
(Old it as the hills) *Audi alteram partem;*
Helps greatly the rule parties' rights to define,
"Brakes put on your wheels," cried the Nose. ("Oh, why start 'em'?")

From his clients should eyelashes never be clave,
And if losers, they might be thus painfully amerced,
Without a hard struggle their bacon to save,
"Armed and well prepared" e'en to submit to the worst.

Dare one (with a fragment of conscience) assert
Honor, value to be the sole heritage of Nose —
Eyes cutting no ice, something vacuous, inert?
As well deem the foot just a family of toes.

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Without Eyes to serve them, why spectacles' use?
(Fair samples he always would seek to provide),
And minds would assuredly candor abuse,
Which the steed gave the footing of him that should ride.

Nose merely the agent; whose principal, Eyes,
Habitually finding him, sets him to work.
Could a staff the limbs' concert venture despise —
Th' Essence's worth in the Accident lurk?

He, the Nose, might as fairly call on to admit,
His own (the Head's) share in the merit professed,
As let him deny to the Eyes a bare whit —
None but he of the whole physiognomy blest.

For, unless wrought upon by the action reflex
Impressed by the brain, all such adjuvants would
Ne'er have roles to play, whether goggles convex
Bridge the Nose, or concave — Matthew wear them or Jude.

You, my Lud, in the cause then, at bar, must award —
Whether point raised of ouster should fail or succeed —
Eyes the post which, in Nature, they faithfully guard,
Elevate o'er the Nose their kind succorer in need.

So his lordship decreed with a grave, solemn tone,
Decisive and clear, without one if or but, —
That whenever the Nose put his spectacles on,
By daylight or candle-light — Eyes should be shut.

A Chapter from Old Greek Probate Law[1]

By Frederic Earle Whitaker, Ph.D.
of the Rhode Island Bar

LUCIAN'S aviator, Icaromenippos, aerial ancestor of the Wrights and Blériots, looking down from the moon on the nations of the classic world, says, "I could see the nomad Scythians in their wagons; the Egyptian farming; the Phœnician trafficking on the sea; the Cilician buccaneering; the Spartan flogging; and the Athenian fighting lawsuits."[2] Thus cleverly does the last

[1] Recently Professor of Greek at Lehigh University and sometime Fellow and Instructor in Greek at Brown University.

[2] Lucian's "Icaromenippos," s. 771, par. 16, Jacobitz edition, vol. II.

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great master of Attic wit, in almost Aristophanic vein, note the marked characteristics of these peoples at one fell swoop of generalization. And especially well founded is the happy stricture on the Athenian's darling weakness; for next to his love for fearless freedom of thought must be put his infatuation for litigation.

In his ultra-enthusiasm in legal matters, the Athenian sometimes adopted what are often accounted "modern improvements," and some of these prevailing practices have been most pertinently parodied by Aristophanes himself, notably in his "Bird Town," where one of the first visitors, following at full speed after the parricide, is a Law-Suit Hatcher, who "can't dig" but is willing to blackmail. In the "Wasps," the disappointed juryman, Boss-Lover, holds a home trial of the dog "Sic-em," which stole the green Sicilian cheese out of the kitchen, but is set free through the puppies brought into court, which, "whining, beg him off, entreat and weep" —a not uncommon though illegal mode of influencing the jury, but a means to which the great Socrates despised to resort even to save his life.

These side plays and the sometimes asserted lack of respect for law on the part of the Athenian,—a failing, characteristic of every republic, ancient and modern,— find their set-off in the noble Apostrophe to Law by the old ruler in the tragedy which the critical Aristotle pronounced the most perfect play ever written — Sophocles's "King Œdipus"; as well as in the continuous belief and consistent action that looked to the popular law courts as the safeguard of the Athenian's constitutional liberty and realized that the hope and redress of a free people lie in the possession and use of the courts of the land. Probably at no period in the history of jurisprudence has interest in legal matters been so intense and so generally founded on an intelligent and sympathetic appreciation of the vital connection between national law and individual happiness as in the days of Periclean Athens — the fifth century before Christ — and in the times immediately subsequent thereto.

In no department of legal lore did the Athenian take greater interest or have a more human concern than in matters which related to instituting an heir or successor to the family estate, if we are to be guided by the mass of material that the "Orators" have passed down to us in the cases in which they held retainers as "Speech-writers."[3] The perpetuation of the race and the preservation of the home have always been dearest to the heart of man of all things human, and have made the regulations concerning marriage and inheritance the most important articles in the world's legal codes. So that the legislation and litigation, the religious customs and domestic ties — which cannot be successfully separated from any careful consideration of the different phases of Hellenic inheritance — may have a lively interest for the modern lawyer and layman, though the scene may be laid and the data derived from a period not so very many generations away from the time when folk-law was merged into the Law of the Land.

Our modern civilization finds at hand two agencies for instituting an heir, the "last will and testament" and the legal fiction of adoption,— the latter method probably rarely resorted to, at this day, for the primary purpose of establishing a successor to one's worldly wealth. We oftentimes "let the law make our

[3]See author's article in *Popular Science Monthly*, p. 871, April, 1910, on "The Trial of an Old Greek Corn Ring."

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will," however, and die intestate, but when we adopt, it isprobably not the motive of the individual nor the policy of the law to make an heir of the adopted so much as to provide fathers and mothers for orphans and homeless children. In this twentieth century after Christ the will is the common instrument which we deliberately employ for the purpose of instituting heirs, but the ancient Greek had recourse, as a rule, to the fiction of adoption to effect that very object, though enough instances of the use of the last will and testament occur in the cases from the Orators to show an established practice.

From the day those priestly epigram-makers, the old Sanskrit philosophers, formulated that terribly clever dictum— "One of two things is true, either the man will leave the money or the money will leave the man" — anxious care for the disposition of worldly goods has had a controlling power in the heart of mankind. And though caste system and clan rights may have postponed its actual operation, the Last Will and Testament — even if sometimes in an embryonic stage — is in the mind of man almost at the very dawn of legal history. At least from the time of the Athenian lawgiver Solon, the will was a legally approved means of instituting an heir, as is evidenced by the law in various cases, notably in the Second Oration against Stephanos,[4] where the orator Demosthenes held retainer as speech-writer for the sons of the noted banker Pasion, who was the J. Pierpont Morgan of his times. The old law therein quoted represents that "any citizen (with the exception of such as had been adopted when Solon became Archon) shall be at liberty to dispose of his own property by will, as he pleases, if he has no male children lawfully born; *unless* his mind is impaired by lunacy or dotage, or by drugs or disease, or unless he is under influence of a woman or some illegal motive, or under constraint or durance." This old law dating back to at least 600 B.C., with its detailed suggestions — and maybe invitations — for attacking a will, shows on its face that legal acumen and conserving of the family estate by will were by no means in their infancy.

Although a will is simply the legal expression of the testator's intention and no involved dissertation is called for here, a few extracts from the old Hellenic will, together with brief reference to some suggestive testamentary customs, may present a birdseye view of this phase of our subject sufficiently comprehensive for the present purpose.

In any bequests under the old Greek will the great purchasing power of money must be taken into the reckoning, for ready money was scarce and it bought from ten to twenty times more than the same amount would to-day with us, varying, of course, with the period and the state of the commonwealth. In Lysias[5] it appears that a too liberal allowance in the guardian's account for the support of two boys, their sister, a man attendant and a maid servant was 1000 *drachmae* ($180) a year, or a little less than fifty-four cents a day for the whole company. Even when prices were higher, Demosthenes (while a minor), with his mother and sister and their necessary slaves, had an annual allowance of seven *minae* ($126), with the house in which they lived.[6] These were the families of rich Athenians and the allowances *per capita* are estimated to be fully two sevenths higher in the lower rating than ordinary adults could live on in comfort. Ordinary interest in ordinary times had

[4]Demosthenes, Or. 46 s. 1133.

[5]Oration 32, s. 28.

[6]Demosthenes, Or. 27, s. 36.

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a minimum rate of twelve per cent, and thirty per cent was common on bottomry loans. Slave labor also tended to lower prices, so that the legacies left by rich Greeks must be interpreted with these comparative values prominently in our minds.

The will of the rich manufacturer, Demosthenes the elder, father of the celebrated orator, as revealed in young Demosthenes's suit against his guardians,[7] sets forth a testament full of interest, both from the ancient and modern legal point of view. Among other provisions, the testator looked after the care of his minor children — young Demosthenes, seven years old at this father's decease, and his little sister, five years of age — and left large sums (for those days) to the three guardians appointed by will. The guardian, Therippides, was given the interest, income and use of one talent, ten *minae*, till young Demosthenes reached his majority; to the second named guardian, Demophon, was left *the daughter*, with a dowry of two talents"[8] and to Aphobos, the third guardian nominated by the will, was bequeathed what might seem to us a rather doubtful legacy, to wit: the wife of the testator, though there went with her a dowry of one talent, twenty *minae*, and the use of the mansion house and the furniture therein. These legacies absorbed one third of the wealthy manufacturer's fortune and do not leave this celebrated will of history entirely within the realm of an embryonic instrument.

Of striking similarity is the extract from the document that purported to be copy of the will of the rich banker, Pasion:[9]

"This is the Will of Pasion of Acharnae. I give my wife Archippe in marriage to Phormio and I give to Archippe for her dowry the talent charged on land in Peparethus, the talent charged on land in Attica, a lodging house of the value of 100 *minae* and also the female slaves and jewelry and other things which she has in her custody in my dwelling house. All these things I bequeath to Archippe."

In Lysias[10], Diodotos, father of two sons and a daughter, also provides by will for minors and gives his wife with a dowry of a talent — possibly the same amount he received with her at his own marriage.

The very wealthy and celebrated Athenian admiral Conon[11] bequeathed a talent and forty *minae* to a nephew, three talents to his brother, and by will also dedicated 5,000 staters (sixteen talents and forty *minae*) to the patron deities Athena and Apollo at the Oracle of Delphi; and still possessed an estate large enough to leave to his son a residue ("the remaining things") of over seventeen talents.[12] These above extracts show that gifts were possible under the old Greek will and raise a suspicion of anticipatory modernism in the work of the old Greek draftsman.

Besides, signatures or seals of the witnesses appeared on the Greek will.[13] In Demosthenes, both "the seals" of the testator and witnesses are mentioned, and the seal probably more than the signature (by handwriting) was the common mode of identification and of establishing the original attestation of the testamentary document. While the number of witnesses to the old Greek will varies in the extant data, no less than three witnesses — the number com-

[7]Demosthenes, Or. 27, s. 5 and Or. 29, s. 43.

[8]About $2,000, though with a modern value from $20,000 up.

[9]Demosthenes, Or. 45, s. 28.

[10]Oration 32, s. 6 *et seq.*

[11]Lysias, Or. 19, ss. 39 and 40.

[12]Anywhere from $180,000 to $360,000 at modern rates of interest, etc.

[13]Isaeus, Or. 9, s. 12 *et aliter*. Or. 7, ss. 1 and 2; Demosthenes, Or. 45, s. 17; Diogenes Laertius, 4, s. 44; 5, s. 57, etc.

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mon today — appear, as in the will of the philosopher Lycon.[14] One duplicate of the Theophrastus will had four witnesses and another duplicate of the same had five witnesses,[15] while in the Oxyrhynchus papyrus[16] seven seals appear, that of the testator and those of six witnesses. Whether the law fixed a minimum, or fancy or caution dictated the number of witnesses, it certainly looks in some instances as though ample provision was taken against any ordinary testator outliving all the witnesses present at the attestation function. And yet to-day the careful draftsman is increasingly apt to add at least one name to the number called for by statutory requirement.

The four witnesses to the will of Acusilaus[17] state that they recognize the seals which they had affixed to the original document, which in this instance is apparently an official copy given out to the testator for the purpose of adding a codicil.[18]

Isaeus, the celebrated testamentary expert and teacher of Demosthenes, in the case of *Hagnon and Hagnotheus* v. *Chariades*[19] — in which the genuineness of the soldier Nicostratos' will is contested, — leads us to infer that, in general, witnesses were not told the contents of the will, and outside of illiterate testators or those laboring under similar disabilities, there would, of course, appear to exist no particular reason why the ante-mortem secrecy in the old Greek will should not be as valuable to peace of mind as with us to-day.

Not only were the witnesses present at the execution of the will and their names recorded in the instrument, but protection and precaution against frauds and accidents were taken and means devised to effect the testator's intention that sometimes seem novel even to-day. Wills were oftentimes executed in duplicate as a safeguard against loss or disappointed heirs who chanced to be not over-scrupulous. There were three "duplicates" of the will of Theophrastus the philosopher,[20] three of the will of Arcesilas[21] and two of Diodotos' will, one in the custody of Diogeiton and one in Diodotos' own house.[22]

This duplication of wills and separate custody of the executed documents is among the novel suggestions advanced by a prominent New York draftsman and legal text-book writer in his latest work on wills[23] and most certainly has the sanction of classical practice, as the above extracts from old Greek legal history clearly reveal. That the custody must not only be separate but also trustworthy appealed to the Athenian with his keen legal instinct fully as strongly as to our expert; for the Hellenic will was entrusted to the keeping of reliable persons who were responsible under the stringent laws regulating the contract of "Deposit."[24] So that between the hallowed temple vault for safekeeping and the comprehensive legislation that encouraged the individual custodians to a lively appreciation of their trust, the old Greek will enjoyed many of the advantages of our safe deposit box, and by the separate custody in vogue, avoided some of the temptations that this ordinarily useful adjunct of our banking institutions sometimes invites,

[14] Diogenes Laertius, 5, s. 74.
[15] Diogenes Laertius, 5, s. 57.
[16] Oxy. Pap. 3, n. 494, about 156 A. D.
[17] Oxy. Pap. 3, n. 494.
[18] See Wyse's "Isaeus," Commentary, Or. 4, p. 387.
[19] Isaeus, Or. 4, s. 13.
[20] Diogenes Laertius, 5, s. 57.
[21] Diogenes Laertius, as above, by which authority Aristotle's will is also quoted, 5, s. 12.
[22] Lysias, Or. 32, s. 7.
[23] Remsen, "On the Preparation and Contest of Wills," c. 1, p. 16, edition of 1907.
[24] Isaeus, Or. 6, s. 7; and Or. 9, s. 5; Demosthenes Or. 45, s. 19; Diog. Laert. 4, 44 and 5, s. 57.

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especially when accessible to interested parties during the life or at the death of the testator.

The will of Theophrastus, mentioned above, end with the names of the testator, witnesses, depositaries, and in some cases the addresses of the witnessses. The conclusion is of interest and well worth quoting in connection with what has been noted above as well as from the fact that Theophrastus was the most distinguished philosopher and most popular teacher of the day, succeeding his master, Aristotle, as head of the Lyceum, for the maintenance of which he provides in the body of the present "duplicate" will:

> His will, sealed with Theophrastus's own ring, is deposited in copies: one with Hegesias, son of Hipparchus. Witnesses — Kallippus, Pelaneus, Philomelus, Euonymeus, Lysander of Hyba, Philon of Alopeke. The second (copy) Olympiodorus has in his custody. The witnesses are the same. The other (copy) Adeimantus took but his son Androsthenes carried off. Witnesses — Arimnestus, son of Kleoboulus, Lysistratus the Thasian, son of Pheidon, Straton of Lampsacus, son of Arcesilaus, Thesippus, son of Thesippus from the Potter's quarter, and Dioscourides the Epicephisian, son of Dionysius.

Woonsocket, R. I.

"J. P."

By Dan C. Rule, Jr.

THE Republicans in caucus put the name of Adam Reese
On the Balleville township ticket for Justice of the Peace;
But the Democratic voters wanted someone who would be
A credit to the office, so they nominated me.
And judging by the merits of the candidates selected,
'Twas dollar bills to doilies I would be the one elected;
The pre-election prophets, with my "stogies" making free,
Would slap me on the back and say, "Hello, J. P.!"

The meanest man in Balleville is Asher Tillingast
Who for evil inclinations has Iscariot outclassed,
And the blessed ties of friendship that loving hearts entwine,
Don't bind with diamond hitches old Tillingast's to mine;
So my astonishment was great when I perceived that he
Was urging all the Balleville men to cast their votes for me.
Before the caucus I had called old Tillingast a liar:
Now he on my repentant head was heaping coals of fire.

But Tillingast is just about as popular a fellow
As is Jack Frost in autumn when the fruit begins to mellow;
And man that's born of woman is very apt to mix
A lot of human nature with his local politics.

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That's why so many voters, with obtuseness unsurpassed,
Deserted me because I was the choice of Tillingast;
And that vile serpent, Tillingast, was smart enough to see
The way for him to beat me was to 'lectioneer for me.

So on account of Tillingast's low-down, two-faced rascality
Young Adam Reese defeated me by sixty-four plurality.
But Tillingast received a shock conducive to repentance;
And I therefor await in dread my undecided sentence
Till Justice Reese has found in *Swan* the penalty at law
Where Richard Roe has sorely smote John Doe upon the jaw.
That's what I did to Tillingast for his temerity
When he slapped me on the back and said, "Hello, J. P!"

Clyde, O.

The Recall of Lawyers

By Louis H. Winch

Chief Justice of the Ohio Circuit Court

[Chief Justice Winch, speaking at the annual banquet of Ohio Probate Judges at Cleveland, Jan. 9, advocated the "recall" of lawyers for incompetence. We heartily approve of the suggestion that there should be some means of re-examining the qualifications of a practitioner at the bar, and of suspending from practice those who are incompetent, as well as those who are dishonest or corrupt. In fact the evil of incompetence is at the present time more serious than that of dishonesty, because no available remedy for it exists. — *Ed.*]

I AM in favor of the recall of incompetent lawyers.

While the mistakes of incompetent judges are ordinarily corrected by reviewing courts, there is no way of correcting the mistakes of incompetent lawyers.

We can get rid of a dishonest or corrupt lawyer, but there is no way of getting rid of the incompetent lawyer, and the latter, ordinarily, does the most damage.

This thought came to me during a recent examination of the merits and demerits of the Ohio code of civil procedure, made for the New York State Bar Association at the request of Hon. F. L. Taft, President of the Ohio State Bar Association. I made up my mind that the Ohio code is about as simple and suitable to the purpose as it can be, but that, nevertheless, there is a vast amount of poor pleading.

Take the case in Cleveland — with twelve common pleas judges, two of them spend all their time in hearing and deciding dilatory pleadings, motions, and demurrers. The same number of judges dispose of all the criminal business of the county.

The time thus spent not only delays the cases in which the motions and demurrers are filed, but puts back the entire docket many months.

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Inability to draw good pleadings may be due to the lack of adequate instruction in pleading and practice given in our law schools under the modern case system, or to the general fact that the requirements for admission to the bar have been too low in the past. Perhaps an apprenticeship in a lawyer's office should be required before or after admission to the bar, so that the young man may learn the practical things of his profession before he is permitted to practise on his own account.

I certainly favor lodging in our trial courts authority to suspend a lawyer from practice upon its appearing by the pleadings he files or his conduct at the trial table, that he is incompetent. Arbitrariness and prejudice of the trial judge can be guarded against by requiring him to refer the question of the lawyer's competency to a standing or special committee of the bar to re-examine the supposed incompetent lawyer, investigate his record, and report its findings, upon and in accordance with which the court shall act. If an unfavorable report is made, suspension should only be until passage of a satisfactory examination.

Criticism of the courts because of the law's delays and the apparent failure o justice in special cases is due in very large measure to the incompetency of lawyers.

How to Simplify Procedure on Appeal[1]

By Judge Charles H. Carey

COURTS and lawyers now make justice a secondary consideration; they proceed on the theory that the rules must be adhered to even though the result is to bring the victory to the party who ought not to win; and they have built up fine theories of the law under which precedent must be followed to absurd conclusions. Precedents have accumulated, and the fecundity of the modern printing press seems to have no limit; so that law libraries with hundreds of volumes of decided cases must be depended upon for the purpose of finding a clue to the path through labyrinths as difficult as those of ancient Egypt or Crete.

Now I advocate a total and radical change. I would make it so that rules of pleading or procedure are of little or no binding force. I would have it so that a plaintiff desiring to sue may file a notice that upon a certain day he will ask relief against a party, and when this notice is duly served the plaintiff shall be entitled to his judgment unless the defendant demands a statement of the claim; but that this statement, if demanded and furnished, need be no more than a memorandum. The answer, like the claim, should be informal. It will be quite sufficient if it states whether the defendant wishes to contest the claim, except that if it is desired to offset, or to confess and avoid, this may be done. But there need be no formalities or niceties of language, and little attention need be given to the accuracy of any statement made on either side. There will be no place for motions or demurrers. . . .

[1] From an address delivered before the Oregon Bar Association, Nov. 22, 1911.

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I would have the court aim at ultimate justice, irrespective of anything in the pleadings or anything omitted from the pleadings.

I would have the court take the evidence offered by the parties, but not be confined to this source of information. I would have the court, of its own motion, bring in other parties or hear other witnesses, adjourning the proceedings from time to time, if necessary, until the matter in controversy is thoroughly examined into. The courts should have power to inspect public or private records and documents, to appoint medical or other experts, to require the party seeking relief to do or abstain from doing acts not necessarily referred to in the pleadings, and it should get at the kernel of the dispute and should see to it that no decision is made on such silly grounds, for example, as that the exemplification of a record is not exact, or that copies instead of originals are used where there is no question that the copies are accurate.

This system relegates to the limbo of the past all the humbug about the distinctions between law and equity pleadings. It will allow parties to have relief, whether in law or in equity, and whether they have put the claims upon paper correctly or not. For no injustice can be done by abolishing formal pleadings so long as the courts are enabled to protect against surprise, and to require the parties to stand for justice.

I suggest, therefore, that the judicial system of Oregon be so revised as to enable the supreme court to review an appealed case upon the original record and without printed abstracts or briefs, and at once. This will operate to discourage appeals that are taken for delay, and will enable the appellate court to dispense with written opinions upon points that have already, in its judgment, been correctly decided, and where no new principle or unusual features require more careful examination and more elaborate expression of opinion.

But, even if this important reform is not adopted in full, still it is not too much to demand that all formalities of appeals be abolished. A suitable bond or undertaking having been furnished, it should under any circumstances be sufficient to lodge in the appellate court a copy of the judgment and the report of the trial, and the appellate court should confine its decision to the merits of the controversy; and if it finds that any evidence of importance has been omitted that could and ought to be supplied, it should receive it, and it should affirm or modify the decision in accordance with ultimate justice, and without being bound by any technical rules whatever.

These plans, it will be perceived, change radically the duties and functions of appellate courts. Printed briefs and abstracts will be no longer necessary. The courts will be courts of review with comprehensive powers sufficient to enable them to dispose of the cases without returning them to the trial court, except in rare and exceptional instances. Instead of bills of exception to confine these courts to the consideration of certain errors in law cases that are claimed to have occurred on the trial, the appellate courts should be open to supplement the investigation made by the inferior court, with a view to reaching substantial justice; so that, if it appear that the trial judge eliminated subjects of inquiry that should have been gone into, or confined the inquiry where it should have been given wider scope, the appellate court should be free to go into these matters fully.

Under this system the verdicts of

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juries should be made as special findings upon definite questions submitted to them. All of the foolish practice of requiring a judge to instruct a jury upon nice questions of complicated law with such exactness as to give ground for new trial or a reversal of the judgment, if he has made a slip of the tongue, will be abolished, and with this change will go a great many of the most cogent objections to the efficiency of our courts of justice. . . .

The changes I suggest would be incomplete if not supplemented by others, less fundamental, but none the less necessary to enable, the courts to simplify their proceedings. . . .

The fact is that our whole system needs revision, and the changes should be first proposed by the bar.

The judges administer the law as they find it. Popular criticism should be directed to the methods rather than to the judges, who ought not to be blamed for following precedent, when the whole superstructure of jurisprudence rests upon precedent as a foundation.

I submit these suggestions with the hope that they will at least stir interest in the subject. Oregon has set an example to other states in many progressive lines. Here is a field that needs her labor. The Oregon Bar Association ought to lead in these reforms, instead of waiting until they are forced by the people, who are impatient of the law's injustice and the law's delays.

The Meeting of the New York State Bar Association

"THE Reform of Procedure in the Courts of New York" was the chief topic discussed at the thirty-fifth annual meeting of the New York State Bar Association, which met in the New York City Bar Association rooms in New York, Jan. 19, 20.

The meeting was called to order by the president, Senator Elihu Root, and the morning session was taken up with reports of committees and other business of the Association.

In the afternoon Senator Root delivered the president's address, his subject being "Judicial Decisions and Public Feeling." This address, which is one of the most timely and important documents for some time on the question of the recall of judges, endeavored to make clear the causes of popular impatience with the decisions of courts, and the reasons underlying the agitationf or the recall. Senator Root said in part:—

SENATOR ROOT'S ADDRESS

"There are several things to be said about this feeling. In the first place, it rests upon a misconception as to the true function of a court. It is not the duty of our courts to be leaders in reform or to espouse or to enforce economic or social theories, or, except within very narrow limits, to readjust laws to new social conditions. Undoubtedly every judge is bound to consider two separate elements in his decision of a case: One the terms of the law and the other the conditions of actual life to which the law is to be applied, and it is only by considering

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both that the law can be applied in accordance with its real spirit and intent. But the judge is still always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve or change the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy. It is very important to have reformers and advocates of all good causes and thoughtful and public-spirited citizens who are keenly alive to the defects in our system of laws and solicitous to find means to cure them. But the courts are excluded by virtue of the special duty imposed upon them from playing any of these parts. Their duty is to maintain and enforce the law as it is at the moment, to interpret it in sincerity and truth under the sanction of their oaths and in the spirit of justice, to accept loyally every change made in it by the law-making power, but to stand firmly against any attempt to ignore it or nullify it, except by the legitimate action of the popular sovereign in its making of constitutions or the legislative branch of the government in its making of statutes in conformity to the constitution."

PAPERS ON PROCEDURE

A paper entitled "How Civil Procedure Was Simplified in Connecticut" gave the views of Gov. Simeon E. Baldwin of that state.

The first two papers treating of the topic assigned for discussion were presented by C. Andrade, Jr., of New York City, who considered "Commencement of Action," and George Gordon Battle and Joseph M. Proskauer of New York, who dealt with "Preparation for Trial and Trial Practice."

Mr. Andrade declared that the reason England and Canada are not demanding the recall is because English and Canadian taxpayers get justice instead of procedure for their money. He proposed that the Code of Civil Procedure and existing rules of court be abolished and replaced by a short set of rules substantially similar to the proposed equity rules of the federal courts.

Messrs. Battle and Proskauer recommended that the present distinction between special and trial terms of court be abolished; that each judge be assigned to a numbered part of the court, and that from the time of the assignment of a case to a judge it should remain with that judge for all purposes, including trial, unless transferred by special order or after appeal.

Other papers on procedure were "Judgment," by Neal Dow Becker of New York; "Appeals," by Everett P. Wheeler of New York; and "The Practice in Surrogate's Court," by John P. Cohalan and Robert Ludlow Fowler of New York. Each state bar association in the United States had also been asked to request one of its members to furnish a paper showing the practice it its respective state, whether common law or statue law, its merits and demerits.

SECRETARY KNOX'S PAPER

In the evening Hon. Philander C. Knox, Secretary of State, delivered the annual address. His speech dealt with "The Monroe Doctrine and Some Incidental Obligations in the Zone of the Caribbean." The history of the inception and growth of the doctrine was traced, and in the end a strong argument was made for the ratification of the conventions between the United States and Honduras and Nicaragua, now pending before the Senate.

The next morning, Henry A. Forster of the New York bar, and J. Newton

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Fiero, dean of the Albany Law School, in papers dealing with "Satisfaction of Judgment in Supplementary Proceedings" and "Special Actions and Special Proceedings," respectively, pointed out the same defects in too much clogging and repetition under existing procedure.

PROCEDURE IN CANADA

Mr. Justice Riddell of the King's Bench of Ontario, speaking in the afternoon, vividly described the swiftness and certainty of procedure in Ontario. He said: "Our law says to a man who's troubled with an irresistible impulse to murder: 'I'll hang a rope up in front of your nose and see if that won't help you inhibit your impulses.' As a net result," continued the speaker, "we're not troubled much with expert witnesses in Canada. In short, there are two ideas about the law: the old idea that it is not so important whether a man gets justice, but that the main consideration is that the cleverest lawyer, the lawyer best able to utilize the forms of the law, should win. The other idea — the one we hold — is this: Let a man get his rights above all; and if he gets justice, no matter if the record does get a shock now and then."

STOCK WITHOUT DOLLAR MARK

The report of the Committee on Corporation Law — Francis Lynde Stetson, Victor Morawetz and Louis Marshal — was entitled "Stock Without the Dollar Mark." It advised the resubmission to the Legislature of an amended law providing for the issue of the stocks of all corporations without any par value stated on the face of the stock. The committee told of the introduction in two previous Legislatures of bills to carry out the plan and of their failure. It also announced it will cause a similar measure to be introduced in the present Legislature. The report was approved.

CONTINGENT FEES

John Brooks Leavitt, chairman of the Committee on the Abuses of the Contingent Fee, submitted a report, concurred in by four of the eight committeemen, with three dissenting and one not voting. The report urged the remedying of admitted abuses by repealing the legislative act of 1848, which gave unrestricted permission to lawyers to bargain with their clients in respect of services. It provided, however, that clients be permitted to hire their attorneys by the year if they desired to do so; or that, where unable, the client might pay his lawyer out of the proceeds of the litigation such sum as they might agree on after its collection, the court awarding the amount in case of failure to agree. It was finally voted that "all agreements on contingent fees between attorney and client should by appropriate amendment of the existing law be made subject to the scrutiny and review of the court as to their reasonableness when made."

JUDICIAL CANDIDATES

The Committee on Selection of Candidates for Judicial Offices reported, through its chairman, Judge Richard L. Hand, asking instructions as to whether its investigation and indorsement of judicial candidates was to be made only in the brief time between nomination and election, as heretofore, or before the nominations had been made. It was decided that the association should pass upon the character and qualification of candidates before nomination.

Fred W. Hinrichs asked that Governor Dix be visited by a committee to have him make the Loomis bill the subject of a special message to the Legislature. Mr. Hinrichs's suggestion was adopted. The Loomis bill deals with the method of selecting candidates for judicial office.

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WORKMEN'S COMPENSATION

A spirited debate occurred on the subject of workmen's compensation. Francis Lynde Stetson introduced a resolution making it the sense of the Association that an amendment to the state constitution should be adopted, to the effect that nothing in the constitution should be construed to forbid the enactment of laws requiring the payment by employers of reasonable compensation to employees who are injured in their work regardless of who is to blame for the injuries.

This resolution was referred to a committee, which later asked the adoption of a resolution empowering the committee to co-operate with a similar committee of the City Bar Association, the joint committee to have the power, without consulting the Association, to recommend amendments to the constitution to the legislature. A storm of protest, led by William B. Hornblower, followed. Mr. Hornblower declared it was too great a power to give to any committee. An amendment was offered by Mr. Hornblower stripping the committee of the power to recommend amendments.

Paul Fuller said that workingmen all over the country were aroused by the situation and charging that inaction was another example of the delays of lawyers. He suggested that Mr. Hornblower offer a substitute resolution, but Mr. Hornblower would not do this, so a vote was taken on the amendment. It was defeated by a narrow margin and the original resolution was then passed by a bare majority.

Mr. Stetson, in recognition of the opposition, then offered a resolution directing the committee to inspect all pending amendments to the constitution on the liability law and to help the Legislature with suggestions.

THE CRIMINAL INSANE

The proposal of changing the verdict in cases of the criminally insane from the present phrasing of "not guilty because insane" to the verdict of "guilty, but insane," as in the English law, was urged by John Brooks Leavitt, Chairman of the Committee on Proposed Legislation Relative to the Commitment and Discharge of the Criminal Insane. No action was taken on the report other than to authorize the committee to confer with committees of other associations as to whether the existing law needs change.

The Committee on Salaries of Federal Judges reasserted its recommendation of last year in favor of increasing the pay of such judges. The committee characterized the present pay as grossly inadequate, and several members pointed out that Congress itself had twice in recent years to be called upon to provide financially for the widows and children of dead Supreme Court Justices.

Among the resolutions adopted was one embodying the appointment of a committee to investigate and tabulate the records of judges on the bench in New York — as to hours spent on the bench, the number of jury cases heard, the number of cases decided without juries, the percentage of convictions or judgments as compared to dismissals. The resolution was amended to include the percentage of reversals, and then adopted.

The Committee on the Amendments of the Law in Respect to the Registration of Titles also submitted its report.

THE ANNUAL BANQUET

The annual dinner was held at the Waldorf-Astoria on Saturday evening. Senator Root presided, and President Taft was the last speaker.

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President Taft said: "We are approaching a crisis in this country. We need the bar, and we needed the bar when our government was founded. If we are the handmaids of justice, then it falls upon us to defend our institutions when they are in danger." He then referred to the danger of making our Constitution "a mere liquid thing," and to the recall of the judiciary. The President also said that to avert the harm of the people being misled, "you members of the profession should speak the truth that is in you and give the reasons for the truth that is in you."

Other speakers at the banquet were Presiding Justice Almet F. Jenks of the Appellate Division of the second department, Ambassador Jean T. Jusserand, and Robert C. Smith, K.C., of Montreal.

The officers elected for the coming year are as follows:—

President, William Nottingham of Syracuse; Vice-Presidents, William G. Choate, James D. Bell, D. Cady Herrick, Francis A. Smith, Jerome L. Cheney, Michael H. Kiley, Richard E. White, Franklin D. Locke, and John F. Brennan; Secretary, Frederick E. Wadhams, and Treasurer, Albert Hessberg.

Reviews of Books

STIMSON'S LAW DICTIONARY

A Concise Law Dictionary of Words, Phrases and Maxims; with an explanatory list of abbreviations used in law books. By Frederic Jesup Stimson, Professor of Comparative Legislation in Harvard University. Revised edition, by Harvey Cortlandt Voorhees of the Boston bar, author of "The Law of Arrest in Civil and Criminal Actions." Little, Brown & Co., Boston. Pp. 346. ($3 *net*.)

IN marked contrast with the encyclopedic law dictionaries of which we have so many, Professor Stimson's short work, correctly described as a glossary of law terms, is marked by a condensation which at first savors of incompleteness. Examination will show, however, that the vocabulary is very full, and probably as complete as one would desire, in spite of the brevity of the definitions. The strength of the original edition of 1881 lay in its skillful explanation and translation of Saxon, Latin, and French terms, giving the book a scholarly stamp. The reviser has added nearly two thousand additional words, and he has done his work well. The dictionary will be of the greatest use to law students and law stenographers, but the lawyer himself will often turn to it with profit to refresh his memory, and for some purposes it will obviously serve him quite as well as a bulkier work.

HALL'S CONSTITUTIONAL LAW

Constitutional Law. By James Parker Hall, A.B., LL.B., Professor of Law and Dean of Law School, University of Chicago. LaSalle Extension University, Chicago. Pp. xiv, 375 + 82 (appendices and index). ($3 *net*.)

THIS work is designed for the general student and general reader rather than for the law student, and is evidently intended to be used in university extension classes. Whatever may have been the intention, the book is manifestly well suited to those beginning the study of the law of the United States Constitution, and in need of a clear, rapid, logical survey of fundamental principles, conducted in a manner as little technical as possible. The author has done his work conscientiously, and his plan is commendable, owing to the lucidity

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with which he sets forth principles in the light of their historical origin. If the law shall soon come to occupy a more important place in a liberal education, as we hope it will, Professor Hall's is an exemplary type of the sort of legal text-book for which new methods of university instruction may eventually create a powerful demand.

THE LAW IN SHAKSPERE

Commentaries on the Law in Shakspere; with explanations of the legal terms used in the plays, poems and sonnets, and discussions of the criminal types presented. By Edward J. White, editor 3d edition of Tiedeman on Real Property, author of Mines and Mining Remedies, Personal Injuries in Mines, Personal Injuries on Railroads, etc. F. H. Thomas Law Book Co., St. Louis. Pp. xviii, 512 + 12 (index). ($3.50 delivered.)

THE lawyer who loves his Shakspere will get more pleasure than anyone else from this elucidation of the legal side of the Shaksperian plays. He will relish a book which assembles quotations relating to a given legal topic, and which clears up the meaning of obscure points — the average lawyer, for example, does not know that in the phrase "quillets of the law," *quillet* is probably a contraction of *quodlibet*, and there are other terms which can be understood only in the light of legal history. The author draws on a fund of many-sided information which does credit to the fullness of his knowledge and industry. At the same time, the book contains some inaccuracies of quotation, and the explanations are sometimes somewhat verbose. The work has the merit of advancing beyond tradition in its interpretations of meanings otherwise explained by Shaksperian scholars, but too high a critical standard must not be claimed for it — some of the opinions expressed are not altogether satisfactory. It has the merit, however, of treating the legal aspect of the plays more fully, probably, than has ever been attempted before.

STOREY'S REFORM OF LEGAL PROCEDURE

The Reform of Legal Procedure. By Moorfield Storey. Yale University Press, New Haven; Oxford University Press, London. Pp. 256 + 7 (index). ($1.35 *net*.)

MR. STOREY, than whom no one occupies a position of higher esteem in the hearts of Boston lawyers, and who is an ex-President of the American Bar Association, delivered the substance of this book in the form of lectures at the Yale Law School in 1911. It is a readable little volume, setting forth the problem of the law's delays in a manner intelligible to the lay reader. The book discusses the evil, and the general means of remedying it, instead of addressing it solely to the task of outlining a definite program of reform. It deals largely in generalities, owing probably to the untrained audience for whom it was prepared, and the writer's technical knowledge and ripe experience at the bar bear fruit only in some broad observations. Much stress is laid, however, on the need of a higher standard of professional ethics, of a bench more carefully chosen and wielding greater power, and of more competent legislation on subjects connected with the administration of the law.

SARCASTIC REFLECTIONS

Reflections of a Lawyer. By Morris Salem, of the N w York bar. Published by the author. (50 cts.)

SO many topics are covered by Mr. Salem's reflections that his brochure has a miscellaneous character, and an informality and variety which appeal to the interest of the reader. The matter is all drawn from the experience of a New York lawyer, and there are some rather cynical comments on actual conditions in the author's field of practice. There are some criticisms which will be heartily approved by those who desire to see an improvement in the

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conditions of professional practice; but there are other observations which seem rather too embittered and not thoroughly candid. This attitude prevents the author from being a wholly trustworthy mentor on questions of professional ethics. The book, however, is enlivened by real wit of a sarcastic order, and sarcasm, when it is as keen as in this case, is one of the most potent and persuasive forms of criticism.

NOTES

"The Constitutions of Ohio," edited by Prof. Issac Franklin Patterson, is of interest in connection with this year's constitutional convention in that state. The full text of the two active and one proposed constitutions, of all amendments and proposed amendments, and of other fundamental documents necessary to an intelligent understanding of the constitutional status of the state, has been included. (Arthur H. Clark Co., Cleveland, O., $3 *net.*)

The Library of Congress has issued a tentative schedule of Headings and Cross-references for a Subject Catalogue of American and English Law, for the use of law librarians. The scheme, prepared under the direction of Edwin M. Borchard, Law Librarian of Congress, is designed for use in the Law Library of Congress and the Supreme Court, but the opinion is rightly expressed that it may be useful to other libraries. The scheme is inclusive and flexible, and seems likely to be adopted to any large law library.

The Outlook's series of articles on the subject, "What's the Matter with Business?" reflected the non-partisan views of leading men whose criticisms of the policy of the Government in dealing with corporations and the tariff are valuable. Mr. Roosevelt's articles on leading issues of the day continue to make this magazine one of vital interest and weight. The admirable editorial policy of *The Outlook* makes it pre-eminently a magazine for publicists. And the lawyer who aims to be worthy of what is best in his profession has to be somewhat of a publicist as well as lawyer.

The Report of the twenty-third annual meeting of the Virginia State Bar Association, held at Hot Springs, Va., August 8–11, 1911, contains: the annual address by the president of the Association, Judge George L. Christian of Richmond, on "Roger Brooke Taney"; "Centralization *vs.* Decentralization," by Prof. R. C. Minor; "The Life and Character of Lord Brougham," by A. W. Wallace of Fredericksburg; "Abolition of Jury Trials in Civil Cases," by Walter H. Taylor of Norfolk; and "Progress Toward a Permanent International Court," by Hon. Helm Bruce of Louisville.

George H. Hull, whose book on "Industrial Depressions" has lately been published by F. A. Stokes Co., was the leader in bringing the American Warehousemen's Association to an agreement with the American Bar Association and the American Bankers' Association, on the uniform Warehouse Receipts Act. Working both with the warehousemen and the others, he showed that a law which would secure perfect protection for the banks in dealing with warehouse securities would also increase the warehouse business enormously. Throughout the conference on the form of the law, Mr. Hull was perhaps the most ardent supporter of Professor Williston, who had drafted it.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

Classics of the Bar: Stories of the World's Great Jury Trials and a Compilation of Forensic Masterpieces. V. 2. By Alvin V. Sellers. Classic Publishing Co., Baxley, Ga. Pp. 321. ($2.)

Claims: Fixing Their Values. By George F. Deiser, A.B., LL.B., of the Philadelphia bar, and Frederick W. Johnson, formerly Assistant General Claim Agent. McGraw-Hill Book Co., New York and London. Pp. 140+18 (index). ($2 *net.*)

A Retrospect of Forty Years (1825–1865). By William Allen Butler. Edited by his daughter, Harriet Allen Butler. With portraits and illustrations. Charles Scribner's Sons, New York. Pp. xviii, 388+52 (appendix and index).

The Law of Personal Injuries, and incidentally Damage to Property by Railway Trains; based on the statutes and decisions of the Supreme Court and of the Court of Appeals of Georgia. By John L. Hopkins. Revised and enlarged edition, 2 v. Harrison Co., Atlanta, Ga. V. 1, pp. xvi, 772; v. 2, pp. xv, 644+68 (table of cases) +58 (index). ($12 *net.*)

A Digest of English Civil Law. Edited by Edward Jenks, M.A., B.C.L., of the Middle Temple, Principal and Director of Legal Studies of the Law Society, formerly Fellow of King's College, Cambridge. Book III, Law of Property. By Edward Jenks. Butterworth & Co., London; Boston Book Co., Boston. Pp. xlii, 122+9 (index). ($1.25 *net.*)

International Arbitration and Procedure. By Robert C. Morris, D.C.L., of the New York bar, counsel for the United States before the United States and Venezuelan arbitration of 1903, lecturer on international arbitration and procedure at Yale Law School, 1904–1911, counsel to the American Peace and Arbitration League. Yale University Press, New Haven; Oxford University Press, London. Pp. 178+60 (appendix and index). ($1.35 *net.*)

The Law of Criminal Libel; a treatise on libel as a Criminal Offense, embracing the substantive law and the procedure and practice in prosecutions by criminal information and indictment at common law and under the Canadian Criminal Code. By John King, M.A., K.C., of Osgoode Hall, Toronto, lecturer to the Law Society of Upper Canada, author of "The Law of Defamation in Canada," "The Law of Contempt," editor of the Canadian cases in the Cyclopedia of Law and Procedure, etc. Carswell Co., Ltd., Toronto. Pp. xxiii, 381 + 18 (index). ($5.)

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Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Criminal Law. "The Public Defender: The Complement of the District Attorney." By Robert Ferrari. 2 *Journal of Criminal Law and Criminology* 704 (Jan.).

The author makes an unusually forceful and persuasive plea for the installation of the public defender.

"The establishment of a public defender's office would bring about splendid results, humanitarian and financial. There would be less delay in the trial of a case; prisoners would remain in jail a shorter time, and out on bail during a shorter period of torture. This for the benefit of both guilty and innocent. But the innocent would regain their liberty sooner and the guilty would be convicted sooner. Both would get a fair trial, and the thousand and one complaints now heard would vanish into thin air. From the point of view of the community it would be advantageous because justice would be less expensive to measure out, since smaller delays, shorter trials would be the rule; and the expedition, the certainty and the fairness with which the law worked would breed a higher respect for law."

The question, in our judgment, is one solely of ways and means. There is no question of principle. The accused should be afforded the same protection by the state as the accuser; the activity of the state should seek ,not to convict, but to do justice. If the instrumentality of the public defender is not the best means of realizing this principle, what other method is available?

Child Labor. "The Twentieth Child." By Rheta Childe Dorr. *Hampton-Columbian*, v. 27, p. 793 (Jan.).

"In all the Northern states the employment of children under fourteen in factories, mills or mercantile establishments is forbidden. Their employment at fourteen, in most states, is conditional on their ability to read and write. . . . The Southern states lag behind, although in every state some kind of child labor legislation has been fought through the legislature. . . . The usual age for beginning work — legally — in the South is twelve."

Constitutionality of Statutes. "The Alleged Usurpation of Power by the Federal Courts." By James B. McDonough. 46 *American Law Review* 45 (Jan.–Feb.).

The author's contention is that no power has been usurped in deciding acts of Congress void.

Conveyances. "Buying a Piece of Land." By Edward W. Faith. 46 *American Law Review* 60 (Jan.–Feb.)

Pointing out defects in laws relating to purchase of real estate, which defects may be remedied by legislation.

Corporations. "The United States Steel Corporation." By Edward Porritt. *Quarterly Review*, v. 216, no. 430, p. 177 (Jan.).

An historical account of the United States Steel Corporation, of interest mainly as a thoroughgoing statement of facts.

See Wills.

Covenants. See Monopolies.

Criminal Procedure. See Administration of Criminal Law.

Criminology. "Lombroso's Theory of Crime." By Charles A. Ellwood. 2 *Journal of Criminal Law and Criminology* 716 (Jan.).

"Lombroso's theory of crime was a completely biological theory, into which, especially in the later years of his life, he attempted to incorporate the social and psychological factors which are also maifestly concerned in production of crime. Lombroso believed, in other words, that the criminal was essentially an organic anomaly, partly pathological and partly atavistic. The social causes of crime were at most, according to Lombroso, simply the stimuli which called forth the organic and psychical abnormalities of the individual. While the removal of the social causes of crime constitutes the immediate practical problem before criminologists, according to Lombroso, because they are the exciting causes, yet the ultimate roots of crime lie in the atavistic and degenerate heredity of the born criminal and the criminaloid, and only the extirpation of these ultimate sources of criminality can afford a final solution of the problem of crime.

"In this organic or biological view of crime, Lombroso was, of course, in harmony with that biological monism which characterized much of the thought of the latter years of the nineteenth century. The psychological and social defects of the criminal are traced by Lombroso in every case to organic causes."

See Penology.

Direct Government. "Judges and Progress." By Theodore Roosevelt. *Outlook*, v. 100, p. 40 (Jan. 6).

"When I was President . . . Mr. William H. Moody, afterwards Justice of the Supreme Court, . . . called my attention to the first essay in Professor Thayer's book of 'Legal Essays' on 'The Origin and Scope of the American Doctrine of Constitutional Law.' Nowhere else is there a clearer statement both of the advantage of conferring upon the courts the power that they possess under our system and also of the further fact that unless that power is wisely exercised it must inevitably be restrained. It is, I believe, an advantage to have fixed in the Court the power to state that a legislative act is unconstitutional; but only provided that the power is exercised with the greatest wisdom and self-restraint. If the courts continue to use it

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with the recklessness that has too often been shown in the past, it is also inevitable that efforts will be made to amend or abolish it."

English Law. "The Value of Modern English Decisions to the American Lawyer." By Edwin S. Oakes. *Case & Comment*, v. 18, p. 438 (Jan.).

"This, then, is the practical value of modern English case law to the American lawyer, that it furnishes him with an interpretation of the common law in the light of modern conditions, to which his courts lend an attentive ear; that it points the way to the solution of the novel questions that are the outcome of these conditions; that it is constantly dealing with the same questions as are arising in his own courts; that it aids in, and sometimes controls, the construction to be placed upon borrowed legislation; and last, but not least, more than giving him mere decisions, it helps him to attain that wider horizon and comprehensive grasp of principle which distinguishes the well-equipped lawyer from the shallow empiricist."

A feature of this article is the valuable citations of parallel English and American decisions covering similar points of law.

Evidence. See Expert Testimony, Procedure.

Expert Testimony. "Expert Testimony." By Albert S. Osborn, author of "Questioned Documents." *Fair Play* (New York), v. 1, p. 11 (Jan. 13).

Mr. Osborn proposes that Official Expert Witnesses shall be appointed by the Courts, to serve for ten years, who may be designated to act for the state or for either party in any trial, and whose fees when paid by the state shall be determined by the presiding judge.

"Such a law would put the reform entirely into the hands of the courts and would certainly lessen some of the abuses. It would attract good men, if they were well paid, and would tend to clip the wings of the pretenders. There are those who would bring about reform by making all experts testify for merely nominal fees; the truth is that the good men are not paid enough, and the fakirs are paid too much if paid anything."

General Jurisprudence. "Democracy and the Common Law." By Roscoe Pound. *Case & Comment*, v. 18, p. 447 (Jan.).

"Jurists of the eighteenth century believed that there were first principles of law inherent in nature, and that these principles were discoverable by deduction as necessary results of human nature. They conceived it to be their task to discover these principles, to deduce a system from them, and to test all actual legal rules by them. But, as has always been true when men have held absolute theories of this sort, the supposed principles flowed in practice from one of two sources. On social, economic, and ethical questions, nature was always found to dictate the personal views of the individual jurist as they had been fixed by education, class interest, and association with others of his class. On legal questions, nature was found to dictate for the most part the principles of law with which the individual jurist was familiar and under which he had grown up. Thus, for the Continental jurist, natural law meant for the most part an ideal development of the principles of the Roman law, which he knew and studied; for the common-law lawyer, in the same way, it meant an ideal development of the principles of the common law. The past generation of lawyers, brought up on Blackstone, learned this mode of thinking as part of the rudiments of legal education. More recently, our historical legal scholarship, assuming that all of our legal system is at least implicit in the reports of the sixteenth and seventeenth centuries, if not in the Year Books, has given us a natural law upon historical premises. Hence scholar and lawyer concurred in what became a thoroughgoing conviction of the nineteenth century lawyer, that at least the principal dogmas of the common law were of universal validity and were established by nature. . . .

"We may have confidence . . . that the common-law ideas of making and applying law, and of the supremacy of law will prevail in the end. But we must not hope to save the absolute theory of law, the theory that the main rules and dogmas of ninteenth-century American common law have been intrenched in our institutions, or are ordained by nature. Such a theory, and it has been maintained and put in force too often in the immediate past, is comparable only to the stout resistance of Coke to the rise of the court of chancery, and the proposition of Holt to the law merchant. Unhappily like notions of finality have been held by some of the great lawyers of all times, in periods of growth. Nor have such notions been confined to the conservative lawyer. It is impressive to recollect that Thomas Jefferson stood for limiting the reception of the common law to the first year of George III, because it would 'rid us of Mansfield's innovations!' Happily the common law has always proved too vital to be confined by such theories. Much as we are bound to resist the attempts to deprive our courts of what little independence remains to them, and to make them mouthpieces of the will of the majority for the time being, instead of oracles of reason, we must likewise oppose the notion of finality, the idea that the main dictates of legal reason for all time have been set forth fully and completely, leaving to us but a few dry details of application wherever we encounter it. The common law is in quite as much danger from the latter as from the former."

Gifts. "How Far Interests Limited to Take Effect 'When Debts are Paid' or 'An Estate Settled' or a 'Trust Executed and Performed' are Void for Remoteness." By Albert M. Kales. 6 *Illinois Law Review* 373 (Jan.).

When gifts in this form are void for remoteness is discussed, with some important distinctions which preclude a simple solution of the problem presented.

Government. "The Constitutional History of Canada." By Justice William Renwick

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Riddell. 46 *American Law Review* 24 (Jan.–Feb.).

"It is plain, I venture to think, that those who framed the Constitution of the United States had not that perfect trust in the wisdom of their people and their descendants of which we so often hear. . . . Using the word 'constitution' in the sense in which it is used in the United States, the constitution of Canada may be described by a parody of the famous chapter on the snakes of Ireland, 'There are no snakes in Ireland.' Our constitution is not only in theory, but also in fact similar in principle to that of the United Kingdom, and there parliament can do anything that is not naturally impossible."

See Direct Government, Legal History.

Interstate Commerce. "The Right to Engage in Interstate Transportation, etc." By Frederick H. Cooke. 21 *Yale Law Journal* 207 (Jan.).

"Most lawyers would doubtless be considerably surprised at an intimation that there is any doubt of the soundness of the proposition that a foreign corporation, railroad or other, may, under any conditions, without the permission or against the will of a state, exercise the privilege of eminent domain within its territory. And, as a matter of authority, this proposition does seem fairly well established, even as applied to a corporation engaged in interstate transportation. Indeed the point seems to have usually been regarded as too obvious to require extended discussion.

International Law. "Report of the Committee on International Law of the American Bar Association." By Charles Noble Gregory. 21 *Yale Law Journal* 193 (Jan.).

The report makes this sole observation on the question of the pending treaties with Great Britain and France: "The proposed treaties have met with official and popular approval upon both sides of the Atlantic, and like treaties with Germany and Japan are mentioned as more than probable."

International Law of War. "The Moslem International Law." By Syed H. R. Abdul Majid. 28 *Law Quarterly Review* 89 (Jan.).

"Compared with some of the war practices of the contemporary Franks, those of the Saracens were most merciful. Conquered monarchs, such as Kahine of Barbary or Dastaro of Sind, were indeed put to death; rebels were cruelly handled, beheaded or impaled; but such harsh sentences were confined to important personages, the general mass of the people being treated by the Saracens with peculiar mildness. The heavier 'contribution of blood' or ransom from the sword was exacted only when terms for peaceful settlement were refused, and slaughter was resorted to only when actual forcible resistance was offered."

"Article 23 (*h*) of Hague Convention, No. IV of 1907." By T. E. Holland. 28 *Law Quarterly Review* 94 (Jan.).

The clause prohibits the commander of an invading force "de déclarer éteintes, suspendues, ou non recevables en justice les réclamations privées des ressortissants de la Partie adverse." Continental writers place a much broader construction than the British Government and Judge-Advocate General Davis on this clause. Professor Holland favors its suppression from the Règlement as void for unintelligibility.

Legal History. "The History of Majority Rule." By Th. Baty, LL.D. *Quarterly Review* v. 216, no. 430, p. 1 (Jan.).

"The most rational and direct explanation of its rise is that like other superstitions it was cradled in uncritical carelessness, and brought to its modern pitch of luxuriant rankness through indolence. Never deliberately or of set purpose adopted as a political principle, it has drifted into a casual acceptance through loose political thinking."

"The Reception of Roman Law in the Sixteenth Century, II." By W. S. Holdsworth. 28 *Law Quarterly Review* 39 (Jan.).

"France, in the *pays des coutumes*, and England, retained their old customary law. But it was not pure customary law. In both cases the customs had been reshaped and restated by men who had come under the influence of the school of Bologna. This reshaping and restatement saved them from destruction. They were made at once more precise and more complete, and therefore more capable of continuing to guide the life of a changing state. In the thirteenth century the influence of Roman law upon English law and upon the analogous French customary law was not dissimilar. Bracton and Beaumanoir could have read and appreciated one another's books. But after the thirteenth century the two countries went their several ways. While the French customary law continued to be administered by lawyers of the type of Bracton, the English common law was shaped by men whose legal training was of a very different kind. Thus all through the fourteenth and fifteenth centuries the French customary law experienced a gradual infiltration of Roman principles and Roman ideas — 'an intelligent Reception.' . . . It is for this reason that English lawyers from the thirteenth century onwards have been inclined to exaggerate the prevalence of Roman law on the Continent. Our law is so un-Roman, our minds are so unaccustomed to the concepts of Roman law, that we can with difficulty distinguish varying shades and gradations in the extent of the Reception which the different countries of Western Europe experienced."

A third instalment is to follow.

"King John and Magna Carta." By Hon. U. M. Rose. *Case & Comment*, v. 18, p. 429 (Jan.).

"The various bills and petitions of right, and the habeas corpus act, while they have given new sanctions to liberty, are but echoes of the Great Charter; and our Declaration of Independence is but the Magna Carta writ large, and expanded to meet the wants of a new generation of free-

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men, fighting the battle of life beneath other skies."

"Benefit of Clergy." By Edward T. White. 46 *American Law Review* 78 (Jan.–Feb.).

"There is no doubt but what the benefit of clergy bred much crime and operated, for centuries, as a great impediment in the impartial enforcement of the criminal laws of England and the United States."

See International Law of War.

McNamara Case. "The McNamara Sentence Justified." By Francis J. Heney. 2 *Journal of Criminal Law and Criminology* 731 (Jan.).

"The action of District Attorney Fredericks and Judge Bordwell was right, because the aim of the criminal law ought to be and is to promote and secure the general welfare of organized society and because the pleas of guilty by the McNamaras, with the swift and mercifully moderate punishment which followed, are better calculated to promote and secure that general welfare than long drawn out trials, with the attendant and inevitable evils which I have described, could possibly have done."

See Professional Ethics.

Mining. "Changes in the Illinois Mining Law." By J. E. Thomas. 6 *Illinois Law Review* 395 (Jan.).

The statute of 1911 has made some radical changes, which are here pointed out.

Monopolies. "*Tulk* v. *Moxhay* and Chattels." By James Edward Hogg. 28 *Law Quarterly Review* 73 (Jan.).

"The case of *McGruther* v. *Pitcher* (2 Ch. 306, 1904) must, apparently, be taken as establishing an exception to the general rule, laid down in *National Phonograph Co. of Australia* v. *Menck* [23 *Green Bag* 596], that a purchaser of patented articles is bound by restrictive conditions imposed by the owners of the patent rights when he purchases with notice of those conditions. The exception appears to be expressed in the proposition that it is only the patentee who can enforce observance of restrictive conditions, and that a licensee from him cannot do so.

"Subject to this exception, then, the benefits of the doctrine laid down in *Tulk* v. *Moxhay* (2 Ph. 774, 78 R. R. 289) with respect to land have been obtained for the owners of patent rights with respect to chattels produced under the patent-grant, though the juridical theory on which these rest is not the theory of *Tulk* v. *Moxhay*."

A closely related phase of this subject is also discussed in: —

"Patented Articles: When are they Emancipated from the Patent Monopoly under which they are Manufactured?" By Walter H. Chamberlin. 6 *Illinois Law Review* 357 (Jan.).

"If this price restriction cannot be enforced under patent authority it is, under the statutes of many states, and, in my opinion, at the common law, illegal, and the public are being forced to pay exorbitant prices for articles, the retail selling price of which would be materially reduced under natural and healthful competition if unrestricted by false doctrines concerning patent monopolies."

"The Enforcement of the Anti-trust Law." By Attorney-General George W. Wickersham. *Century*, v. 83, p. 616 (Feb.).

"It has been proposed — and the President has stated that he sees no objection to it — that the law might be supplemented by specifying some of the specific acts which have been adjudged by the courts to be embraced in the phrase 'undue restraint of interstate trade,' in order that merchants may have before them in codified form a clear enumeration of certain things they may not do, and be thus relieved of the so-called 'glittering generality' of the statute. The difficulty of carrying out this suggestion will be found when the draftsman comes to write such a statute. I am inclined to think that formulating the various kinds of unfair trade and undue restraints of trade which would properly be included in such a statute will add little new to the popular understanding of the meaning of the Sherman act, although, as the President suggests in his message, it may result in shortening the task of the prosecuting officers of the Government."

Patents. See Monopolies.

Penology. "The State's Authority to Punish Crime." By Harald Höffding. 2 *Journal of Criminal Law and Criminology* 691 (Jan.).

"The theory of education and the deterrent theory are both directed to the end which must necessarily be aimed at in relation to transgressors of the law. Both must be united in a perfect theory of punishment. The punishment will then at once be effective in changing the character of him who is punished and be an example of the fact that the rules of law must not be broken. The individual who is punished will thus appear at once as end and as means. To carry out such a conception there will certainly be needed an art and a knowledge of human nature which is not yet at our disposal. It is only in more recent years that we have begun to study prisoners and imprisonment in a scientific way. But *the decisive standard for the perfection or imperfection of the essence of punishment will yet be obtained from the degree in which success has been reached in combining education and determent.*"

Pleading. See Procedure.

Police Administration. "The Boston Police Department." By George H. McCaffrey. 2 *Journal of Criminal Law and Criminology* 672 (Jan.).

Valuable not simply as a study of a local situation, but for the light thrown on the general subject by comparison with approved standards, by criticism of defects elsewhere overcome, and by the proposal of remedies suggested by the experience of other great cities.

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Practice. "The Trial of Cases in Pennsylvania." By Henry B. Patton. 60 *Univ. of Pa. Law Review* 224 (Jan.).

Deals with exceptions, nonsuit, points for charge, closing addresses, charge of the Court, the record, the jury, verdict, new trial, etc.

Procedure. "Continental and Common Law Procedure Contrasted — An Interesting Sidelight on Reform in Pleading and Practice." By Axel Teisen. 74 *Central Law Journal* 22 (Jan. 12, 45 (Jan. 19).

The German jurist whose opinions are aired in this report of a dialogue supposed to have taken place in a Philadelphia club thus expresses himself on the subject of the "free theory of proof": —

"If justice, substantial justice is the object of the civil courts, it follows that the procedure must be made as simple as possible, so that it does not become a game where the most tricky has the best chance to win. If this is the *raison d'être* for civil tribunals, it follows that a civil trial is not war, but its negation. If a civil case is a peaceful arbitration and not a war measure, it follows again that you must leave to the parties the absolute right of disposition over their case, leave them to present it and prove it in their own way, reserving to the court, after the evidence has all been put before it, to decide whether it does prove what it was intended to do. . . .

"There must, of course, always be some rules for the manner of introducing evidence, mainly amounting to this, that when you have once commenced you must, under all ordinary circumstances, continue until you have all the evidence in which you expect to produce, and cannot be allowed later to introduce other evidence which you might as well have produced in the first instance; this will not prevent the taking of evidence in *perpetuam rei memoriam*, or the introduction of later discovered evidence, under proper safeguards. But all your rules for laying a foundation for evidence may be discarded; it is left to yourself, and to your own logic and judgment in what order you desire to produce your evidence. . . .

"I have the greatest admiration for your system of civil procedure as a complete structure, for the tremendous amount of learning, keenness of thought and ingenuity collected therein; also for the invaluable services that system has, in times past, given to the Anglo-Saxon race and indirectly to all mankind. But my admiration is rather of an architectural nature, if I may use the expression. . . . The better a thing is done in the beginning, the better chance it has to survive for a long time, and if very excellently done, it even has a chance to survive its own usefulness. This, I am afraid, is what has happened to your system of civil procedure."

"The Problem of Reforming Procedure." By Henry Upson Sims. 21 *Yale Law Journal* 215 (Jan.).

"The nature of a suit at law and that of a suit in equity are essentially different. And that is another fundamental principle which has been overlooked by many advocates of a uniform procedure. To accomplish by the enactment of a statute 'the abolition of the distinction between actions at law and suits in equity,' and at the same time to retain our English system of law is as impossible as to abolish by statute the points of the compass."

This article should be read because of its learned review of the history of forms of pleading and the various attempts to reform them.

Professional Ethics. "The Limits of Counsel's Legitimate Defense." By Dean John H. Wigmore. 2 *Journal of Criminal Law and Criminology* 663 (Jan.).

"Theoretically, the accused's counsel acts to secure a fair trial for his client, and therefore to free the latter if he is innocent. Practically we know that the regular criminal practitioner fights to free his client, guilty or innocent. There is here no discrimination between the rich or the poor offender, the hitherto respectable or the hitherto under-world man — the Hines and Walshes, or the McNamaras and Ruefs. Their counsel fights to the last ditch. Can the law and the community afford to permit this? Is there no way of putting a limit on it? For it is surely breaking down our system of criminal justice. It tends to foster the technicality so much censured. It forces the state prosecutor to fight equally without scruple. It drives almost all honorable lawyers out of a field where duty calls them and the community needs them. It is one of the most repulsive features of our present system.

"Is there no relief? Must we wait for a new generation slowly to bring a radical change of thought and custom? Will the institution of a state defender (to oppose the state prosecutor) furnish a speedier solution? These are troublesome questions which must be answered before long."

Referring to his course in the McNamara case, Clarence Darrow said, "The boys are *not murderers at heart;* they thought they were just fighting a battle between capital and labor."

Dean Wigmore pertinently observes: "What the public now needs to know plainly is, whether there is any lawyer or class of lawyers, now allowed in our courts, who sympathize sincerely with this thug doctrine and will do anything to save its followers. Let us air this whole issue before public opinion. Let Clarence Darrow, or any one else who believes it, avow it and defend it. If our criminal system is being administered today by an appreciable number of able and intelligent lawyers who hold that view, let us all know it. Public opinion will then take a hand and settle the issue. If it can stand that doctrine, so be it. If the public verdict repudiates it, then let some measure be taken for eliminating its adherents from the ranks of the bar, and for making the defense of accused persons an occupation consistent with self-respect and the service of justice."

Public Officers. "Recovery of Salary by a *De Facto* Officer, I." By Gordon Stoner. 10 *Michigan Law Review* 178 (Jan.).

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The rule allowing the incumbent of an office without legal right to recover the salary of the office, even in the absence of another claimant, is not based upon the *de facto* doctrine, this writer considers, except in the minds of judges who have misunderstood the term "*de facto* officer," this term being applied, not to the officer because of the manner of his appointment, but to the legal character of his acts for the purpose of validating them.

Questioned Documents. See Expert Testimony.

Real Property. "The Running with the Land of Agreements to Pay for a Portion of the Cost of Party-Walls." By Ralph W. Aigler. 10 *Michigan Law Review* 187 (Jan.).

A thorough discussion, covering the subjects by states, the author concluding that "in by far the greater number of states it is held that the covenants may properly be classed as running covenants."

See Conveyances, Torrens System.

Religious Freedom. "The Law is the United States in its Relation to Religion." By Edwin C. Goddard. 10 *Michigan Law Review* 161 (Jan.).

"It has, in some of the states, been held that Christianity is part of our common law. We have already said enough to make it clear that in many ways our common law presupposes Christianity, but it must be clearly obvious that it is only in a very limited sense that Christianity can be said to be a part of our common law.

"It was doubtless the common law of England, but it is not a part of the English law which we have brought over and adopted as our own. Not to Christianity alone, but to Mohammedanism, Brahmanism, Confucianism as well, liberty of religious opinion and of worship are guaranteed. Upon this one limitation must be noted. It is only opinions that by the Constitution are placed wholly beyond legislative control. As Chief Justice Waite in a leading case [*Reynolds* v. *U. S.*, 98 U. S. 162] expressed it: 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.' "

Roman Law. See Legal History.

Torrens System. "The Land Transfer Report." II. By Eustace J. Harvey. 28 *Law Quarterly Review* 26 (Jan.).

"In preference, then, to the Commissioners' programme, certain measures are here recommended, most of which could be effected without legislation. The first thing is to put possessory, or non-guaranteed, registration on a sound basis. . . . The next requisite is to definitely settle what is to be the form of the register and how the subsequent dealings are to be effected."

"The Report of the Land Transfer Commissioners." By Charles Sweet. 28 *Law Quarterly Review* 6 (Jan.).

"The most valuable part of the Land Transfer Report, in the humble opinion of the present writer, is that in which the Commissioners recognize the advantage of a proper system of registration of deeds, coupled with the simplification of the law of real property, as a reform which might be introduced at once, and applied to the whole of England."

See Conveyances.

Torts. "Principles of Liability for Interference with Trade, Profession, or Calling, III." By Sarat Chandra Basak. 28 *Law Quarterly Review* 52 (Jan.).

"Shortly stated, the view of Professor Ames is to establish a general proposition that willfully to damage another by a positive act and from a spirit of malevolence' is a ground of action. But just as Lords Watson and Herschell, who belong to the opposite school, were obliged in *Allen* v. *Flood* [A. C. 1, 1898] to allow exceptions in the cases of malicious prosecution and libel on privileged occasions, so does Professor Ames pray in aid a variety of rules, namely, the doctrine of public policy and theory of absolute legal right, to explain away those cases where the inefficacy of wrongful motive in the formation of liability has been finally established in courts. . . . We venture to think, however, with all respect to the great English judges on the one hand, and Professor Ames and those who maintain similar views with him on the other, that there is a more satisfactory point from which the effect of malice in the popular sense may be viewed in determining the grounds of liability."

Waters. "Stream-Water Rights in Illinois." By Elmer M. Liessmann. 6 *Illinois Law Review* 382 (Jan.).

Examining the rights of riparian owners and the legal rules governing the uses of the water of streams.

Wills. "Rights of Life Tenants and Remaindermen in Corporate Distributions." By Hon. Alexander W. Smith. 21 *Yale Law Journal* 181 (Jan.).

"Whatever of confusion is noticeable in the decisions of the courts may be traced to their failure always to bear in mind that the stockholder has no title to the assets of his corporation. The corporation, as a separate entity and a legally living person, not only owns its assets, but, within the bounds of good faith and in the exercise of business discretion ascertained and expressed through the media of its charter and by-laws, has absolute power to dictate whether they shall be permanently capitalized or periodically distributed. If a minority only short of a majority is without power to control such action, much less can a single stockholder through the instrumentality of his will effect such a result."

See Gifts.

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Miscellaneous Articles of Interest to the Legal Profession

American Traits. "The Middle West: I, The Fibre of the People." By Prof. Edward A. Ross. *Century*, v. 83, p. 609 (Feb.).

"'Do you note any difference,' I asked a Western man in the service of a New England state, 'between your people and the people here?' 'Yes,' he replied, 'My own people look at life in a big way. They are more willing to co-operate, more generous in supporting things for the general good, more ready to use the state government to serve their common needs. The folks here lack the *we*-feeling. An intense parochialism keeps them jealous of their state government, and a suspicious individualism hinders them from working together for their common benefit. In many directions I see their narrow-mindedness and mistrust of one another holding them back from prosperity.'"

Biography. "James Iredell: Lawyer, Statesman, Judge, 1751–1799." By Federal Judge H. G. Connor, 60 *Univ. of Pa. L. Rev.* 225 (Jan.).

"His early death cut short a career on the bench full of promise of enlarging scope and usefulness. That he would have continued to develop his high judicial qualities and, if permitted, shared with the 'Great Chief Justice' the work of laying deep and strong the foundations of American constitutional law cannot be doubted."

"Roger Brooke Taney." By George L. Christian. 46 *American Law Review* 1 (Jan.–Feb.).

"Roger Brooke Taney was a great man and a great judge, a brave and true patriot who dared to do his duty as he saw it in the most trying and perilous period of his country's history."

Tariff. "What's the Matter with Business?" II. The Views of Leslie M. Shaw." By Francis E. Leupp. *Outlook*, v. 100, p. 29 (Jan. 6).

"A tariff which measures the difference in the cost of production . . . is not free trade, nor is it protection; it is competition. Children in the eighth grade know that if it costs one dollar to make an article in the United States which Germany can make for seventy-five cents, a tariff of twenty-five cents gives Germany an equal chance to supply our market. . . .

"The idea of charging the tariff to meet changed business conditions is the rankest nonsense. It matters relatively little what the tariff is, business will adjust itself to it in time. It is the uncertainty that frightens people."

Latest Important Cases

Bankruptcy. *Exemption of Wife's Interest in Insurance Policy from Seizure by Creditors — Contingent Interest Not Protected by the Statute.* U. S.

Judge Dodge, in the United States District Court at Boston, January 23, overruled the Referee in Bankruptcy and held that *Edward L. Loveland*, a bankrupt, had a cash surrender value in an endowment policy of $2,000 upon his life, which was an asset that passed to his trustee in bankruptcy.

The bankrupt had claimed that there was an exemption on the insurance policy under Sec. 6 of the bankruptcy act, by reason of the fact that the Massachusetts statute protects policies payable to a married woman from being reached by creditors of the insured. The court decides that there was no exemption in this case, because by the terms of the policy Loveland's wife had only a contingent interest.

The policy was payable to Loveland at the end of the twenty-year endowment period if he should live, and in case of his death it was payable to his wife, if living, otherwise to his executors. Besides, he has the right to change the beneficiary at any time.

Employers' Liability. *Concealed Danger of Psychological or Physiological Origin — Automatic Muscular Sequence in Operation of Dangerous Machine — Employer's Duty to Give Warning.* Wis.

The circumstances of a novel and

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interesting decision in an action for damages for personal injuries have been communicated to us by Christian Doerfler, Esq., of Milwaukee, of counsel for the plaintiff. The accident for which the plaintiff, a minor, sued his employer occurred in a tinware factory in Milwaukee. It was the task of the plaintiff to operate a press which stamped pieces of tin at the rate of about thirty-five per minute. The press was set in motion by the operator pressing his foot upon a treadle. The plaintiff having operated one day the machine for a number of hours without any hitch, a piece of tin placed in the machine for stamping suddenly became attached to the die, and when the plaintiff attempted to remove it with another piece which he held in his hand; he unhappily failed to take his foot from the treadle, and the punch descended, causing the injury complained of.

The contention of the plaintiff's counsel was, in substance, that the muscular movements of the operator of the press, occurring in a continuously repeated sequence, required no act of the will and became mechanical and automatic, that in consequence of this automatic action the foot of the operator would be likely to descend on the treadle whenever a piece of metal was fed into the machine, that this was a danger of which the operator could not be aware without warning from his employer, and that it was the duty of the employer to point out the existence of the danger. Counsel further insisted that the employer should explain to his workmen the function of this habit resulting in the past in innumerable accidents upon these machines, and that he should warn the operator that when a piece of metal became attached to the machine it would be necessary for him to take a step backward from the machine to break up this automatic sequence, otherwise the mutilation of a member of his body would result.

This contention was upheld in all essential particulars by the Supreme Court of Wisconsin, *Kaczmarek* v. *Geuder Paeschke & Frey Co.*, August term, 1911, no. 156. The Court (Winslow, C.J.) took the ground that the circumstances disclosed a concealed danger of which it was the duty of the employer to give warning:—

"We cannot say as matter of law that this psychological or physiological danger may not exist and be just as real a danger as a danger resting in some unexpected movement of the machine itself; nor can we say in this case as matter of law either that there was no evidence to charge the defendant with knowledge of the danger, or that the plaintiff must be charged with knowledge thereof; hence the question was necessarily one for the jury, and unless there were prejudicial errors in the admission of evidence or the submission of the case in the charge, the judgment must be affirmed."

Our readers may see a fancied analogy between the principle of this case and that of workmen's compensation, making the employer an insurer of the safety of his workmen regardless of his own fault. The Court, however, did not see the case in this light:—

"It is true that an employer is not an insurer of the safety of his employees, but he owes them the duty of providing reasonably safe machinery, and using ordinary care at least to discover concealed or latent dangers in its use, and especially does he owe this duty to minors. If, year after year, these accidents have been going on with perfect machines, and no sufficient explanation, it seems to us entirely proper for that fact to be shown in order that the jury

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may say whether or not the employer ought not to have investigated and ascertained the cause. That investigation and careful study would have led to the obtaining of the information brought out in this case, there can be little doubt. The evidence showed that at least one shop superintendent in Milwaukee using similar machines had known of the unconscious muscular habit likely to be formed in the use of such machines for nearly twenty years. Mr. Wolter, who was shop superintendent in the tinware establishment of the Kieckhefer Bros. Co. for a number of years prior to 1899, testified that there were in use in the factory numbers of these same machines; that he himself discovered the danger of the formation of the habit, and that he warned every beginner at such a machine of the danger of forming the habit, and of forgetting himself and stepping on the treadle, and that he also warned him if the piece of tin stuck in the die then he should stop at once and notify the foreman in his department. This seems to be pretty conclusive proof that an employer who was inclined to pay attention to the question and devote thought to it could solve the mystery of these numerous and constantly recurring accidents with perfect machines; at least it is in our judgment evidence from which the jury could so conclude."

On account of the interest which this decision will arouse, we depart from our usual rule to quote only the pronouncement of the Court, and print the following comment sent us by Mr. Doerfler: —

"Observe that the Supreme Court is very guarded in its wording of this opinion, evidently for the reason that they cannot now fully realize in what way this new doctrine will be used in the practice. The value of this decision is not so great from a legal standpoint as it is from a humanitarian standpoint. It has been commonly supposed heretofore that these accidents happened through negligence of the operators; now that the true cause has been shown and the danger-point in the operation of the machine discovered, my contention is that the operator will shrink from the danger, and his intention being called to the time when danger is imminent, a simple instruction as the one set forth in my brief, will, in my opinion, readily avoid future accidents. The tinware factories all over the United States, as I am informed, have already taken note of this new doctrine, and are taking precautions on account of it. Instead of increasing litigation from this source, it will practically avoid it. At any rate, an employer who conscientiously performs his duty under the law will be relieved from liability."

Federal and State Powers. See Inheritances.

Inheritances. *Distribution of Estates of Injured Employees — Death Damages — No Federal Power to Regulate Under Employers' Liability Act — Interstate Commerce Clause.* N. Y.

A case involving a conflict between the federal Employers' Liability Act of 1908 and the New York statute relating to the distribution of the damages recovered for the death of employees caused by the negligence of an employer was decided by the New York Court of Appeals Jan. 16 in a manner limiting the scope of the federal law, but Cullen, Ch.J., and Hiscock and Vann, JJ., dissented.

Matter of Taylor is summed up by the syllabus of the *New York Law Journal* as follows: An intestate was killed through the negligence of a railroad company. He left a widow and father surviving, but no children or other next to kin. The widow was

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appointed administratrix and she brought suit against the company, setting forth a good cause of action under our statute, but alleged that the action was brought under the act of Congress known as the Employers' Liability Act. The company made an offer of judgment, which she, under approval of the Surrogate's Court, accepted, and the money was paid to her. The father of the intestate thereupon made a claim to one-half of the amount under the Statute of Distribution. The federal statue in such a case gives the whole amount to the widow, and upon the question whether the state or federal law controlled the distribution of the fund, it was held that the power of Congress in its regulation of interstate commerce ended with the death of the intestate; that the states never delegated to it the power to distribute personal estates, and that so far as the act of Congress contemplated a distribution of the fund it was invalid and unauthorized; that the allegation that the action was brought under the federal statute might be waived, and that the fund should be distributed in accordance with the state law, one-half to the widow and one-half to the father.

Insurance. See Bankruptcy.

Interstate Commerce. See Inheritances.

Labor Laws. *Ohio Nine-Hour Law for Women Upheld.* O.

The Ohio Supreme Court upheld the constitutionality of the Green nine-hour law for women Jan. 30. There was no written opinion, the Court sustaining the judgment of the court below, which was based upon the decision of Mr. Justice Brewer in *Muller* v. *State*, holding women entitled to protection because all humanity and the welfare of the entire race is dependent upon preserving the physical, mental, social, and spiritual integrity of her sex.

Motor Vehicles. *Pedestrian on Street Crossing Not Required to Stop, Look, and Listen — Duties of Drivers.* N. Y.

The rule which fixes the rights of drivers of ordinary vehicles in the use of street crossings is not relaxed in favor of automobiles, according to the decision of the New York Court of Appeals, Jan. 9, in *Baker* v. *Close* (*N. Y. Law Jour.*, Jan. 23). The right of passage is common to all, and both footmen and drivers are bound to exercise reasonable care for their own safety and the safety of others upon the street. The rule of law requiring a person to look both ways, to listen and, if necessary, to stop before crossing a steam railroad at grade, has no application to a city street crossing with respect to guarding against danger from automobiles.

The plaintiff had been injured by being run down at a busy street crossing in Schenectady by an automobile owned by the defendants. The Court (Werner, J.) said: "The rigorous rule applicable to steam railroad crossings is necessarily relaxed at the usual street crossings, and the footman is not required, as matter of law, to look both ways and listen, but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control."

Master and Servant. See Employers' Liability.

Negligence. See Employers' Liability.

Torts. *Injuries to a Licensee — Implied Invitation.* N. Y.

There was some difference of opinion in the New York Court of Appeals

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regarding what constitutes an invitation subjecting a land owner to obligation for injuries received by a person who goes upon his land and is hurt. The question arose in the case of *Fox* v. *Warner-Quinlan Asphalt Co.* (decided Jan. 23, *N. Y. Law Jour.*, Feb. 7). There was a driveway over the defendant's land which had been used by the public for a long period, without interference by the owner, and the defendant made an excavation at the side of this driveway, which invaded it so fast that the plaintiff, unaware of the rapid progress of the excavation, fell into the pit one night and was injured. At the trial term of the Supreme Court a nonsuit was directed, but the Appellate Division reversed the judgment. The Court of Appeals reversed the Appellate Division, on the ground that the plaintiff was merely a licensee. But one member of the Court of Appeals, Vann, J., dissented. The way in which the mixed question of law and fact was disposed of is interesting.

The majority of the Court took the position that the mere fact that the landowner had not interfered with the use of his land for public travel did not afford any evidence of invitation on his part, and holding that there was no evidence of invitation, the Court (Willard Bartlett, J.) decided the case solely on the authority of the rule regarding licensees. Judge Vann, however, took a different view of the facts, stating them "as the jury could have found them if the case had been submitted to them for decision." He concluded that on this view of the circumstances, the question as to whether there was an implied invitation might have been answered by the jury in the affirmative. The facts supporting this inference were stated by Judge Vann as follows: —

"This driveway had been used continuously by the public for more than twenty years and was practically a highway, though not legally such, because it had never been accepted by the public authorities. It was of the uniform width of from fourteen to sixteen feet throughout the entire distance between the two avenues which it connected. It had no fence on either side, no grass grew on it, and it was simply naked earth, stone, and gravel, worn by long use into a plain, hard, well-beaten road. It was not plowed or cultivated, although crops were raised on either side, and it was openly and notoriously used by the general public as a short cut from one avenue to the other. For more than twenty years — twenty-four years according to the recollection of one witness — it had been in daily use by all kinds of vehicles, including grocery, coal, dirt, milk and delivery wagons, hucksters, carriages, buggies, hacks, light wagons, and heavy wagons, farmers' wagons loaded with hay and produce, and the like. Men, women, and children walked over it every day and apparently it was traveled upon much more than many regular highways in the country. Traffic thereon was continuous and increased as the years went by. There were no obstructions in the driveway, but it was an open and well-defined road, a highway for all practical purposes, and was regarded as an actual highway by travelers and observers generally. During all this time its course and character were unchanged, except that its condition was improved by the long-continued use."

It is certainly a strange result, when the New York Court of Appeals holds that such facts disclose no evidence of an implied invitation to the public to use what was in practice, if not legally, a public road.

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The Editor's Bag

THE RECALL OF JUDGES

ANY attempt to change the principles of our system of delegated government, and to reform it along the lines of the initiative, the referendum, and the recall, is likely to be due to one of three possible causes, and may be due to the concurrent action of two or all of them. In the case of the recall of judges, the agitation, we think our readers will agree, is the result of all three together.

The movement for the recall of judges is due (1) to a failure to understand the fundamental principles and whys and wherefores of the existing frame of government, (2) to possible defects in it for which a conservative and sound remedy is available, and (3) to the modern collectivistic movement which seeks to conform all existing institutions to a new social ideal.

The New World inherited the Old World tradition that the judge's calling is highly specialized, and calls for ability of a rare order, which can come to full maturity only through lifelong experience. Our ancestors did not suffer from the delusion that there is danger of judges deteriorating after their elevation to the bench, and there is no evidence to support such a view. A judge thoroughly competent at the outset grows stronger, rather than weaker, with experience, and there is nothing to show that he tends to become fossilized; on the contrary, his value increases until he reaches the age when he will either choose to retire of his own accord or be retired on part pay by operation of law. The notion that the bench tends to become encumbered with "dead wood," and that it needs frequent infusions of "new blood," is not borne out by the actual facts. It is this very superstition, that an untried is preferable to an experienced hand, that specialization tends to narrow a man's horizon and that men fresh from the people make better all-round judges, which plays an important part in this agitation for the recall of judges. It has its root in a temperamental factor which no amount of argument will circumvent. There will always, doubtless, be people who will cherish this superstition, which nothing can overcome but the sober judgment of the more prudent and influential class of citizens.

There are, of course, defects in the existing systems of selecting judges, if only for the reason that no system can be perfect. The theory underlying the practice of all our states is that no lawyer shall be elevated to the bench without careful preliminary inquiry into his qualifications, and if this inquiry is not thorough enough now to guarantee the competence of our judges, it can be made more thorough without any radical innovations. If it were to be granted that the recall of judges would remove incompetents, what assurance would it give that their positions would immediately be filled by competent lawgivers? The conspicuous fault of

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the recall is that it avoids the real issue.

Of the changing social ideals of our time we will say only a word, the subject is so vast. We concede that our judges are not always progressive enough in adapting their views to those which have become predominant in the community, and that they do not always keep in mind the fact that even the interpretation of constitutions must bow to the will of the people. But conceding all this, the recall of judges is but a poor expedient, in comparison with the amendment of state constitutions, for what security is given that the new judges raised to office by a popular whim would be capable guardians of these constitutions? Law must of necessity lag behind public opinion; and the moment we attempt to pack our judiciary with "progressive" judges we run the risk of filling the bench with very bad lawyers, who will render the logical and consistent development of our law impossible.

The suggestion was made recently by Chief Justice Winch of the Ohio Circuit Court, that judges should be removable by the legislature for incompetence, the question being brought before the legislature by a system of popular initiative and referendum, and the accused judge having the right of an impartial hearing before the legislature. This device would be highly objectionable, though it might perhaps be a safer remedy for an existing evil than Prof. W. F. Dodd's radical proposal that the power to pass on questions of the constitutionality of state statutes be taken from state judges.

LORD MACNAGHTEN

Lord Macnaghten completed on Jan. 25 his twenty-fifth year of judicial service as a Lord of Appeal in Ordinary. The whole of his judicial career has been spent in the House of Lords. The learning and eminent intellectual gifts of Lord Macnaghten have made him famous in this country as one of the brightest ornaments of the English bench.

RECENT CONFESSIONS OF CRIME

DR. GEORGE A. ZELLAR, a well-known alienist and superintendent of one of the Illinois hospitals for the insane, in discussing recent confessions of crime of a notorious character, declares that they were prompted by psychic manifestations, due to a general stirring up of men's consciences.

"This country," he says, "has withstood crime waves, industrial waves, and waves of religion, but a new period, in which the conscience is supreme, is rapidly manifesting itself." In proof of this, he cites the notable cases, East and West, that have occurred within the past few months. Seemingly he has made out a strong case.

However, when we come to a thorough analysis of these confessions, we are not altogether convinced of the soundness of his deductions. As an instance, we take his first example, that of the seventeen hundred Adams county, Ohio, voters who confessed their participation in the election bribery which had been going on in that county for years. Undoubtedly it has a most remarkable display, but we doubt very much the genuineness of the remorse that prompted it. If our recollection of the matter is correct, in this case, the prosecution had evidence more than sufficient to convict, long before the offenders were brought into court, and it a was knowledge of this fact, rather than a quickened conscience, that prompted the confes-

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sions; a plea of guilty meant a light penalty.

"Did not Beattie confess to the murder of which he was charged?" asks the doctor, "and did not the McNamaras confess at Los Angeles, because their conscience could not withstand the strain?"

True, Beattie confessed, but he did not do so until after he had been sentenced to death. And to the end that his confession might not weaken any chance he might have in the direction of executive clemency, he insisted that it should not be made public until after his death.

The McNamaras confessed, but the clearest possible evidence shows that they did so to save their necks, and not to unburden their souls. We say they confessed; we should have said, they pleaded guilty to the particular offenses with which they stood charged at Los Angeles, but they confessed practically nothing of their criminal operations at large — at least nothing that will interfere with any effort they may make in the future for pardon.

The Richeson case is somewhat different, but not altogether so; as in the case of Dr. Webster, his only hope lay in the mercy of the court; certainly there is nothing in his conduct, from the time of his leaving school in Missouri to the time of his confession in the Charles street jail in Boston, to indicate that anything like remorse could so quickly possess him, and we doubt if it is saying too much to say that the hope of clemency moved him to confession, rather than the prompting of an awakened conscience.

We can see little in these cases to prove the presence of a psychic wave, and so long as Dr. Zellar has nothing but forced confessions to offer in support of his theory, we are not much inclined to consider it a rational statement. And until the thousands of bribe-takers and bribe-givers outside of Adams county, Ohio, who are now silent, voluntarily confess their guilt; until the dozens of murderers who are now fighting to defeat the ends of justice, voluntarily surrender themselves to be punished; until the court calendars that are now flooded with cases of persons who are striving by every means in their power to thwart the purposes of the law; until that psychic wave succeeds in securing convictions that antedate those of the state's attorney, — until then we shall be exceedingly doubtful of its existence.

THE INSANITY OF WILLIAM HUNDLEY

"THIS Thaw case reminds me of a case which was much talked of when I was practising law down in the country, years ago," said an old lawyer, as he sat in his office chair with his feet elevated in proper rural and free-and-easy style, his Missouri meerschaum between his teeth, in a reminiscent mood and a moment of leisure.

"It was in the '60's," he continued. "The war had ceased but the bitter feeling between Northern and Southern sympathizers had not yet died out, particularly in Missouri, the borderland of the great contest. Here neighbor was against neighbor, town against town, and county against county. William Hundley, a young man, member of a well-known family of Gentry county, had just returned from the Confederate service. William Boyer, a young man and neighbor, had been in the Federal service. Hundley and Boyer met one day. There may have been a woman in in the case. I do not know whether there was or not, but I do know that there was whiskey and bad whiskey,

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and a bitter feeling toward Boyer on that day in Hundley. Hundley was loaded, and so was his gun, and the result of the combination was that William Boyer was then shot to death by William Hundley.

Hundley was arrested, indicted, and put on trial. His defense was insanity. He was tried before a jury, and Judge Isaac C. Parker, afterwards a United States Judge in the Indian Territory, noted for the number of his convictions in criminal cases, who was set on conviction in this case. It may have been because he was a Union sympathizer. The jury found Hundley guilty and he was sentenced to be executed. But the end was not yet. An appeal was taken to the District Court of that district, a court composed of the circuit judges of that district, one of whom was Judge Jonas J. Clark, an eccentric character and Union soldier of that day.

"Judge Clark had been accused of aberrations of the mind, and had himself admitted in public that he had a fellow-feeling for a certain defendant who had set up the defense of insanity in his court. He would never take a public conveyance for the purpose of getting around his circuit, and if his horses were employed on his farm, he would walk from county seat to county seat, sometimes more than thirty miles a day. He adjourned court one day while I was trying a case before a jury, to look up a blooded boar that had gotten loose. Another time he excused a jury for the reason that the weather was fine for killing his hogs. When this Hundley case came before him as District Judge, he was very much worried about the question of the sanity of Hundley. He therefore determined to see and converse with him himself, and went to St. Joseph, where he was confined, for that purpose. He reported that as a result of that interview he was convinced that Hundley was sane. It was afterwards told that Hundley asked the sheriff who it was that had come to see him, and when told that it was Judge Clark, he exclaimed: "Why, that old fellow is as crazy as a loon."

"The case subsequently went to the Supreme Court, which then held a session at St. Joseph. It reversed it because the court of its own motion instructed the jury that it devolved upon the defendant to show to their satisfaction by a clear preponderance of the testimony that he was insane when any evidence which reasonably satisfied them that the accused was insane at the time the act was committed, should have been deemed sufficient. And again, because the court in its instructions did not properly distinguish between temporary insanity produced immediately in an ordinarily sane person by voluntary intoxication and insanity remotely occasioned by previous bad habits. This was one of the early cases deciding the relation of intoxication to responsibility for crime. (46 Mo. 415.)

"In this case H. A. Vories, so well known at the St. Joseph bar, made the last and supreme effort of his life on behalf of the defendant. Broken down with weight of years and sickness, his face furrowed with wrinkles and his breathing difficult because of asthma, he was carried up the steep wooden steps to the court room where the Supreme Court was then holding its session. When friends endeavored to dissuade him from going, he replied with characteristic vehemence, 'By God, I will go to save that boy if they take me away in a coffin.'

"And when they unwrapped him from the innumerable wraps with which he was usually and then enveloped, and he came forth therefrom like a modern

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mummy, he made the greatest argument of his life. The plea of insanity and the untiring and reckless devotion of his lawyer saved William Hundley. On the retrial of his case, he was acquitted."

WHAT'S IN A NAME?

WHAT'S in a name?

Across the street from the Court House at Hopkinsville, Ky., is this sign:

I. M. BLACK
A WHITE LAWYER

On the sprinkling wagon at Waukegan, Illinois, is this: "Will U. Drinkwine."

While in Chicago the most corpulent judge is named Judge Petit, and the lawyer who never in his life has used a harsh word is named "C. I. Sass."

Recently Ex-Mayor Busse's telephone rang.

"One of your coal wagons have broken down and blocked the entire south-side traffic," said an excited voice.

"You say it has my name on it? Well then, it will take care of itself." And he banged up the receiver.

CURIOUS TO LEARN

IN Georgia they tell of a prisoner who had been convicted a dozen times of stealing, who, when placed at the bar for his latest offense, displayed a singular curiosity.

"Your honor," said he, "I should like to have my case postponed for a week. My lawyer is sick."

"But," said the magistrate, "you were caught with your hand in this gentleman's pocket. What *can* your counsel say in your defense?"

"Exactly so, your Honor; that is what I am curious to know."

DISPERSING A MOB

THOMAS McKEAN, Chief Justice of Pennsylvania, was a man of gigantic stature and a fiery temper.

A mob in Philadelphia defied the efforts of the sheriff to disperse it. He so reported to Justice McKean, then sitting in full court.

"Have you read the Riot Act?"

"Yes, your Honor. It had no effect."

McKean's eye flashed dangerously. "Have you ordered out the military?"

"Yes. Shall I fire on them?"

"No. I'll disperse them."

McKean rose and rushed out of the court in his wig and gown, his face flushed with passion, into the midst of the riotous mob.

"I am Thomas McKean, Chief Justice, and I command you to disperse." So saying, he seized two of the ringleaders, literally tucked them under his arms, and returned to the court, while the crowd crept home, silent as frightened sheep.

WITHOUT ARGUMENT

A WELL-KNOWN lawyer practising before the Court of Claims tells of a youthful attorney in Indiana who talked for several hours, to the great weariness of the judge, the jury, and everyone in the court room who was obliged to listen.

At last, however, he sat down, and the opposing counsel, a white-haired veteran, rose to reply.

"Your honor," said he, "I will follow the example of my young friend who

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has just finished, and submit the case without argument."

With that he took his seat, and the silence was oppressive.

THE POLITEST OF JUDGES

OCCASIONALLY there are judges on the bench so polite that their courtesy is vexatious to the recipients. Justice Graham of England was spoken of as the most polite judge that ever wore the ermine.

"My honest friend," he would say to some convicted criminal, "you are found guilty of a felony, for which it is my painful duty to sentence you to transportation for the term of ten years."

On one occasion he, by mistake, sentenced a man to transportation who had been convicted of a crime punishable by death. Having been set right by the clerk of the court, His Lordship gravely exclaimed:—

"Dear me! I beg his pardon, I am sure!" Then putting on the black cap, he courteously apologized to the prisoner for his mistake, and sentenced him to be hanged by the neck until he was dead.

A GREAT SPEECH

AN INDIANA lawyer, whose eloquence was of the "spread-eagle" sort, was addressing a jury at great length, when his legal opponent, growing weary, went outside to rest.

"'Old Ironsides' is making a great speech," said some one to the bored attorney.

"'Old Ironsides' always makes a great speech," said the other. "If you or I had occasion to announce that two and two make four, we'd be just fools enough to blurt it right out. Not so 'Old Ironsides.' He would say:

"'If, by that particular arithmetical rule known as addition, we desired to arrive at the sum of two integers added to two integers, we should find — and I assert this boldly, sir, and without fear of successful contradiction — we, I repeat, should find by the particular arithmetical formula before mentioned — and, sir, I hold myself perfectly responsible for the assertion that I am about to make — that the sum of the two given integers added to the two other integers would be FOUR!'"

NEED OF DISCRIMINATION

THOSE who like that peculiarly rich, pulpy Western fruit known as the papaw, which has been defined as "a natural custard," are likely to be immoderately fond of it; but those who do not like it nearly always have a strong aversion to it. A man was on trial in a Missouri court, charged with having broken into a neighbor's premises and stolen a bushel of this fruit.

The first man examined as to his qualifications to sit on the jury was asked this question, among others: "Do you like papaws?"

"I can eat a hatful of them at a sitting," answered the man, with a broad smile.

"Your honor," said the prosecuting attorney, "we challenge this man."

"On what ground?" asked the court.

"On the ground, your honor, that any man who likes papaws would feel like justifying any other man for stealing them, on account of the temptation being irresistible."

"You may stand aside, sir," said the judge.

The next man who was examined did not like papaws — the very idea of eating them "made him sick."

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"We'll take him your honor," said the prosecuting attorney.

"Hold on!" exclaimed the attorney for the defense. "We object to this man, your honor."

"What is your objection?" asked the judge.

"The fact that he doesn't like papaws, your honor, would give him a feeling of prejudice and contempt for a man charged with stealing them, and render him incapable of returning a fair verdict."

"You may stand aside, sir," said the court.

A jury was finally secured, consisting of men who had never tasted a papaw.

THE HOLY CITY

THIRTY men, red-eyed and dishevelled, lined up before a judge of the San Francisco police court. It was the regular morning company of "drunks and disorderlies." Some were old and hardened, others hung their heads in shame. Just as the momentary disorder attending the bringing up of the prisoners quieted down, a strange thing happened. A strong, clear voice from below began singing:

"Last night I lay a-sleeping,
There came a dream so fair."

Last night! It had been for them all a nightmare or a drunken stupor. The song was such a contrast to the horrible fact that no one could fail of a sudden shock at the thought the song suggested.

"I stood in old Jerusalem,
Beside the Temple there,"

the song went on. The judge had paused. He made a quiet inquiry. A former member of a famous opera company, known all over the country, was awaiting trial for forgery. It was he who was singing in his cell.

Meantime the song went on and every man in the line showed emotion. One or two dropped on their knees; one boy at the end of the line, after a desperate effort at self-control, leaned against the wall, buried his face against his folded arms, and sobbed, "Oh mother, mother!"

The sobs, cutting to the very heart the men who heard, and the song, still welling its way through the court, blended in the hush.

At length one man protested. "Judge," said he, "have we got to submit to this? We're here to take our punishment, but this—" He too began to sob.

It was impossible to proceed with the business of the court, yet the judge gave no order to stop the song. The police sergeant, after an effort to keep the men in line, stepped back and waited with the rest. The song moved on to its climax:

"Jerusalem, Jerusalem! Sing, for the night is o'er!
Hosanna in the highest! Hosanna forevermore."

In an ecstasy of melody the last words rang out, and then there was silence.

The judge looked into the faces of the men before him. There was not one who was not touched by the song; not one in whom some better impulse was not stirred. He did not call the cases singly, a kind word of advice, and he dismissed them all. No man was fined or sentenced to the workhouse that morning. The song had done more good than punishment could possibly have accomplished.

— *Youth's Companion.*

"I THINK SO"

"YES — I think so," answered the witness.

"You say you think!" growled the attorney. "Don't think. Just give us the facts."

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NOBODY'S SON

AN AMUSING incident occurred in a Southern court recently when a colored prisoner, about sixteen years old, appeared before the judge, charged with the theft of a ham.

"Take off your hat!" said the judge.

"What for?" asked the prisoner, without obeying.

'What for?" thundered his honor. "You are in court! Take off your hat!"

"I jest don't have to," replied the prisoner calmly.

At this juncture the judge turned to the father of the prisoner and asked angrily, "Is that your son?"

"No yo' honor," replied the man, with an appreciative grin, "I guess she ain't nobody's son."

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

A West Virginia darky, a blacksmith, recently announced a change in his business as follows; "Notice — De co-pardnership heretofore resisting between me and Mose Skinner is hereby resolved. Dem what owe de firm will settle wid me, and dem what de firm owes will settle wid Mose."

— *Virginia Law Register.*

"In the early seventies, I was attorney in a replevin case for a colt before one Capt. C. D. M——, J.P., in M—— County, Mo. The courtroom was in the esquire's dwelling. The room had a fireplace about five feet wide, with about seven bushels of ashes in it.

"The jury, composed of six good men and true, were seated on a slab held up by two stones, one at each end. I was sitting in front, on the right of the jury, and my opponent, one I. G——, on the left. The witness box was immediately in front of the ash bed above described.

"The jury was duly sworn and one B—— was on the stand. He testified that the colt was of a brown color, and in cross-examination I got him to admit that he was mistaken, that it was really an iron gray.

"W. M——, one of the jury, then raised up from the puncheon, rolled up his coat sleeve, and remarked that no———could nor should swear to a lie before him while he was on a jury. And 'biff' he took the witness in his face, and knocked him over into the ashes.

"B—— scrambled out, struck the door, jumped on his horse, cut the halter, and fairly flew through the woods. Then the trial proceeded in order, and I lost my case."

— *Case and Comment.*

The Legal World

Monthly Analysis of Leading Events

No very noticeable change in public sentiment with reference to the Sherman act has appeared, but it is at least certain that the advocates of extirpation of monopoly have not been gaining ground, and that any movement of public opinion which may have occurred has been in the direction of government regulation rather than suppression of monopoly. The hearings in Washington justify such a conclusion. The

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business community is if anything more emphatic in its demand that the law shall be not only reasonable, but plain, and the popular desire for regulation such as that already exercised over railways is so apparent that Congress can hardly afford to ignore it. The country as a whole seems to want federal supervision of monopoly under a statute supplementary to the Sherman act, but the country cannot yet be said to be committed to the cause of federal incorporation or of regulation by an administrative commission. The latter two proposals are undoubtedly regarded with favor, but public sentiment moves slowly, and there are still backward currents which show that the people still hesitate to approve anything which may barely suggest too positive a legitimation of reasonable restraints of trade.

A somewhat depressing development of the month was the Administration's acceptance of the Lodge amendment to the general arbitration treaties with England and France. Public sentiment could have been educated to look upon the unamended treaties with greater favor, but the Administration doubtless had very strong, if not conclusive grounds for its assumption that the ratification of the treaties by the Senate, in the form originally proposed, was impossible of attainment. The adoption of the plan in this amended form will be better than nothing, for the moral influence of reports by the Joint High Commission finding controversies justiciable and recommending arbitration will be considerable; it will be very far, however, from imposing on this country an obligation to arbitrate all justiciable differences, and will bring us only one step nearer the settlement of international disputes by law rather than by armed force.

Procedure

The time for oral argument has been reduced by the Missouri Supreme Court from three to two hours. It is estimated that this will aid the court materially in catching up with the docket.

As a result of the representations made Jan. 25 before the full Judiciary Committee of the House and a subcommittee of the Senate Judiciary Committee by a committee of the American Bar Association, it was thought probable at the time that two of the three bills which the Association is urging in the interest of reforming judicial procedure, might pass this session of Congress. The bills that are to be favorably reported by the subcommittee of the Senate committee are the Nelson bill, seeking to prevent purely technical errors that do not affect the merit of the case, from being made cause for reversal, and the Root bill, which seeks to prevent the dismissal of or further delay on the trial of a case which has been erroneously brought in equity instead of at law, or *vice versa*. The third bill, which the subcommittee consisting of Senators Root, Culberson, and Brown took under advisement, is the bill seeking to authorize a review by the United States Supreme Court on writ of error the decision of a State Supreme Court, whether that decision upholds a State statute or invalidates it.

Interesting figures of appeals and reversals are given by T. J. Johnston of the New York bar, in a letter to the *New York Sun*. An examination of the appellate history of 145, 551, in which he had capable assistance, showed him that "there were only 3,101 appeals and 754 reversals, for any reason, including technical ones; the percentage of ap-

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peals was 2.13, of reversals 0.518, one-half of one per cent, or one case in 193.04. In New York county there were in 1906 in criminal cases 5,265 jury trials, where everything favors the criminals. There were 93 appeals and 5 reversals! This was the work of Mr. Jerome, shortly afterward so villainously assailed. In the five years ended with 1906 there were disposed of by the magistrates and the courts of record in this county 81,000 criminal cases; appeals, 281; reversals, 27. In Vermont in that year not one case was reversed. In Alabama not one per cent, in Indiana one-third of one per cent, in Washington 1.08 per cent. "In 1906 the federal courts dealt with a total of 50,926 cases; of 358 appeals to the Supreme Court of the United States 67 caused reversal, of 1,204 in the Circuit Courts of Appeal 327 were reversed. The percentage of efficiency was 99.23."

A legislative commission has made a report on the inferior courts of Suffolk County, Massachusetts. The commission, after investigating the central municipal court of Boston and the courts of several suburban districts, recommended a consolidation of the inferior courts of the county, by the extension of the central court, the abolition of the remaining courts, the creation of a juvenile division having jurisdiction throughout the county, and an appellate division for error of law in civil causes; the court to consist of one chief justice, fifteen associate justices, ten special justices, and one associate and two special justices for juvenile work. The commission also recommended larger and more specific authority in the court, by majority vote of its judges, to make rules and orders for the transaction of its business and regulation of its practice; centralization of executive authority, to secure efficiency and uniformity in the transaction of its business, and to promote co-ordination in the work of its departments; the adoption of a system to prevent duplication of trials on issues of fact, in civil causes; and permissive authority for the court to appoint salaried interpreters.

The Sherman Law

The National Civic Federation has made public an analysis of sixteen thousand answers received by it to a series of questions concerning the Sherman law. The analysis of the answers is summed up by the Federation as follows: "The replies indicate little sentiment in favor of the unconditional repeal of the Sherman law. On the other hand, it is shown that there is practically no desire to abolish large combinations. The public have no desire for government ownership, on one side, or unrestricted and unregulated private or corporate control on the other. They will accept large combinations adequately regulated. Eighty-four per cent of the answers pronounce the Sherman law neither clear nor workable, or workable without being clear; but only some twenty per cent declare in favor of its repeal. Of these latter the larger number add that 'If not repealed, it should be amended,' etc."

Louis D. Brandeis of Boston told the House Committee of Congress on Judiciary Jan. 26 why he thought the Lenroot-La Follette bill now pending in Congress would adequately supplement the Sherman anti-trust act and relieve the business situation. "This bill," he said, "takes a middle ground; it rests

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on the fundamental proposition of the Sherman act, namely that it is both desirable and possible to maintain competition. This bill accepts the decision of the Supreme Court in the oil and tobacco cases and merely undertakes to place upon the defendants the burden of proof that their restraint is reasonable, provided it be shown that the defendant has entered into a conspiracy. When it appears to the court that the defendants have entered into a conspiracy, then it is incumbent upon them to show that it is consistent with public interest. It supplements the 'rule of reason by a rule of justice.' "

Personal

Judge Ira A. Abbott, who has been an associate justice of the Supreme Court of New Mexico for the past seven years, has concluded his duties in the territorial courts, which have been superseded by state courts, in order to return to his home in Haverhill, Mass.

Homer Albers of the Boston bar has been elected Dean of the Boston University Law School, filling the position formerly held by Melville M. Bigelow and recently by Alonzo R. Wead. He is a graduate of this law school, and has been a lecturer in it for many years. Mr. Albers has preferred the private practice of law to a judgeship of the Massachusetts Superior Court offered him in 1903 and to professorships in the law schools of Michigan and Northwestern universities.

John Chipman Gray, Harvard, '59, LL.B., '61, Royall Professor of Law at Harvard Law School, was elected president of the Harvard Alumni Association at a recent meeting of the executive committee. Professor Gray is generally regarded as the leading authority in this country on the law of real property, and as a master of the subject of perpetuities his knowledge is unrivaled. It is commonly understood that he has more than once refused a position on the Massachusetts Supreme Court.

Because of the constitutional prohibition that "no person shall hold the office of Judge or Justice of any court longer than until and including the last day of December next after he shall be seventy years of age," the personnel of the present New York Court of Appeals will undergo a radical change within the next two years. Judges Irving G. Vann of Syracuse and Albert Haight of Buffalo, will reach the age limit on Dec. 31 next, and Chief Judge Edgar M. Cullen of Brooklyn and Judge John Clinton Gray of New York will retire on Dec. 31, 1913. Judge Willard Bartlett of Brooklyn retires on Dec. 31, 1916, and Judge Frederick Collin of Elmira will be seventy years of age by Dec. 31, 1920. The term of Judge William E. Werner of Rochester does not expire until Dec. 31, 1918. The other two judges, Emory A. Chase of Catskill and Frank H. Hiscock of Syracuse, are serving under special appointment as additional judges to take care of the business of the Court.

Bar Associations

Indiana. — The annual convention of the Indiana Bar Association is to be held in July in South Bend, Ind.

Kansas. — The annual meeting of the Kansas State Bar Association will be held Jan. 30. President Harry B. Hutchins of the University of Michigan delivered the annual address, his

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subject being "Respect for Law." The special committee on criminal law, in its report, announced that it had found the criminal procedure of Kansas free from technical faults and delays which have been attributed to the criminal procedure of this country.

South Carolina. — The annual meeting of the South Carolina Bar Association was held at Columbia, S. C., beginning Jan. 24. President P. H. Nelson made his report and a general discussion of the business followed. Judge Alton B. Parker of New York delivered an address in which he expressed himself as opposed to the recall of the judiciary and took exception to some of the criticisms of the bench made in the past by Mr. Roosevelt. Others reading papers were Chief Justice Gary, and Messrs. Knox, Livingstone, and T. P. Cothran.

South Dakota. — At the thirteenth annual meeting of the South Dakota Bar Association, held at Aberdeen, S. D., Jan. 4–5, the following officers were elected: President, James Brown, Chamberlain; first vice-president, J. H. McCoy, Aberdeen; second, Frank Anderson, Webster; secretary, J. H. Vorhees, Sioux Falls; treasurer, L. M. Simons, Belle Fourche.

Miscellaneous

A movement has been launched looking to the appointment of a divorce proctor in Des Moines. A proctor has been appointed in Kansas City and is doing good work there. It is likely that a similar office will be created in Chicago courts. It is the duty of the officer to investigate all divorce cases filed in the courts and make recommendations regarding their disposition to the judge who hears them.

The International Law Association, at its next meeting in Paris, France, to begin May 27, will consider the question of an international divorce law. The conference also will give attention to the question of copyright, international arbitration of disputes between nations, industrial problems in the light of the law of nations, and the prestige to be given by other nations to business concerns.

That Congress shall have power to enact laws regulating hours of labor throughout the United States was the purport of a resolution for an amendment to the Constitution offered in Congress Jan. 31 by Representative Samuel W. McCall of Massachusetts. "Every industry," he said, "is subject to a uniform operation of the tariff. As an economic proposition, it is no more desirable than the hours of labor in a given line should be variable than that the duties should be higher or lower in one state than another."

The struggle to secure a suitable site for the new law courts in New York City ended Jan. 18, with the action of the Board of Estimate. The building, which will be of huge proportions, will occupy the tract of land bounded by Leonard, Lafayette, Baxter, and Park streets, while Centre street, with its car tracks and footways, will run through its basement. The first cost of this site will be $4,425,500, and the cost of condemnation proceedings will not carry it much over $6,000,000. The first estimate of the cost of the building is $9,000,000.

What was believed to be the first demonstration in a court of justice of the Münsterberg theory of criminal detec-

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tion by heart pulsations occurred Jan. 20 at Watts, Cal. The demonstration ended in the discharge of Arthur Smith, a metal worker from Tacoma, Wash., who had been arrested as a suspicious character. He consented to be a party to the experiment and his normal pulse was found to be seventy-nine. It increased to ninety-one beats when he gave his name as James Smithers, and Judge Cassidy told him he was not telling the truth. His heart then beat at the rate of ninety-five. After a few seconds' hesitation the man replied: "Arthur Smith is my right name, but I am an honest workingman and no vagrant. I'm sorry I lied, but I have relatives in the North."

Obituary

Coman, Henry B. — Supreme Court Justice Henry B. Coman died at Oneida, N. Y., Jan. 10, of typhoid. His term would not have expired till 1920.

Cooke, Frederick Hale. — Frederick Hale Cooke, for many years a member of the law firm of Cravath, Henderson & De Gersdorff of New York, died on Jan. 11 at his home in Brooklyn. Mr. Cooke was the author of a number of treatises on legal subjects and had resided in Brooklyn for twenty-five years.

Crew, William B. — Judge William B. Crew, former member of the Supreme Court of Ohio, died at Marietta, O., Jan. 24. He served on the common pleas bench from 1891 to 1902, when he was promoted to the supreme bench to succeed Judge M. J. Williams, who died in office.

De Witt, George G. — George Gosman De Witt, a prominent lawyer of New York City, died Jan. 12, at his home, 39 West Fifty-first street, at the age of sixty-six. He was a member of the law firm of De Witt, Lockman & De Witt. He became a Trustee of Columbia College in 1890, and a Governor of the New York Hospital, Roosevelt Hospital, and a Director of the Chemical National Bank.

Lochgren, William. — Having been Commissioner of Pensions and later, from 1896 to 1908, Judge of the United States District Court, William Lochgren died at Minneapolis, Jan. 28. He was in his eightieth year.

Nicholls, Gen. Francis T. — Having been twice Governor of Louisiana, and long a Justice of the Louisiana Supreme Court, Gen. Francis T. Nicholls died at New Orleans early in January.

Peirce, Edward B. — The shocking railroad accident which caused the death of Mr. Harahan, former president of the Rock Island Railroad, also resulted in the death of Edward Beachamp Peirce, general solicitor of the Rock Island lines. He had achieved a national reputation as an authority on interstate commerce law. He published a digest of the decisions of the courts and Interstate Commerce Commission under the Act to Regulate Commerce.

Shedden, Lucian L. — A leader of the bar of northern New York, Lucian L. Shedden died at Plattsburgh Jan. 17. He had served as county attorney, county judge, member of the Board of Commissioners of Gas and Electricity, and he was a Regent of the University of the state of New York.

Sloane, Ulric. — Ulric Sloane, former law partner of ex-Senator Foraker, recognized as one of the three greatest criminal experts that have practised in Ohio, authority on insanity in criminal law, with a record of having participated in more than two hundred murder cases, died Jan. 21, at Cincinnati, at the age of sixty-one.

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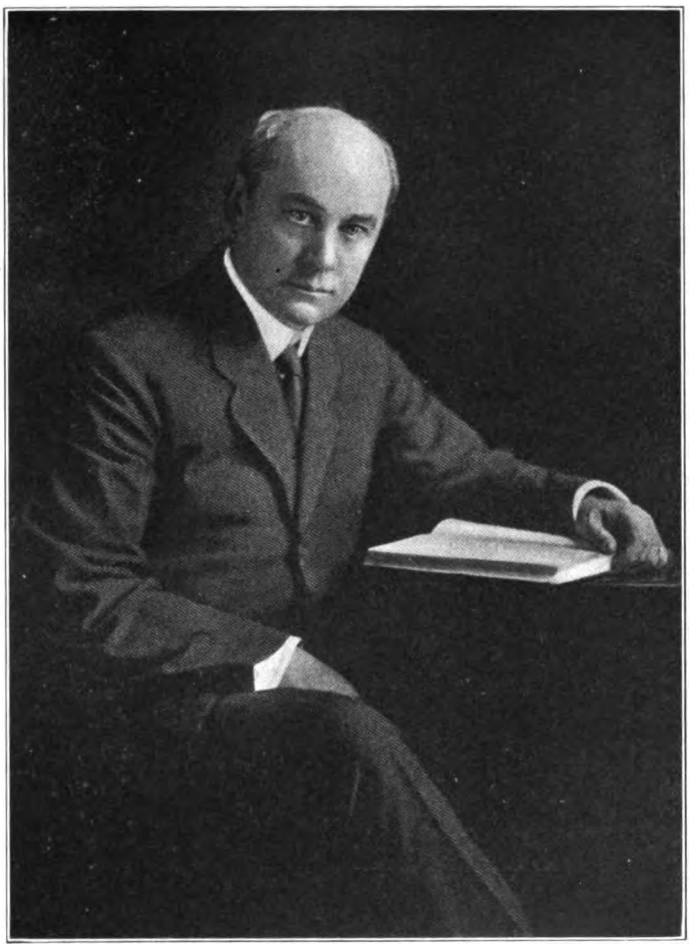

James Brown Scott.

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The Green Bag

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James Brown Scott[1]

By Robert Lansing[2]

THE future student of history will doubtless look back upon the early years of the twentieth century as a period momentous in the social development of the human race. Men who live in the time of crises, whether political or social, seldom appreciate the full significance of the movements which are taking place; much less are they able to draw accurate conclusions as to what the outcome will be. Yet we, who live at this time, though our sense of proportion may distort events, cannot but realize the gravity of the problems which the present generation is called upon to solve. The period is one in which society is seeking to adjust its highly developed institutions, the slow growth of centuries, to new ideas which have all at once become dominant in the world. It is a period of transition, in which the customs and usages of peoples are breaking down before a new sense of obligation and a new conception of duty. Mankind has suddenly awakened to the fact that the methods which have been employed for ages are at variance with the motives which should inspire human actions, and that these must undergo radical change. To work out a social organization which will harmonize with these motives is engaging the thought of those who are students of politics and society.

The fundamental idea which has become dominant and has given impulse to the movement for a change in the very structure of society is in a broad sense altruistic. It seems to have its origin in an appreciation of the interdependence of nations, classes, and individuals comprising the entire human race from the most civilized to the most savage, from the richest to the poorest, from the

[1] [This is the fourth of a series of articles on some of the most eminent jurists now living in this country. We have already published sketches of John Forrest Dillon, by George S. Clay (23 *G. B.* 447); Samuel Williston. by Bruce Wyman (23 *G. B.* 613); and John Henry Wigmore, by Albert Kocourek (24 *G. B.* 1). —*Ed.*]

[2] Mr. Lansing, at present Counsel for the United States in the American and British Claims Arbitration has had more practical experience in the actual preparation and trial of cases before International Commissions and Tribunals than any other American lawyer. He was Associate Counsel in the Behring Sea Arbitration, 1892–3; U. S. Counsel in the Behring Sea Claims Commission, 1896–7; Solicitor for the United States before the Alaskan Boundary Commission, 1903; Solicitor and Counsel in the North Atlantic Coast Fisheries Arbitration at the Hague, 1910.

Mr. Lansing was one of the founders of the American Society of International Law, and is an associate editor of and frequent contributor to the *American Journal of International Law.*

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most virtuous to the most criminal. In the light of altruism the obligations of man to his fellows, of society to the individual, of nation to nation, have been newly interpreted and have furnished a new standard by which human action is to be judged.

The men who are striving to find a practical solution to these problems so vital to the welfare of humanity are engaged in a work of the greatest importance to the present and the future. In the endeavor to reconstruct social and political institutions along the lines of thought now ascendant they are engaged in a task which demands the exercise of the greatest wisdom; and upon the successes and failures of these constructive thinkers depend in large measure the destinies of humanity.

In no sphere of human activity has the present standard of duty become more generally recognized than in the field of international intercourse. Drawn together by improved means of communication and by the ever increasing bonds of commerce and industry, the nations of the world have acquired a new sense of mutual obligation, which has become most powerful in directing their relations with one another. Within recent years the great political force in the world was nationalism, selfish, covetous, and indifferent to the rights of others. The handmaid of nationalism was physical might; its manifestations, military success and conquest. But the present generation has seen the passing of the age of nationalism and the beginning of the age of internationalism, in which right is placed above benefit, justice above opportunity, peace above the triumphs of war. Internationalism, in the sense in which it is used today, is the application to the relations between nations of the altruistic idea which permeates society.

In view of this change in the motives which inspire governments in their intercourse with one another, the exercise of physical force is considered generally unjustifiable and reprehensible. The civilized nations have with unanimous voice avowed it to be their purpose to apply to international controversies those principles of law and equity which have so long been applied to disputes between individuals and which have given stability to national states and their institutions. Within a state the machinery for the application of justice exists in a highly developed form, but in the community of nations it is but partially developed. Until the means for insuring the uniform application of justice to international controversies are perfected, governments will continue to maintain armaments with which to protect and enforce their rights.

The first step, then, toward the establishment of that universal peace which will be the most complete expression of the present altruistic idea in the international sphere is the institution of an international judiciary possessing a jurisdiction over all controversies between nations which have failed of diplomatic adjustment. Without the existence of such a judicature sanctioned by all the great civilized powers and making certain that the rights of every nation will be protected and their free exercise guaranteed, the hope of a permanent international peace will be vain.

With a keen appreciation that the old method of agreement to submit a dispute between nations to a specially selected tribunal fails to meet the requirements of the new internationalism, Mr. James Brown Scott has given to the subject of the establishment of a permanent international judiciary with a general jurisdiction much study and

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thought. He is undoubtedly today the most prominent American advocate of a judicial system which will insure equal justice to all nations, both great and small. He has worked out the problem and formulated a plan, and to secure its acceptance by the world he has been and is devoting his energies; and in doing this he is laboring in the most practical way in the cause of universal peace.

Mr. Scott is peculiarly fitted by his talents and training for the task which he has undertaken. He is of American parentage, and was born in 1866 in a village of the Province of Ontario; his family shortly after his birth returned to Philadelphia, where he prepared for college and entered Harvard University, graduating from that institution in 1890. The following year Harvard conferred upon him the degree of Master of Arts, and he was granted the Parker fellowship, under which he spent three years at Berlin, Heidelberg, and Paris, perfecting his education in the study of international law, which he had selected as a specialty, and obtaining a speaking knowledge of German and French.

Returning to the United States Mr. Scott was admitted to the bar and took up his residence at Los Angeles, where in 1896 he organized the Los Angeles Law School (which later became the Law Department of the University of Southern California) and for three years continued as dean of that school. In 1899 he was offered and accepted the deanship of the College of Law of the University of Illinois, and remained there until 1903, when he became a professor in the Columbia Law School. In 1906 Mr. Scott was appointed the Solicitor of the Department of State, but continued his services in the educational field by filling the chair of international law at George Washington University and that of lecturer at Johns Hopkins University. In 1911 he severed his connection with the Government to accept the secretaryship of the Carnegie Endowment for International Peace, of which the founder had named him a trustee.

While connected with the University of Illinois Mr. Scott continued his special line of study and published his "Cases on International Law," a collection carefully compiled and classified which has become a standard in the United States. In 1906 he entered upon a more valuable service in the literary field in becoming the editor-in-chief of the *American Journal of International Law*, the quarterly of the American Society of International Law, an organization of which Mr. Scott was one of the founders, and which has been most successful during its six years of existence, a success due in large measure to the *Journal*, which from the first ranked very high among the periodicals devoted to the subject of international law. The excellence of this publication must be credited chiefly to the ability, the labor, and the world-wide acquaintance of its editor-in-chief.

The year following the first issuance of the *Journal* Mr. Scott was appointed a technical delegate for the United States to the Second Peace Conference at The Hague. His services in that capacity and later as the critical historian of the proceedings have given him a prominent place internationally. Possessing an extensive acquaintance with all the leading works upon international law and with many of the distinguished jurists and diplomats who were members of the Conference, with a memory exceptionally retentive, with a natural gift for clearness of expression and a fluency of address in English

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and foreign languages, he was peculiarly equipped to perform the duties which his position imposed.

Believing that the most important service which the Conference could render would be the establishment of a judicial system more fully developed than the one which had been created by the First Hague Conference in 1899, Mr. Scott devoted himself to a thorough study of the principles, history, and possibilities of international arbitration as a uniform means for the settlement of controversies between nations through the application of recognized principles of justice and equity to all questions which might arise. The conclusion which he reached, as to the place occupied by the tribunal created by The Hague Conference of 1899, and confirmed by that of 1907, in the evolution of an international juridical system, is the chief contribution which he has made to the literature of the subject. It is brought out in his exhaustive work published in 1909, entitled "The Hague Conferences of 1899 and 1907," in which he analyzes and compares the proceedings and accomplishments of these two great assemblies, introducing the various subjects discussed with reviews of the historical events leading up to and affecting the action of the Conferences.

Soon after completing this critical analysis of the work done by the two Conferences Mr. Scott, who had returned to Washington and resumed his duties as Solicitor of the Department of State, was appointed one of the Government's counsel in the North Atlantic Coast Fisheries Arbitration. The tribunal to hear the case was constituted under the provisions of The Hague Treaty of 1899. It assembled at The Hague early in June, 1910, and three months later rendered its award. He thus obtained practical experience in the conduct and efficiency of an arbitration before the Permanent Court as now constituted, which impressed upon him the defects as well as the benefits of the system.

But prior to this actual experience Mr. Scott had become convinced that the world required a court of justice composed of a limited membership which should sit permanently, rather than a special tribunal selected in each case by the parties from a large panel of judges as provided in the treaties establishing the Hague Court. To accomplish this change the first step had already been taken by the United States, which had proposed to the principal powers that there should be conferred upon the international court of prize, with its limited number of permanent judges, a general jurisdiction over justiciable questions, or that there should be created a court of arbitral justice with the same numerical limitation of membership and permanency as the court of prize. Either course would result in the establishment of a world tribunal whose constitution would not be subject to contract between the parties. Mr. Scott was charged by his Government with the conduct of this delicate negotiation, and for that purpose he visited Europe and conferred with statesmen of the leading powers. He performed his mission with ability and success, although the agreement which he succeeded in negotiating still awaits its final ratification by the contracting governments.

With his subsequent experience in the Fisheries Arbitration confirming him in his belief that the Hague Court should be always composed of the same judges, in order that there should be the stability requisite to give to its decisions the force of law and to induce the nations

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to invoke more generally its offices, Mr. Scott on his return from The Hague instituted, with others interested in the cause of arbitration, a propaganda in favor of the establishment of a court of arbitral justice or else the extension of the jurisdiction of the court of prize to international controversies in general. The medium of giving publicity to the arguments in favor of this course was the American Society for the Judicial Settlement of International Disputes, which was organized in 1910, and of which Mr. Scott was made the president. The Society has not confined itself solely to the particular object which called it into being, but through its public meetings and the distribution of literature has done much to diffuse knowledge of the progress being made in arbitration and to arouse public opinion favorable to the more general acceptance of the principle by all governments.

Mention was made of the important contribution to the history of international arbitration which was made by Mr. Scott in his work on the two Hague Conferences. The year following the publication of that work he elaborated his idea in a lecture delivered at Johns Hopkins University and in an address at the Lake Mohonk Conference on International Arbitration. Up to the time that Mr. Scott made public the result of his researches, international arbitration had been considered, I believe without exception, a degenerate type of judicial procedure derived from the more perfect system of justice instituted by civilized states for the settlement of disputes between individuals. This derivation of international courts of arbitration Mr. Scott denies, showing that it is based upon a misapprehension of the facts, or at least upon erroneous conclusions. Instead of being a degenerate type of institution, a crude imitation of the process of national courts of justice, he shows that the course being pursued for the establishment of an international judiciary is following the identical lines of development which may be traced in the history of Rome, and that by the same steps by which the Roman courts came into being, international courts are being evolved and are bound to develop the same permanency and efficiency which characterized the judicial system of the Roman Empire. This is the assertion which Mr. Scott makes as a result of his studies and which he proceeds to demonstrate.

He points out that in the primitive community the mode of settling disputes was by self-redress: "that in the early period of Roman history there did not exist institutions which, without a misuse of terms, could be called courts of justice"; and that there was no public machinery for the settlement of controversies of a civil nature between Roman citizens. Through the operation of usage and custom, however, the primitive method in regard to disputes as to land was superseded by their submission to a stranger, an arbiter, for settlement. By agreement the parties bound themselves to comply with the decision of the arbiter chosen by them, and failure to do so operated as an authorization for the other party to resort to self-redress as matter of right. "The agreement to submit was contractual, the appointment of the arbiter was voluntary, and his decision was enforced by the individual litigant, not by the power of the state." This primitive condition of the settlement of differences between Roman citizens Mr. Scott declares to be analogous to the condition existing prior to 1899 among civilized states, which up to that

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time submitted their disputes to a specially constituted tribunal or commission. As was the case in the early Roman period, the arbitral body was named voluntarily and mutually, and the enforcement of an award remained as a matter of right with the successful litigant. What an award did then it does now, that is, it practically declared that the party in whose favor it was rendered was justly entitled to resort to self-redress in case the other party declined to abide by the decision.

Having shown the close analogy between this early Roman method of determining rights in controversy and the method practised so long by nations, Mr. Scott takes up the next development in the judicial institutions of Rome. He shows that through the same agency of custom the litigants were in time limited by law in the selection of an arbiter to a special group of individuals, a panel, which at first consisted of the members of the Roman Senate. Still in this second stage of evolution the submission was by contract, as was the selection of the arbiter, and the state was not charged with the enforcement of the decision, which operated in the same way as in the earlier period in that it clothed the successful party with the right of execution. In this second step in development Mr. Scott sees the same step in advance taken by the nations at The Hague Conference of 1899, when they established a panel of jurists from which governments might select arbitrators to decide controversies and to which panel their selection was limited. As in the case of litigants of the Roman Republic the choice of a judge or judges, though limited, was by contract, the submission was by contract, and the award was enforceable by the successful party as a direct consequence of the contractual relation.

This, says Mr. Scott, is the present stage reached in the development of an international judiciary. The nations of the world have unconsciously followed the exact line of growth which was followed by the Roman people in developing the judicial system, which is the foundation of the systems of nearly all modern states. The progress that has been made internationally is in accord with the law of evolution manifested in the history of Roman institutions. There remains for the world to take the final step, as it was taken by Rome, and establish a tribunal limited as to numbers, with a permanent membership, not subject to the will of the parties but named by the community of nations regardless of the particular case to be submitted to it.

But Mr. Scott does not rest his law of the evolution of judicial institutions on Roman history alone. He goes further and points out that the Supreme Court of the United States as a tribunal for the settlement of interstate controversies went through the same stages of evolution. From the Declaration of Independence to the present time there have been three types of government in this country; first, the Revolutionary until July, 1778; second, the Confederate until 1789; and third, the federal after 1789. Under the Revolutionary government the only method for settling disputes between the thirteen sovereign commonwealths was by mutual selection of commissioners or arbitrators and by mutual submission of questions to them, and self-redress was the sole means of enforcing their decision. The conditions seem to be identical with those of the early Roman period and those existing internationally prior to 1899.

By the Articles of Confederation of 1778 the second step in the develop-

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ment of a tribunal to settle the differences arising between states was taken. Congress, by article IX, was empowered to create a panel of thirty-nine judges, from which by a process of elimination the disputing states selected seven or nine to decide the controversy. This is the identical change which took place in the Roman system and which was brought about by The Hague treaty of 1899.

The final stage in development was reached when the Supreme Court of the United States was vested by section 2 of article III of the Constitution of 1789 with jurisdiction over "controversies between two or more states." The tribunal was no longer composed of judges selected by the parties, but consisted of a permanent body chosen without regard to the wishes of the litigants or the nature of the case. The contractual element in the constitution of the court and in the submission of the parties to it disappeared, as it did in the later Roman period, and as it is bound to disappear when the final step is taken in the development of an international judiciary.

Mr. Scott also points out that the operations of the Supreme Court are conclusive proof that it is practical and efficient for a tribunal to decide interstate controversies without a political superior to enforce its mandates. By what process, he asks, can a state of the American Union be compelled to submit to a decree of the Supreme Court? What branch of the federal government is delegated with the authority to execute a judgment against a state? If a state should decline to abide by a decision of the Supreme Court, there is no constitutional power to coerce it. The submission of a controversy between states to a permanent body of judges is made compulsory by the organic law, but obedience to a decision is voluntary. After a century of successful experience by the United States of compulsory submission of interstate disputes to an established court unsupported by a superior authority to enforce its decisions, Mr. Scott very pertinently claims that the absence of an "international sheriff" to compel obedience is not a valid argument against compulsory arbitration or against the establishment of an international court of arbitral justice, and he logically concludes that, since this type of judicial settlement has been found to be sufficient in the relations between the states composing the United States, there is every reason to suppose that it would be equally so in the community of nations.

Mr. Scott thus shows, in a way which carries conviction, that there exists a complete analogy in the development of the Roman court of justice, of an interstate court in the United States, and of an international court, even to the absence of a political superior empowered to enforce judicial decrees, and that in view of past experience compulsory international arbitration is not only practicable but is the natural development which will take place in conjunction with the institution of a world court with general jurisdiction.

Convinced that the evolution of an international judicial system is bound to follow the law of development disclosed by the histories of Rome and of the United States, Mr. Scott is directing his efforts and the resources at his command to persuade governments to take the final step which will place the decisions of an international tribunal of justice on as high a plane as those of the highest national courts, clothing them with an authority as declarations of law, which will not only bind the litigants but all civilized states as well,

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since they, as creators of the tribunal, constitute a judicial union which is bound to respect and uphold the principles of justice and equity which its tribunal announces.

Mr. Scott's present position as secretary of the Carnegie Peace Endowment furnishes him with unusual opportunities to accomplish the purpose, which he considers to be in accordance with the law of development and in harmony with the spirit of the age. His erudition, earnestness, ability, and industry make him especially fitted to meet the responsibilities and to perform the duties which he has assumed. He has entered upon a larger field of public usefulness than any which he has before occupied, where, doubtless, his labors will bring him new honors and add to the esteem in which he is held by those who know of the services which he has already rendered in the cause of universal peace.

Washington, D. C.

An Advocate Fearless and Bold

I WAS a barrister ready and bright,
Good in his chambers, good in a fight.
But, discontented, he said, "I want fame,
What shall I do, then, to earn me a name?"
Quick came the thought, "I will try length of speech,
And stick to my guns like a true legal leech."
Having a case then to argue one day,
He spoke for six hours without sign of decay;
Three days he continued for twenty hours more,
He finished his facts, then dealt with the law.

The end of his case was not very happy,
For the judge on the fourth day became somewhat snappy,
Which forced him to stop, and his lordship derided
His arguments lengthy, and against him decided.

But his object was gained, his name was now known,
For the Press him exalted, and said he had shown
That he was an advocate fearless and bold,
Whose clients would never be left in the cold.
So now he is famous and earning large fees,
And he talks and he talks and everyone sees
That because of the length of his speech he must be
An advocate good as one ever shall see.

— *Law Students' Journal.*

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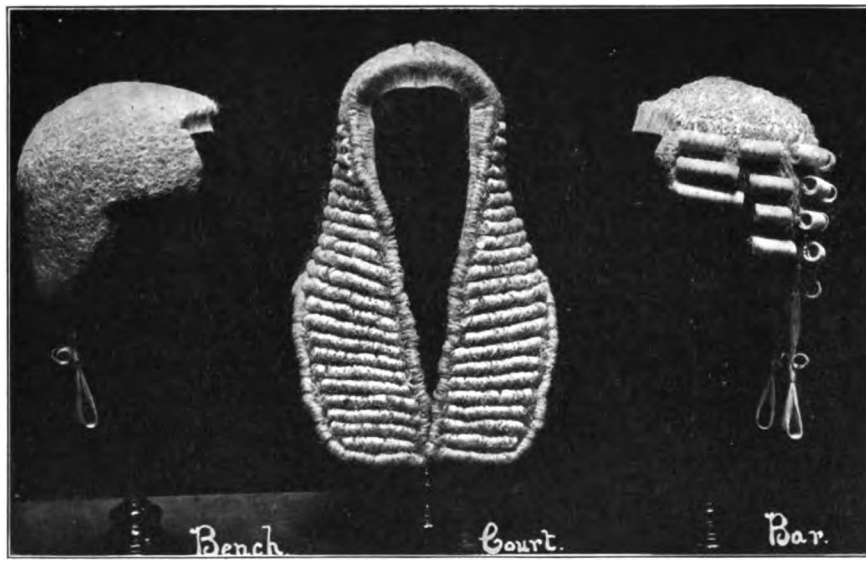

A Wig-Shop in the Temple

HERE in the United States, as the Englishman is apt to view the matter, there is scant honor paid to judges, and possibly one reason is because the American judge does not wear the pompous wig without which his English brother would hardly dare to open court.

In that connection special interest attaches to a queer little shop, much of the sort Dickens delighted in, which seems to do a flourishing business near the Temple.

To reach the place one travels by way of courtyards and passages, among little overhung offices, to the sign of a "Law Wig and Robe Maker." In passages close by the guides point out pictures of the old Middle Temple Hall and of the Temple Church, and of the dining-hall of the Middle Temple. Yonder is Middle Temple Hall, where Shakspere played "Twelfth Night."

You halt before an array of wigs, set in globes, in a window which projects out under the arches which form part of the series connecting the "squads" of the Temple.

If you are not intending to order, you step into the wig-shop timidly. "Would you have a blue bag, sir?" asks the attendant. Ten pounds, eighteen shillings, you learn, will get you a bag and a wig, but a very ordinary wig it will be.

If you are a barrister of rather higher pretensions, a King's Counsel, you want something better. A King's Counsel wears a court wig and silk gown. The gown costs from nine to twelve guineas. The King's Counsel's whole outfit will cost possibly forty guineas, implying court suit, wig, and gown.

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Such a man invests in the red bag of a King's Counsel, while his bag of old he usually presents to a junior as a mark of respect. Later he becomes attached to a particular red bag and keeps it as long as he can.

Judges have the wig and a green bag. Judges' wigs are substantially one and all the same and come to about thirty dollars.

Most of these wigs are made of horsehair, which is first colored a snowy white. It takes about a month to make a Judge's wig, although the material can be got ready in six or eight days. The hardest part of the work is the weaving by hand, and even for an expert this is tedious. Experts, moreover, are hard to find, for there are only three of these shops in the world, and all three are in London.

"If you're not buying wigs, you'll at least buy postcards, — two of 'em only a shillin'," the wig-maker urges. You feel he may do you bodily hurt if you do not leave at least so much behind you.

Satisfied with the shilling, he grows loquacious, and tells you how the judges keep their wigs on, in court, unless the day grow inordinately warm. Then he shows the ribbon which serves as the foundation for the wig, he explains the elaborate workmanship. Wigs are all about, —on the floor, walls, and tables. Among them a gilded portrait of Dickens looks down on the scene.

Outside you survey the hoary structures of the Middle Temple. Some barristers are coming to order wigs, and you go.

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The State University Law School: I, Its Rise and Its Mission

By Charles M. Hepburn
Professor of Law in Indiana University

DOES the true mission of the state university law schools differ in any material respect from the true mission of other university law schools? If it does, what is this mission?

These related questions have been submitted to the deans of several state university law schools, east and west. The answers, in the form of distinct articles, will appear in later issues of the *Green Bag*. But as a preliminary to these more interesting articles, and while they are in the making, a few things may be said about the rise of law schools of this kind, their present number and their possible field of usefulness.

Between the opening of the earliest university law school in America and the opening of our earliest state university law school there was an interval of nine years. The Harvard Law School, succeeding a privately endowed professorship of law, began its career in 1817; the law school of the University of Virginia, an integral part of Jefferson's original plan for a state university, began in 1826.

In the view of today there is in this nothing that is specially significant. We have grown accustomed, through the experience of half a century, to an average of two new law schools a year; and today a six months old university of a new fledged state is hardly entitled to recognition unless it has its university school of law.

But such was not the view of the first quarter of the nineteenth century. The tradition then, in America as in England, ran strongly against the idea of professional teaching of law in the universities.

Isolated college professorships in law had indeed appeared here and there, and had been held by distinguished lawyers. The law professorship which Jefferson, in 1779, induced the College of William and Mary to substitute for an existing professorship in divinity, had been occupied by Chancellor Wythe, and had numbered John Marshall in its list of students — the future Chief Justice thus attending the first course of law lectures ever given by a professor of law in an American college. Mr. Justice Wilson, of the Supreme Bench of the United States, with Wythe a signer of the Declaration of Independence, held for a time the law professorship which was established in 1790 in the College of Philadelphia. Chancellor Kent was the incumbent of the professorship of law which was established in Columbia College in 1793, and as such began that brilliant career of legal authorship for which he is chiefly remembered. And beyond the mountains, Henry Clay was for two years professor of law in Transylvania University, at Lexington, Kentucky.

These beginnings were auspicious enough. With all the prestige of the splendidly equipped law schools of today, it would be hard to match the opening of the first course of law lectures at Philadelphia in 1790; for the

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lecturer had among his auditors the "President of the United States and his Cabinet, the Houses of Congress, the Executive and Legislative Departments of the Governments of the State of Pennsylvania, and the City of Philadelphia, the Judges of the Courts, the members of the Bar," and a brilliant array of ladies. But if these law professorships were established in the hope of developing into professional schools of law, each failed of its purpose. They failed none the less if they were patterned after the professorship of law which the author of Viner's Abridgment had founded at the University of Oxford for the benefit of non-professional students of the common law, and which in 1765 bore fruit in Blackstone's Commentaries.

In the latter aspect these early law professorships may some day serve as precedents when our universities, especially our state universities, recognize the need of affording the layman an opportunity to study the law of the land. In their own day, however, their fate served strongly to confirm lawyers in the belief that university law school teaching could not succeed in America.

Successful university law schools were, of course, well known to continental lawyers. The fame "of the mother of all the universities," the University of Bologna, rested chiefly on her school of law, which was founded about the year 1088, and for generations drew students of law from the four quarters of Europe. To it, in the latter end of the twelfth century, came Englishmen, to study law under Azo, "master of all the masters of law"; and it was from Azo's published works that the author of the first organic treatise on English law, Bracton, writing in the middle of the thirteenth century, drew the general conception, the arrangement and the classification of his book.

The law school at Bologna brought others in its train. They flourished, these university law schools, in Italy, in France, in Spain, in Germany. At the opening of the nineteenth century the university law school was not only the accepted method of legal education on the Continent, but it was supported by the traditions of seven centuries.

These seven centuries, however, were without effect on the methods of legal education in England and America. Our traditional theory demanded law office instruction and the atmosphere of the courts. Nor was this unnatural, in the earlier stages of our law. We now define law as a science to be learned out of books; but for centuries the common law of England, whether regarded as a science or as an art, could be effectively studied only as it arose, in the courts at Westminster. Our books of the law were still to come. The long series of Year Books bear witness, it may be, to the earnest efforts of law students to catch the law living as it rose. In the absence of a native *corpus juris* a professional school of law was well nigh impossible at Oxford or Cambridge. There was the preference of the ecclesiastics, who were in control at the universities, for the civil and the canon law; there was also the reason given by Fortescue, that "at the universities of England the sciences are not taught but in the Latin tongue, and the laws of the land are to be learned in the three several tongues, to witte, in the English tongue, the French tongue, and the Latin tongue"; but if these obstacles to the study of the common law at the universities had been removed, there would still have remained a more serious difficulty — the lack of an adequate written

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basis of investigation and instruction in our growing body of native law.

This deficiency could, no doubt, have been supplied long before the year 1800. But the tradition in favor of law office instruction had by that time taken deep root in England and America. The professional students of law, turning away from the universities which offered them nothing, gathered around the seat of the courts at Westminster. Even while the Inns of Court were active in the work of legal instruction, the students were in daily and diligent attendance on the courts. When the Inns ceased to give actual instruction, in the latter half of the seventeenth century, the law students were brought into still closer touch with the law offices, the actual work of the courts, and the study of law as an art. Such was their daily habit of life for centuries; it is not surprising that the vision of a professional law school on a university campus, remote from the courts and the haunts of lawyers, was regarded as foreign to the genius of the common law. For many years after the opening of the nineteenth century our prevailing theory of legal education was essentially the theory presented in Fortescue's De Laudibus. When the Prince enquires why the laws of England, being so excellent, are not taught in the universities, the Chancellor informs him that they are taught in a better place, in the Inns of Court, situated "where the courts of law are held, and in which the law proceedings are pleaded and argued, and resolutions of the court, upon cases which arise, are given by the judges."

That an American university could successfully maintain a school of medicine was not questioned. A medical school had been established in the College of Philadelphia, the forerunner of the University of Pennsylvania, in 1765, in King's College, the lineal ancestor of Columbia, in 1767, at Harvard in 1782, at Dartmouth in 1798. But the doubt whether a university law school could succeed held the minds of the profession until after 1850. Professor Dwight, speaking of the origin of the Columbia Law School, has borne witness to the misgiving, the trepidation, with which that school was opened in New York City in 1858. "Even thinking men, who believed in schools of theology and in colleges of medicine, had little or no faith in schools of law."

It was in such circumstances, and with this cloudy horizon, that our first state university law school was launched, at the University of Virginia. The year was 1826, the year in which the Yale Law School, already existing on a private foundation, became formally incorporated in the college. It was three years before the beginning of the new era of the Harvard Law School under Story.

This Virginia State Law School was definitely designed, not as a law professorship for the instruction of laymen in the law of the land, but as a complete professional school of law. Its design, however, reached further than mere technical training for practice at the bar. The state, in Jefferson's view, had an interest of its own to serve in affording an opportunity for the professional study of law. It owed to itself the duty to train up a young lawyer in the way he should go, that when he entered the legislature he might not depart from it. In a letter to James Madison, under date of February 26, 1826, Mr. Jefferson has this to say: —

"In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke Littleton was the Universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British consti-

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tution, or in what were called English liberties. You remember also that our lawyers were then all Whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' horn book, from that moment, that profession (the nursery of our Congress) began to slide into Toryism, and nearly all of the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be Whigs, because they no longer know what Whigism or republicanism means. It is in our seminary that that vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister states. If we are true and vigilant in our trust, within a dozen or twenty years a majority of our own legislature will be from one school, and many deciples will have carried its doctrines home with them to their several states, and will have leavened thus the whole mass."[1]

Notwithstanding the prejudice of the profession in favor of the atmosphere of the courts and law offices, this new law school was established not in any populous centre, nor at the state capitol, nor at the door of a court house, but on the campus of a newly created university a mile beyond a little town in Piedmont, Virginia. If the situation of the Harvard Law School at Cambridge was so unfortunate as to imperil its success, as some confidently asserted, the situation of the Law School of the University of Virginia should have meant its speedy death. Yet the school was a shining success. Neither the stress of civil war nor the presence of armies in line of battle along its horizon broke the continuity of its sessions. It withstood even the devastation of the reconstruction days.

The same faith in university law school teaching and the same sense of duty resting on the state to train those who were preparing for admission to the bar, were more strikingly manifested sixteen years later, when the second state university law school was founded.

This occurred in the remote hill-country of southern Indiana, where, since the year 1820, a few far-seeing men had been laboring to build up an institution of higher learning. As early as 1835, the Board of Trustees of what was then Indiana College sought to open a school of law as a department of the college. They went so far as to call the foremost lawyer of his day in Indiana, Isaac Blackford, to be the first professor of law in the new school. Three years later the act of the legislature which converted the college into the present Indiana University expressly included "law" among the sciences which should be taught. A university school of law was accordingly opened at Bloomington, Indiana, as a department of this new state university, in 1842.

Four years later a law school was established at the University of North Carolina — the third in order of the state university law schools. In 1854 the present Law Department of the University of Mississippi was opened. In 1859 the University of Michigan, founded in 1837, opened its law school, with Judge Cooley as its resident professor.

Thus begun, the movement towards state university law schools was at first both slow and halting. The semi-centennial of the beginning of the movement showed only ten schools — the five already mentioned, and the law schools of the University of Georgia, the University of Wisconsin, the University of Iowa, and the University of Missouri. But the succeeding thirty-five years have added twenty-four schools to the list, seven of which appear within the five years beginning in 1906.

The growth and vigor of the schools themselves within the last five years

[1] For this extract from Mr. Jefferson's correspondence I am indebted to Mr. Lile, Dean of the University of Virginia Law School.

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is no less remarkable. In the full catalogue of thirty-four schools two show an enrollment of more than five hundred students. Seven others exceed two hundred students. In many of them there has been of late a marked tendency to advance the standards of admission and to increase the length of the required course. No less marked is the recent improvement in the material equipment in libraries and buildings.

A comparison of these thirty-four schools shows a certain homogeneity. As a rule, they are in small towns, they are day schools, they are three-year schools, and they have remarkably low tuition fees. In several instances the tuition fee is only a third of that charged at Harvard, Yale, Columbia, Pennsylvania, or Chicago. In some it is only one-sixth. In others there is no tuition fee for resident students.

It would seem that law schools organized on this basis, and conducted largely at the expense of the Commonwealth, are the expression of some sense of obligation resting on the state. But what this obligation is, and whether it results in a mission which is different from or wider than the mission of non-state schools, are questions to which the state university law schools themselves have so far given no clear answer. Rather we have copied the pattern, excellent in its way, of the non-state schools. Our catalogues reflect a trusting confidence that whatever is, is best.

But certainly there are opportunities which belong with peculiar fitness to the state law schools — opportunities directly in line with service to the state. To these schools, rather than to those on private foundations, belong the opportunity and the duty which Viner and Blackstone recognized more than a century and a half ago, the duty of enabling every man to obtain "a competent knowledge of the laws of that society in which we live." To the state schools belongs also the duty of providing the professional law student with an opportunity to study thoroughly the law of the state which maintains the school — the law of the jurisdiction. To them also belongs the privilege, if not the duty, of providing an educational uplift for the members of the bar within the state, through some proper form of extra-mural instruction in law.

Bloomington, Ind.

Get all the entertainment we can out of our work as we go along, for we may rest assured that if we postpone the fun of life until the work is done it will never come. It will find us dry and dusty as so many remainder biscuits after a voyage.

— *Joseph H. Choate.*

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The Appellate Autocrats, or Simon Ordinary's Concrete Justice

By A. G. Zimmerman[1]

IT was evident that he had never been in a law office before. He entered in a lumbering diffident sort of way. He removed his hat and in his indifferent English wanted to know "if this be a lawyer office."

He was Simon Ordinary and he looked his name to perfection. He was a simple ignorant country laboring-man, well along in the sixties. He had a steady, kindly blue eye, and an affidavit face that bespoke his thorough-going honesty and his freedom from guile.

He was a man of peace, but he had reached a settled conviction that he must now fight — in an orderly way if possible — to get his rights. He intended to have and keep what belonged to him, but he wanted to pursue approved methods. He was law-abiding to a fault.

During his twenty years or more in this land, Simon Ordinary had by honest toil and frugality managed to accumulate a very modest competence. Much of this was invested in two little houses and cheap lots in a small country town. In one of these houses he lived; the other he leased to tenants. He was grateful for his opportunities and had an innocent pride in his success.

He had great respect for authority, for position whether official or social, and for the rights of others. But he was determined to have his own, and his appeal to the law was for simple justice.

After patient and persistent questioning, young Lawyer Tryem managed to extract the essential details of his diffident client's trouble. It seemed such a clear case of premeditated spoliation on the part of an influential well-to-do citizen, that the lawyer hesitated. Yet the man had such evidence of honesty and truthfulness about him as to carry conviction in spite of the apparent improbability. Subsequent investigation and development more than substantiated the old man's story.

Captain James Somebody was a prominent business man of the town — so much so that in imagination he saw the letters P.B.M. after his name with as much pride as a college president sees his LL.D. He was in the habit of running things and getting what he wanted. To him his country social position and financial standing was "might," and he was a firm believer in the theory that "might makes right." Moreover, he was willing to put the theory in practice,especially in the case of his neighbor, Simon Ordinary, whose comparative success and assumption of rights the captain appeared to resent.

Between the two lots of Simon, chance or some bygone public-spirited citizen had left an eight-foot alley or passageway that nobody seemed to own or claim and that had never been legally dedicated to the public. Back of the lots at one end of the strip was a pasture made up of vacant lots belonging to Captain Somebody. On the sides of the strip were old out-of-repair fences, one being just four feet from the tenant house. A side entrance to this house opened on to a platform with front and

[1]Judge of Dane County Court, Madison, Wis.

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rear steps leading to a walk along this four-foot strip between the house and the fence.

Only the captain used the eight-foot alley strip, though he had several other ways, not quite so convenient, of getting to his pasture.

Some six or seven years before, Captain James Somebody, P.B.M., conceived the idea of getting a tax title to this alley way. Under the circumstances, the carrying out of this idea was perhaps not a censurable proceeding. The captain being an influential citizen, the strip could easily be gotten on the tax-roll as desired.

Thus far this mind of "might" worked within its technical "right." But the thing seemed so easy, and the eight-foot strip was so inconveniently narrow for a driveway, that the idea was enlarged and the passageway assessed as a twelve-foot strip — including therein the four-foot walk between the dilapidated fence and the tenant house. The assessor would naturally take the say-so of an influential citizen as to the width of the alley, and ask no questions.

The fact that Simon Ordinary owned and had possession of that extra four feet did not bother the worthy Somebody much. Simon was simple-minded, very ordinary, not very wide-awake generally, and the thing might be worked quietly and come out all right in the end. The eight-foot strip was confoundedly narrow and the extra width was really necessary. That the four feet belonged to Simon Ordinary, and were vitally necessary to the utility of his tenant house, was no concern of the captain's, if through a legal quibble they could be obtained to make his passage really valuable. Besides, Somebody, who had some years before aided Ordinary in buying this same house and lot, knew that the paper title was not exactly gilt-edged. Of this possible weakness of his title, Ordinary had no suspicion.

So the thing was thereafter returned for delinquent taxes, and the fore-handed captain eventually obtained tax certificates on a twelve-foot strip for three successive years. Then he was entitled to a tax-deed from the county — on one of two conditions being complied with.

These conditions were bothersome, but necessity must on occasion circumvent the law. One condition required due proof of notice of the tax-deed application to the owner or occupant of the premises. It was of course impossible to comply with this condition, because that would put Simon Ordinary wise and enable him to liquidate the delinquent taxes and spoil the tax-deed proposition.

There was left the alternative condition of filing an affidavit of non-occupancy. As two-thirds of the strip was in fact unoccupied, such an affidavit would be only one-third false! A subservient non-enquiring constable might be utilized. With the cursory information that it related to this unoccupied strip, and presuming on ignorant indifference as to its exact width, the affidavit of non-occupancy was readily obtained and the tax deed issued by the county on the strength of it for the twelve feet.

Having thus secretly obtained and recorded his tax deed, the foxy captain quietly rested on his laurels for nearly three years, presumably under the impression that the three-year limitation in which his void tax deed might be set aside was running. However, to complete his spoliation, shortly before the expiration of the period, he forcibly and physically took possession of the four-foot strip by destroying the fence, removing the platform, and erecting a new fence on the twelve-foot line. This new fence was put close up against the

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side of the house and directly across the side door, rendering this exit useless.

Simon Ordinary, of course, vainly protested against this notorious taking of his land by the P.B.M., but was informed that the latter had a deed and had paid for the strip. Had the simple Simon also been an influential citizen, such open piracy would not have been attempted. Or had Simon been less simple and less law-abiding and more assertive, he might have held his ground and fence with like assurance and more force, and with some legal justification as well as moral right.

But Simon was mystified and nonplussed. He could not understand the situation. He knew that he had a deed of the premises, that he had been in possession some fifteen years, and that he had annually paid the taxes. He did not comprehend that a slight misconstruction of the description in his deed, and the customary careless description in his tax receipts, could furnish the necessary legal technicality to justify a notorious appropriation of what everybody knew was his property.

Simon Ordinary therefore appealed to the law for concrete justice. He knew that in accordance with the abstract principles of justice implanted within his soul, he was being wronged.

To young Lawyer Tryem the case was perfectly clear, considering "justice in the abstract." But after instituting an action in ejectment, and becoming familiar with all the devious technicalities to be confronted, he realized that there was an appreciable difference between concrete and abstract justice. He set forth the facts fully in his pleading, and demanded possession and damages for forcible dispossession and the withholding.

Captain James Somebody's answer denied everything except that he was in possession under a tax deed. The fact of the answer being sworn to did not, of course, require admitting anything detrimental! Technical mental reservations and devious misconstruction of facts would sufficiently justify only favorable allegations. It was only a pleading, anyway!

The trial in the district court lasted three days. The matter ought to have been disposed of in about as many hours. In England the hours would probably have been ample.

Mr. Stikatem, Captain Somebody's seasoned old lawyer, understood about legal technicalities. He knew he stood no show whatever with the jury. It was absolutely necessary to get technical error into the record, so as to get a reversal on appeal and wear out the plaintiff by protracted and expensive litigation.

Stikatem's extensive experience taught him to reason that the appellate autocrats in general could be trusted to find error, technical or otherwise, if within the possibilities; that they were past-masters at the art of discovery, and were also beyond the reach of human or individual considerations.

So the old lawyer "played horse" with young Tryem and the trial court. The examination and cross-examination of witnesses was prolonged and reprolonged in the interest of the appellate autocrats.

The presiding judge was exasperated, but also practically powerless to hasten or condense the proceedings. He, too, knew from painful experience that the eagle-eyed appellate autocrats would carefully scan the record, and if any of the innumerable court-made precedents and technicalities were strained in the interests of concrete justice, then their supreme and final interpretation of the possible value of the testimony, as well

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as their adjudication of the law, would reverse the case and send it back for a new trial.

There were a dozen witnesses for the plaintiff, but the defendant himself was his only witness except for one immaterial expert. Mr. Stikatem depended upon (1) his client's forcible possession, (2) his fraudulent tax deed, and (3) other technicalities to be supplied by chance errors at the trial.

The court atmosphere was surcharged with the transparency of the whole proceeding.

Everybody — the parties, the lawyers, the witnesses, the judge, the jury, the court officials, the hangers-on and spectators — the very portraits of honored deceased judges and lawyers hanging on the walls of the court room — clearly realized that abstract justice lay with Simon Ordinary.

There were three independent legal reasons in favor of plaintiff's title, any one of which should give him the right to recover.

But the human soul of the presiding judge was perplexed. He had been on the bench but a few years. He saw those autocrats in the distance. He could not see, for the moment, that the plaintiff's simple possession for many years was a title superior to a void tax deed — he could not see it because he did not think it possible the autocrats would deign to so see it.

Neither did the judge think the autocrats would stand for tacking plaintiff's possession with his grantor's, and thus making a good twenty years' adverse possession title under the statute.

The third alternative was also troublesome. Simon's deed was not quite straight; *i.e.*, the lines (of the metes-and-bounds description of the definitely numbered partial lot and block) were not exactly with the cardinal points of the compass as described in the deed. The plot and lot lines were shifted slightly to the east of due north There was a chance for doing technical concrete injustice where the meaning and abstract justice were clear to everybody.

However, in a lucid moment of forgetfulness of the autocrats, the judge finally declared the deed all-sufficient.

Thereupon Simon Ordinary won his case with both court and jury.

Shrewd old lawyer Stikatem expected this result. In due course he appealed according to his original programme. He knew his client could easily stand the expense and delay. In fact he showed no mercy as to his own fees, because he knew that Captain Somebody was entitled to no consideration in this regard. And as to justice — why that was the very thing that Mr. Stikatem was employed to avoid!

On the other hand, expense was a most important item to Simon Ordinary. He had been under the impression that a simple *séance* in court would end the controversy. It was possible that he could be broken both financially and in spirit at the protracted prospect before him in his thirst for concrete justice.

To some extent fortune continued to at least flirt with the plaintiff. Despite the long trial and drawn-out cross-examination, Lawyer Stikatem was unable to convince the appellate court that there was any reversible technical error in the general testimony. Things looked shaky for the appellant. Still, the resourcefulness of the appellate autocrats in finding technical error on their own account without having it specifically pointed out to them, had yet to be reckoned with.

Moreover, the legal point as to the sufficiency of the description in Simon's deed, on which the trial court actually

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decided the case, gave such glorious opportunity for hair-splitting, that a mere appellate court — beyond humanizing influences — could not be expected to do otherwise than take advantage of it. And of course they did. On the strength of technical court-made law, they swept aside without ceremony that reason for upholding the judgment.

To offset this adverse conclusion the court graciously decided for Simon Ordinary on his second legal reason for recovery (which the trial court would not see), as to possession, by saying in the opinion: —

"But he (plaintiff) did show actual possession of the strip. This is sufficient evidence of title to sustain his action, until the defendant has shown a better title. If the defendant's tax deed was valid it shows a better title. But its validity depends upon the question whether the premises were occupied as provided by law during the time preceding the taking of the deed."

Then seemingly to overlook no possible technicality for reversing, and ignoring the fact that the statute provides for "occupancy *or possession*" they say that, "This," the question of occupancy, "is in dispute and doubt upon the evidence." Yet the evidence by numerous witnesses was all one way, and only the foxy captain himself in one part of his testimony disputed it, while in another part in answer to questions of the court he admitted the "occupancy or possession" and that he knew it. Witness some of this testimony: —

Court — You knew Mr. Ordinary had rented that house to different persons?

Captain Somebody — Yes, sir.

Court — You knew that he had charge of it?

Answer — Charge of the house? Yes, sir.

Court — And the premises with the house? *A.* — Not these premises.

Court — Well, the premises with the house. *A.* — Some of the premises, yes, sir.

Court — You have seen that house there? *A.* — Yes, sir.

Court — For how long? *A.* — Well, for forty years.

Court — You knew this platform was there on the east end of it? *A.* — Yes, sir.

Court — That is removed now, is it not? *A.* — I believe it is.

Court — Don't you know? *A.* — I have seen it away one side.

Court — And that part of the ground that platform stood on is now included in that alley you use now? *A.* — I think all of it is.

Court — It was removed when you put the fence up? *A.* — Yes, sir.

Court — And before you put the fence up that was used in connection with the house? *A.* — Yes, sir.

Of course the misguided trial judge was "clear off his trolley" when he said in his decision: —

"It is shown that some one was in possession or occupancy . . . without dispute — I say without dispute on the ground that when the tax-title claimant himself admits that he knew the house was there, that that platform was being used on the east side as a part of it, that he had to remove that platform to build his fence where the line ran, he cannot come into court and say that that land was not occupied, knowing at the same time that the plaintiff did own that house, had used it, and was the owner of it at the time and in possession."

Further, in attempted support of this technical reason for reversal, the appellate autocrats say, "It is also in dispute and doubt whether the defendant intruded into the premises." It requires discerning appellate wisdom to realize

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how in the very nature of the case there could be or was any controversy on this question.

And lastly in this same line was an intimation of "dispute and doubt" as to whether Simon Ordinary *consented* to having this strip stolen from him and the fence put up against his door! The only apparent excuse for this all-wise conclusion appears to be self-contradictory testimony of the defendant which was met by numerous witnesses, with the defendant impeaching himself before he got through testifying.

However, these technical "doubts and disputes" furnished judicial technical reasons for the autocrats' eagle-eyed search for technical error for reversal, because the trial court had not thought of "submitting to the jury for decision" questions nobody at the trial thought there was any dispute about. The very nature of the situation would seem to preclude any idea of doubt about it anywhere outside of an appellate court room where technicality rules as the "lord of high decision."

Nevertheless, that disposed of two of the three independent legal reasons on any *one* of which the judgment of the lower court in favor of Simon Ordinary *might* have been sustained.

The final reason, relating to adverse possession, remains to be considered. The statute law prescribed in effect that a title by adverse possession for twenty years without color of title, *i.e.*, without written conveyance valid or void, ripens into an absolute title of ownership.

It was conceded without "doubt or dispute," even by the appellate autocrats, that Simon Ordinary had been in possession of the four-foot strip for fifteen years, and that he and his immediate predecessor or grantor had been in uninterrupted possession for more than the required twenty years.

Young Lawyer Tryem contended that under the statute such twenty years' possession by Simon and his grantor, by tacking and without a paper or written transfer between them, established absolute title and furnished a valid ground for affirmance of the judgment.

Mr. Stikatem, the experienced old technical lawyer of Captain Somebody, insisted that the statute contemplated twenty years' continuous possession by a single holder, or written conveyances between successive holders.

The appellate court in its opinion on this point said: —

"He (Simon Ordinary) also failed to show title by adverse possession. His possession was without color of title and falls short of the statutory period, while the fact that he had no written conveyance leaves him without aid from the prior possession of his predecessors in possession."

That, of course, judicially settled the case of *Ordinary* v. *Somebody*, the judgment of the lower court being reversed and the cause sent back for a new trial.

As illustrating the infallibility and consistency of the appellate court, and furnishing the excuse, or lack of it, for the "concrete justice" meted out to Simon Ordinary, a few quotations on the identical point from the same court may be of interest.

Seven or eight years before, the court said: —

"There are doubtless instances where the successive possessions of different occupants have been regarded as a single continued possession, but we do not see how that can be held as to the excess here."

A year prior to the fiat in Simon's case, the court held as follows: —

"So, without a deed of the strip, it seems that the defendant can claim no

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right to the land founded upon the adverse possession of his grantor. This seems to be the effect of [citing the last foregoing case]."

These two were the only cases cited as authority for the last quoted extract from the opinion in the case of *Ordinary* v. *Somebody*, while in another case decided several months *before* the Ordinary decision, the court complacently held just the reverse by saying: —

"While it is not necessary, in order to create such privity [between several occupants] as will enable a subsequent occupant to tack his possession to that of a prior occupant, that there should be a conveyance in writing, and although such prior possession may be transferred by parol, yet it must clearly appear that the particular premises as in this case the strip in dispute, were in fact embraced in the deed of transfer, in whatever form it may have been made."

A year and a half *after* the Ordinary case, the last quoted identical language was again used in a decision, and without quotation marks.

Five years after the decision in which Simon Ordinary got his concrete justice, the court in a general discussion of the subject said: —

"That this court did not intend (ever!) to hold that a paper transfer is essential to privity between possessions, is clear. It has not been so understood, and it was distinctly said that a paper transfer is not essential to the tacking of adverse possessions together."

And again in the same case it is set forth: —

"Sufficient has been said to bring out clearly the true doctrine as understood by the court, that a paper transfer is not necessary to connect adverse possessions together," followed by the statement: "We might almost call the roll of the courts on that doctrine."

Yet in dealing out concrete justice to Simon Ordinary, the appellate court, inadvertently perhaps but no less erroneously as shown from its own statements before and admissions thereafter, decided differently "the true doctrine as understood by the court," in its painstaking and conscientious efforts to find technical error if possible in accordance with an apparently preconceived idea of its duty and purposes.

And it is universally conceded, too, that this appellate court was one of the very best, ablest and most conscientious in the nation even a score of years ago.

The re-trial in the lower court with a new jury again took days where hours should have sufficed for the simple issues. But the trial court dared not take chances on the appellate autocrats' discerning powers.

The resourceful old technical Stikatem this time concluded to facilitate a mix-up on the part of the jury and furnish ammunition for another reversal, by imposing a special verdict on the court. He knew that this scheme was usually a most fruitful reservoir for complications. It required extraordinary ingenuity to formulate as many independent questions of fact in this simple case as there were jurors to decide them, but the feat was eventually accomplished and the list submitted to "the twelve men good and true."

However, Simon Ordinary, despite the legalized judicial pitfalls and traps thrown in his path, again obtained a verdict and judgment. As a matter of course Captain James Somebody again appealed.

Whether it was because the appellate autocrats by this time had unconsciously absorbed some of the humanizing influences of the case, or whether they carelessly neglected to scan the record with magnifying glasses, or indeed, whether

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it was because the proceedings satisfied the most exacting and technical judicial discrimination, will forever remain a mystery, but the fact is that the judgment of the trial court was this time unanimously sustained.

In the absence of a more rational explanation, it may be said the high and puissant appellate autocrats seemed to have become almost human.

The result was so extraordinary and so surprising to Captain Somebody's old technical barrister, and he was so certain that the justices must have decided the matter with their eyes shut, that he brought the case to their attention for the third time on a motion for a re-hearing, filing a lengthy printed brief in support thereof.

But it availed the persistent Stikatem nothing. Justice — especially when one side obstinately wants it, and the other as pertinaciously doesn't — is usually slow but sometimes sure.

After half a decade or so of judicial strife in behalf of his simple client, young Lawyer Tryem went back to first principles. With ax and spade he aided Simon Ordinary and the sheriff in demolishing the Somebody fence and in replacing the smiling Simon in possession of his coveted four-foot strip, with the dour and sour-faced captain looking on.

Simon Ordinary had obtained his "concrete justice." He had recovered his four-foot strip.

"What was it worth," you ask? "The justice?" "O, the strip!" Well, independently of its peculiar value to the house, it may have been worth as much as fifteen dollars. But Simon eventually got justice, which is everything. And his litigation did not cost him, in dollars and cents, much more than the value of the house and lot, either!

Queries: Were Simon Ordinary an intelligent student of civic affairs, could he reasonably be permitted to at least inquire whether it is the legislators, the lawyers, the inferior judges, or — let it be said gently and deferentially — the appellate judges, who are responsible for the court-made law and legal rules and precedents?

And further, whether these orderly and sacred vehicles of justice in their turn are at the root of the delays, the expenses, the denials, the miscarriages and cumbersomeness — of concrete justice as it is ladled out to a litigious and long-suffering humanity?

Or do the real Simon Ordinarys only feel at times that there is something wrong about it all without knowing and ordinarily caring little where it is?

As new, able, honest, ambitious lawyers with commendable ideas of improvement one at a time become justices, are they gradually worked over and absorbed by their elder brethren to become fossilized parts of the same old sacred antequated judicial machinery of court-made technicalities, rules and precedents?

Is another Justinian or Napoleon needed to sift the legal rubbish and bring order and simplified system out of judicial chaos?

Or can the forty-nine sets of appellate justices be induced by — whisper it softly — public sentiment,to quietly and gradually in an orderly way rectify the sacred abuses, themselves? *Quien sabe?*

Madison, Wis.

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The Little Old Lawyer

By Dan C. Rule, Jr.

ONE Saturday night, Julie says to me, "Larry,
I want a silk dress, and a dimun tiary,
And a Frinch limousine; but, Larry Malone,
The thing I must have is a home of me own.
A little brown cottage I have in me eye,
That's hard by the mills and that's easy to buy.
The owner agrees, since we live by days' works,
To let us move in and buy it by jerks;
'Ten dollars a month, and ten dollars down,'
Said the Little Old Lawyer of Dillingham town."

We had lived in the cottage not more than a year,
When the mills where I labored stood silent and drear;
And I muttered to Julie, "A strike is a kind
Of a gun that's less deadly in front than behind.
On the little brown house the dues we must meet,
Or yer puff and me shavin'-mug lands in the street!
Can ye think of a way, and explain it by stages,
How installments are paid when ye're gettin' no wages?"
But Julie replied with a sigh and a frown,
"Ask the Little Old Lawyer of Dillingham town."

I stood in his office and held up me head,
And asked him the question, as Julie had said.
He smiled as he pointed his hand at me hair,
And replied, "Ye have plenty of silver up there."
Then he fished out the deed from a neat little pack,
And scowled as he scribbled a line on the back.
"Because I am close as the glaze on a brick,
The price of yer home ye must tender me quick,
Which is nothin' a month and one dollar down,"
Said the Little Old Lawyer of Dillingham town.

They'll let Julie and me into Heaven, we trust.
When there, we will ask for some emery dust,
And off in a corner, we'll polish a crown
For the Little Old Lawyer of Dillingham town.

Clyde, Ohio.

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Injudicial Rulings on Questioned Documents

By Webster A. Melcher
of the Philadelphia Bar

FORTUNATELY for the administration of justice, the vast majority of our judges are conscious of the fact that the mere donning of a judicial toga does not endow them with any peculiar knowledge on subjects outside of their own special branches of study, and that experts in other lines are able to enlighten them on such subjects. Therefore they treat the skilled assistant with the same fair consideration that any other witness would receive; and the weight to be given to his opinions is determined by his knowledge of the subject, as ascertained through a full, fair, and intelligent examination. This is but an exhibition of *judicial* conduct on the part of those judges.

There are, however, rare exceptions existing here and there of judges who allow their self-esteem and unreasoning prejudice to override their judgment; consequently they are found pursuing an almost opposite course. They resent all such skilled assistance, as a sort of unnecessary imputation against their own learning, and treat such witnesses with contempt and insult wherever possible. This is an example of *in*-judicial conduct on the part of those judges.

But among the majority class first mentioned there is occasionally found a judge who, with the best of intentions, on the spur of the moment so far fails to apply the principles of common sense and of accepted law to the matter before him, that he insists on perpetrating a ruling which is contrary to both sets of principles. Such decisions may be appropriately termed *in*-judicial rulings; and, as they are generally not appealed from, either through the temerity or ignorance of counsel or the fact that the case is settled, they practically never find their way into the official reports, — which is perhaps a fortunate thing for all concerned.

The writer in the course of his experience of nearly a generation as a member of the Bar making a specialty of the examination of questioned writings and documents, has encountered a number of such *in*-judicial rulings made in scattered jurisdictions throughout the United States; and these are here gathered together and presented as "horrible examples," with the object of preventing their repetition. In passing it can be said that some of the most absurd of these rulings came from the mouths of some of the most learned and respected members of the Judiciary; it may be assumed, therefore, that a review of them will be to the advantage of all, as well as to the Bar at large.

Out of consideration for the courts involved, the cases will not be referred to by names; but in every one of them some question had been properly raised, bringing before the court as an issue the genuineness of some writing or document, and the ruling cited was not a mere extrajudicial dictum.

1. *Preliminary to Trial.*

In an action upon a paper alleged to be forged, the plaintiff cannot be required to produce it for examination by an expert on behalf of the defense in advance of the trial.

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2. *Comparative Tests.*

Chemical tests on papers other than the one in dispute, or standards — in fact, on entirely extraneous and disconnected papers — may be admitted in evidence for comparison of the results of such tests as between the papers in the case and those outside of the case.

Reproduction of similarly made microscopic tests are, however, not admissible.

3. *Standards.*

No writings of other than the exact words or exact names in dispute are admissible.

A writing four years distant in date from the one in question is too remote to be admitted.

A letter from A to B is not admissible upon the testimony of C, who did not see it written, but to whom A recognized it as being his own writing.

A writing admitted to be genuine is yet inadmissible if it be not part of the transaction involved in the suit.

The party whose writing is in question may, just before the trial and for use therein, write similar words to them in dispute, and such writings are admissible, although made years after the writing in dispute.

In an action on a paper alleged to be forged, where defendant's counsel in cross-examining plaintiff's witness uses writings purporting to be by the party whose writing is questioned, and where plaintiff's counsel at the close of such cross-examination asks defendant's counsel to put those writings in evidence as standards and the request is refused, and where plaintiff's counsel thereupon calls on the defense for the production of those very papers, and on so obtaining possession of them offers them in evidence himself as standards, they will be admitted.

4. *Scope of Proof.*

Where it is alleged on one side and denied by the other that the body of a will, as well as the testator's signature thereto, was all in the handwriting of the testator, the proof will be confined to the signature alone, because, forsooth, "if the signature is genuine it does not matter who wrote the body of the will."

Where the bone of contention is a writing which is alleged by the plaintiff to have been written by A, and this is denied by the defendant, the defense may, if able, show that A did not write it because *he* did *not* write it; but the proof cannot be carried further, to show that A did not write because B *did* write it.

An expert witness may state his opinion, but cannot, even though permitted by statute, give the facts on which he rests that opinion or his reasons therefor. "It would only confuse the court and jury for him to give the details."

Illustrations tending to explain the witness's testimony are not allowable, even though a statute does provide otherwise.

An expert witness may not refer to the data contained in the written memoranda that he made when he examined the papers, but must testify (even in chief) wholly from memory, "otherwise no one could protect himself against such a witness."

A diagram made by the witness and used in explaining his testimony is admissible in evidence *generally*, and its use is not limited to mere purposes of reference, and this even in a murder case.

5. *Quality of Proof.*

Where an expert witness testifies, *inter alia*, that in his examination of

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the papers he found, for instance, that the disputed writing was made by a person holding a stub pen in his left hand at an angle of seventy-five degrees, and producing characters of a rolling design, while the writer of the standards used a sharp pen with his right hand, at an angle of one hundred and twenty degrees, and produced sharp angular characters; and where, because of that difference, in addition to numerous others of similar natures that he also mentioned, such witness is of opinion that different persons wrote the two sets of writings, nevertheless the witness did not testify to any *facts*.

6. *Qualification of Witness.*

A lay witness "acquainted" with a man's genuine signature, and claiming to have an "exemplar" thereof in his mind, so that, by a comparison of such exemplar with a signature before him, the witness can tell whether or not such signature is genuine, cannot be required to establish his qualification by indicating any of the characteristics of such exemplar.

An expert witness must have some knowledge of a language as a language, and not as a mere collocation of marks and letters, in order to pass on a writing in such language, even though the witness is entirely competent to pass on mere marks and letters themselves.

7. *Cross-Examination.*

A lay witness "acquainted" with a man's genuine signature, and claiming to have such an "exemplar" thereof in his mind as will enable him to determine from inspection whether or not a signature submitted is genuine, cannot be required to pass on such signature until he has seen also the rest of the paper.

An expert witness may not supplement his categorical answers by any explanations or qualifications, even though the truth requires it.

8. *Self-Incrimination.*

The alleged forger may be required on cross-examination to write the words alleged to be forged, to be used in the case, even though it be a criminal proceeding against himself.

9 *Aids to the Jury.*

Admittedly correct photographs of the writings are inadmissible, where the writings themselves are present or when the photographs are made on a transparent background.

The jury will not be furnished with any instrument to assist them in examining the writings in the jury room.

10. *Comparisons by Counsel.*

Where counsel in addressing the jury proposes to compare the writings in the case for the benefit of the jury, by the aid of a scientific instrument, he may first be required to submit to a cross-examination regarding such instrument.

It is reassuring, indeed, that the foregoing rulings cover but twenty-four points; but, though their number is comparatively small, the radical nature of most of them is so striking as to make their avoidance of great importance.

If it be true that we profit most by the mistakes we make, these rulings ought to be profitable to the profession out of all proportion to their numbers, and may it be so.

Philadelphia, December, 1911.

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Reviews of Books

MORRIS'S INTERNATIONAL ARBITRATION

International Arbitration and Procedure. By Robert C. Morris, D.C.L., of the New York bar, counsel for the United States before the United States and Venezuela arbitration of 1903, lecturer on international arbitration and procedure at Yale Law School, 1904-1911, counsel to the American Peace and Arbitration League. Yale University Press, New Haven; Oxford University Press, London. Pp. 178+60 (appendix and index). ($1.35 *net*.)

THIS volume is timely in connection with the topic of general arbitration treaties and has the merit of execution by thoroughly competent hands. The opening chapter deals with the history of arbitration and shows the antiquity of its origin. In the second chapter there is an interesting account of the more important arbitrations to which the United States has been a party. This historical matter supplies the writer with arguments for general international arbitration; to illustrate: — "The assaults made upon American commerce by France and England during the Napoleonic wars were resented here, not only because we suffered great material injury, but because these acts were regarded as insults aimed at our national independence. Yet these same spoliations were submitted to arbitration. . . . . Indeed, our whole national history furnishes abundant evidences that the disputes usually prohibited — independence, honor, and vital interests — have repeatedly formed the subjects of arbitration." The concluding chapter outlines very clearly the history of The Hague Conferences, and of proceedings in important recent arbitrations by the Hague Tribunal.

Many facts bearing on the subject of general arbitration have been compressed within the small compass of this book and accurately and attractively presented.

The appendix contains important documents chiefly of a procedural nature.

JOHNS HOPKINS STUDIES

The Closed Shop in American Trade Unions. By Frank T. Stockton, Ph.D., Instructor in Economics and History in the University of Rochester. Johns Hopkins University Studies, series 29, no. 3. ($1.25 cloth, $1 paper.)

The Development of the English Law of Conspiracy. By James Wallace Bryan. Johns Hopkins University Studies, series 27, nos. 3, 4, 5. (75 cts. paper.)

The Doctrine of Non-Suability of the State in the United States. By Karl Singewald, Ph.D., Fellow in Political Science in Johns Hopkins University Johns Hopkins University Studies, series 28, no. 3. Johns Hopkins Press, Baltimore. Pp. viii, 117. ($1 cloth, 50 cts. paper.)

MUCH information regarding the history and present status of the closed shop is given by Mr. Frank T. Stockton, in a monograph that should be read by every student of labor problems. The various types of closed shop are described — the "simple closed shop," the "extended closed shop," and the "joint closed shop." The treatment of the subject is impartial, and even sympathetic. People who denounce the closed shop need to be reminded that there is no definite type of this device of organized labor, and the practices of the unions in enforcing it vary widely. The closed shop, we are also reminded, should not be confused with the closed union — the union open to all workmen does not handicap the employer in obtaining his supply of labor. Taking up the indictments of the closed shop one by one, and the way in which they have been met, the author endeavors to reconcile the two positions by an

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unvarnished statement of the facts. He seems of the opinion that the question of the closed shop resolves itself, in the last analysis, to that of the superiority of labor organization and collective bargaining over the independence of the individual unattached workman. He does succeed in showing conclusively that the dangers of the closed shop are not nearly so great as is frequently supposed.

Labor questions are also dealt with by Mr. Bryan incidentally in his work on "The Development of the English Law of Conspiracy," the closing chapter treating of combinations of labor. The revolution in the English law of strikes during the nineteenth century suggests that the attitude which even now in some quarters opposes the closed shop may soon pass away. The anti-strike and anti-picket legislation of the early nineteenth century, and the laws ensuring the employer freedom in selecting his employees, were based, Mr. Bryan tells us, on an obsolete view that such doings worked injury to the community as a whole. Thus there was a conspiracy to do not simply a statutory wrong, but a wrong *in se*. In a previous chapter, the author intimates that "the English law relating to criminal conspiracy is unique. . . . We may say generally, however, that the offense of conspiracy does not in reality constitute an exception to the fundamental principle that the law will not take cognizance of a base intent to do evil." When an act is done to effectuate an intent, then "in some cases at all events the law will punish an intent." The decision in the *Journeymen Tailors'* case, thus interpreted, may not appear anomalous. The author has delved deeply in the early sources of English law, as well as into modern adjudications, and has executed a scholarly piece of work.

Mr. Singewald's "Non-Suability of the State" is a stimulating book, written evidently by one well qualified to conduct a philosophical inquiry which the scope of the treatise excludes, and full of vigorous logic that does not hesitate to uncover shortcomings in the reasoning of courts. This valuable contribution to our constitutional history is in method not historical alone, but juristic as well. The first part deals with the doctrine of non-suability, and the second with its application to suits against public officers. This latter part is a legal essay of conspicuous merit.

FROST'S CORPORATION TAX LAW

A Treatise on the Federal Corporation Tax Law, including therein a commentary on the tax itself, an appendix containing the text of the Act, all rules and regulations of the Treasury Department relating in any way to the Act; text of all laws relating to the collection, remission, and refund of internal revenue; text applicable to the administration of the federal Corporation Tax Law, and Opinions of the Attorney-General bearing upon the meaning of the Act. By Thomas Gold Frost, LL.D., Ph.D., of the New York City bar, author of "General Treatise on the Law of Guaranty Insurance," "The Incorporation and Organization of Corporations," etc. Matthew Bender & Co., Albany. Pp. xvii, 174 + 147 (appendices and index). ($4.)

THIS volume includes a history of the federal corporation tax, and a discussion of the constitutionality of the act and of the decisions on its construction and interpretation. This is followed by a discussion of the Treasury rulings on the form of tax returns, accompanied by examples of such returns. There are several valuable appendixes containing the text of the act, the Treasury regulations and opinions of the Supreme Court and of the Attorney-General, not the least interesting of which is a copy of the Bill of Complaint in the case which went to the Supreme Court to determine the constitutionality of the statute. The book is essentially a practical working book and will be of

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great assistance to lawyers in the preparation of Corporation Tax returns for their clients.

DEISER AND JOHNSON'S CLAIMS

Claims: Fixing Their Values. By George F. Deiser, A.B., LL.B., of the Philadelphia bar, and Frederick W. Johnson, formerly Assistant General Claim Agent. McGraw-Hill Book Co., New York and London. Pp. 140+18 (index.) ($2 *net*.)

WHILE this book includes an exposition of leading principles of the law of negligence, it is not a law book. It is designed primarily for the use of claim agents and all who may be called upon to adjust claims for personal injuries. The idea underlying the book seems to be that an honest and just claim will be met by an intelligent and honorable claim agent without recourse to legal advice, and that an ability to deal logically with facts is the chief essential for the valuation of claims, knowledge of legal principles being necessary only as bearing upon the questions of responsibility, legal cause, duties of the employer, and the like.

The circumstances which may affect the valuation of claims are very comprehensively discussed, and the book gives some sound practical advice which will be found most useful. The authors show a sincere purpose to promote honest and fair methods, and lawyers whose practice includes any considerable proportion of negligence cases will get valuable hints on the best way to deal with questions of fact and of damages.

NOTES

Harvard University announces the publication on February 26 of a History of the British Post Office, by Professor J. C. Hemmeon of McGill University. In addition to an account of the development and present organization of the postal department of Great Britain, the book includes a discussion of the parcels post, the telegraph and telephone system, and similar subjects. It is issued as Volume VII of the Harvard Economic Studies.

"Recent Administration in Virginia," by F. A. Magruder, Ph.D., Instructor in Political Science in Princeton University, is the latest of the Johns Hopkins University Studies to be received (Series 30, no. 1). The expansion of administrative functions since the constitutional convention of 1902 is considered, and the present administration is contrasted with that of the period covered by the constitution of 1869.

The Proceedings of the thirty-second annual meeting of the Ohio State Bar Association contains the interesting debates on legal administration and reform of procedure which took place at the sessions at Cedar Point last July. Congressman Samuel W. McCall's address, "Representative as Against Direct Government," is one of the most important papers included. The President's address, by Hon. Allen Andrews, contains reflections on public criticism of the courts. Other papers include "Liability Legislation, its Purpose and Methods of Enforcement," by James Harrington Boyd, and "The Reclamation of the Arid West, with (a little) of the law under which it proceeds," by Stanley E. Bowdle. Mr. Boyd's address, taking up more than eighty pages of the book, treats the subject in a very logical and systematic manner, and is a most valuable feature of the volume.

BOOKS RECEIVED

An Essay on Hinduism: Its Formation and Future — illustrating the laws of social evolution as reflected in the history of the formation of the Hindu community. By Shridhar V. Ketkar, M.A., Ph.D., Ph.D. in Sociology, Politics, and Political Economy, ex-president of the Society of Comparative Theology and Philosophy, Cornell University, v. 2 of History of Caste in India. Luzac & Co., London. Pp. xxxix, 162+15 (appendix).

History and Organization of Criminal Statistics in the United States. By Louis Newton Robinson, Assistant Professor of Economics in Swarthmore College. Houghton Mifflin Co., Boston and New York. Pp. viii, 100+4 (appendix). ($1 *net*.)

The Law of Interstate Commerce and its Federal Regulation. By Frederick N. Judson, of the St. Louis Bar. 2d ed. T. H. Flood & Co., Chicago. Pp. xxiv, 630+77 (appendix)+26 (table of cases)+71 (index). ($6.50.)

The Marriage Law of Canada: its Defects, and Suggestions for its Improvement. By George S. Holmested, one of His Majesty's Counsel for Ontario. Arthur Poole & Co., Toronto. Pp. iii, 46+5 (index). ($2.)

The Sunday Law in Canada. By George S. Holmested, one of His Majesty's Counsel for Ontario. Arthur Poole & Co., Toronto. Pp. ix, 111+17 (index). ($3.)

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Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Chinese Law. "A Study of Chinese Jurisprudence, I." By Pan Hui Lo. 6 *Illinois Law Review* 456 (Feb.).

A very able summary of the fundamental laws of the Chinese Empire. Of the penal code he says: "Punishments for crimes and small offenses are comparatively severe and heavy, and those for breach of civil obligations altogether ridiculous. The provisions are lamentably defective in everything relating to political freedom or individual independence, while the treason laws are preposterous. As the standard and conception of civilization is being rapidly changed through the march of the western ideas and learning into the East, it needs no prophet to tell that ere long such a code is bound to be radically modified or largely abolished."

Conflict of Laws. See Marriage and Divorce.

Corporations. See Voluntary Associations.

Criminal Law and Procedure. "Some Characteristics of English Criminal Law and Procedure" (*continued*). By G. Glover Alexander. 37 *Law Magazine. Review* 162 (Feb.).

"Among the very desirable reforms needed in Criminal law are: —

"(1) The abolition of the now meaningless distinction between felonies and misdemeanors. . . .

"(2) The revision of maximum and minimum sentences. . . .

"(3) The charging of offenses in plain, non-technical language. . . .

"(4) A Bill is now before Parliament to divide charges of murder into two classes, viz.: (*a*) murder in the first degree, where the jury think that the prisoner ought to be hanged; (*b*) murder in the second degree, *e.g.*, cases of infanticide, joint participation in suicide, etc., in which for many years past it has not been the custom to carry out the death penalty, and the passing of it upon an unfortunate creature who is often more sinned against than sinning, is justly regarded as a needless cruelty.

"(5) The general simplification of procedure, which is possible in many cases.

"(6) The appointment of more stipendiary magistrates. . . .

"(7) The establishment of an Inferior Court of Criminal Appeal. . . .

"(8) Finally, there is one matter which, it is to be hoped, will receive the immediate attention of Parliament as soon as it meets, viz., the giving of power to the Court of Criminal Appeal to direct or order a new trial to take place in certain cases where it quashes a conviction."

"Procedure in Criminal Law." By James B. Brooks. 21 *Yale Law Journal* 267 (Feb.).

"I believe in the thoroughly Christian humanity of our own laws, and legal system, and I am not ready to approve any law of procedure that has in view the quickest legal immolation in prison or the taking the life of a citizen charged with crime. I believe that it is the *certainty* of punishment, rather than the nature or imminence of it, that most influences crime in our country. It is the steady, resistless process of working out even-handed justice, that is most effectual in deterring the commission of crime. Quick works gets quick riddance of the accused man, but does little else, and that is not altogether a worthy motive."

Criminology. See Immigration.

Evidence. "The Rigidity of the Rule against Hearsay." By Ephroditus Peck. 21 *Yale Law Journal* 257 (Feb.).

"The far greater learning of modern judges, the far higher intelligence of modern juries, the far greater complexity of facts involved in modern litigation, all call for the expansion of the power of the trial judge to admit exceptional evidence in exceptional cases, and the abolition, or restriction to narrow limits, of absolute and rigid rules of exclusion of evidence. . . .

"It seems to me that the time has come for another reform, less radical than that of the 1840s, but which should at least modify the rigidity of the rule excluding hearsay."

General Jurisprudence. "The Development and Formation of International Law." By Ernest Nys. 6 *American Journal of International Law* 1 (Jan.).

The writer adduces historical evidence disproving the proposition that law means constraint (*Recht ist Zwang*); the early Irish law, for instance, governed social relations in the absence of legislative or judicial power.

Three successive phases in the development of law are distinguished. First comes that of esotery, the law being confided only to the initiated. Next comes the phase in which juridical rules are made public. Finally there is the phase of sytematic exposition and commentary. The form of the earliest law was not clear, precise, or determined; this is a characteristic of later law. "Law is not the creature of legislators; law even antecedes custom." In India particularly we have the example of ancient law, based on custom rather than on royal ordinances, and self-enforcing, automatic, rather than enforced by a political agent.

These considerations readily lead to the conclusion that a sanction of coercive force is not necessary, and in constitutional law it is often lacking.

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Custom is invariably at the bottom of maritime institutions and rules, says Mr. Nys, as well as of the rules of private law.

Other instalments are to follow.

"Is Law the Expression of Class Selfishness?" By Francis M. Burdick. 25 *Harvard Law Review* 349 (Feb.).

"It would be a strange situation, surely, if the courts were at the same time enemies and partisans of the employer class. Is it not more probable that they were neither enemies nor partisans; but that, in formulating the general doctrine of the master's liability to strangers, as well as the special fellow-servant doctrine, they were striving to do what seemed to them right and wise? They may have erred. Is there any evidence that they were actuated by discreditable or selfish motives?

"The writer holds no brief for the impeccability of judges or the infallibility of courts. But a careful and, he trusts, a candid study of the decisions of English and American courts during many years, has convinced him that the body of law thus developed is not the expression of class selfishness. On the contrary, it seems to him an honest, and in the main an adequate system of principles under which justice can be fairly administered between litigants without respect to class or rank or condition."

"Should Science rather than Precedent Determine the Law? — Common Law and Civil Law Contrasted by a Jurist familiar with Continental Practice." By Axel Teisen. 74 *Central Law Journal* 137 (Feb. 23).

"As a matter of fact, I do not hesitate to state that there is more certainty about the law in Continental countries than in either England or America. Each new point raised, be it by a case actually tried, or by a new condition otherwise arisen, or by a new statute passed, becomes at once a matter of examination and discussion within the profession and in its schools, which discussion generally leads to a final agreement about the proper treatment of the point. It is more than unlikely that the courts, after such an agreement has been reached, should disregard it in their future decisions. For this reason, we are generally in a position to tell a client what the law is about a certain point, even before it has been decided by the courts, or at least to give a distinct opinion and advise about it, because it probably has been discussed from all sides in the juridical literature."

Government. See Public Officers.

Immigration. "Immigration and Crime." By I. A. Hourwich. *American Journal of Sociology*, v. 17, p. 478 (Jan.).

"The statistics of crime in the state of New York, which is said to hold more than its proportionate share of the lawless immigrants, warrant only one of the following two conclusions: Either the new environment enables this invading army of immigrants with criminal records to keep within the law; or else the criminal classes of Europe, contrary to the popular belief, furnish less than their proportionate quota of immigrants — which is quite plausible, since the criminals belong to the submerged portion of the population and are kept at home by want of funds with which to pay for their passage."

Industrial Accidents. "The Relation of Fatigue to Industrial Accidents" (*concluded*). By Emory S. Bogardus. *American Journal of Sociology*, v. 17, p. 512 (Jan.).

Tables are introduced to support the following conclusions: that continuous work, other things being equal, is accompanied, hour by hour, by an increasing number of accidents; that the increasing muscular inaccuracy which accompanies uninterrupted work results in increasing danger of accident; and that fatigue is a cause of industrial accidents.

Seven judicial decisions are also cited with this comment: "The fact that fatigue has attracted attention to itself as a cause of accidents to the extent that such a conservative body as the judiciary will thus indict it, is noteworthy. The seven cases which have been summarized in the preceding paragraphs are not presented because of any legal points involved or for any reasons other than as a sevenfold argument in support of the thesis that fatigue is a cause of accidents."

Insurance. "Parol Waiver under the New York Fire Policy." By George Richards. 12 *Columbia Law Review* 134 (Feb.).

The history of the doctrine of parol waiver is indicated, and the manner in which courts have advanced beyond this doctrine, with some resulting confusion. A uniform contract patterned after the New York fire policy is favored as the surest protection against fire and against fraud.

International Law. See General Jurisprudence, Legal History, Marriage and Divorce, Missionaries, Negotiable Instruments.

Interstate Commerce. "The Fourth Section, or the Long and Short Haul." By Jay Newton Baker. 21 *Yale Law Journal* 278 (Feb.).

"The idea dwelt upon by the Commerce Court, and apparently controlling in its decision, seems to be that so long as the rate at the intermediate point is reasonable, it is a matter of indifference to that locality what rate may be made to the more distant point. This utterly ignores the fact that the railroad is a public servant, owing a common duty to both the long distance and the intermediate point, and that no rate to the intermediate point can be reasonable so long as the carrier is maintaining at the more distant point a lower rate, except in so far as that lower rate is compelled by causes which the carrier does not control."

Juries. "The Selection and Drawing of Jurors for the City and County of Philadelphia." By T. Elliott Patterson. 60 *Univ. of Pa. Law Review* 324 (Feb.).

Mainly a description of the system of drawing jurors as provided for by law.

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Legal Cause. See Torts.

Legal Education. "The Law and its Study." By Col. William Hoynes. 21 *Yale Law Journal* 278 (Feb.).

"What with reports, text-books, statutes, cyclopedias, digests and publications of various kinds, it takes a fair income to keep an office supplied with them. Even now but comparatively few lawyers can afford to take them all. . . . It is not the statement of such principles that fills and multiplies the books, but the publication of multitudinous cases, a large percentage of them cumulative or dealing with similar and almost indistinguishable facts. . . . The most obvious and feasible plan of meeting the difficulty is to turn submissively to the study and application of the fundamental principles to matters in litigation."

"University of Jurisprudence." By Sylvanus Morris. 21 *Yale Law Journal* 205 (Jan.).

"The time has not arrived, when a school of pure jurisprudence, for the academic, philosophical study of the science for learning's sake can be maintained. But the time is ripe for the establishment of such a school to meet needs now existent in our country. The advantages of a training in such a school to judges and practitioners are apparent and need not be discussed."

Legal History. "History of International Law Since the Peace of Westphalia." By Amos S. Hershey. 6 *American Journal of International Law* 30 (Jan.).

A rapid survey which is of marked value as a succinct historical summary of the progress of international law down to the present time.

"The Inns of Chancery; their Origin and Constitution." By Hugh H. L. Bellot, D. C. L. 37 *Law Magazine & Review* 189 (Feb.).

"When we remember that in the reign of Henry VI they numbered, according to Fortescue no less than ten, and that a century or more separated the later foundations from the earlier, a common origin appears improbable."

Marriage and Divorce. "Marriage with Foreigners." By W. R. B. Briscoe. 37 *Law Magazine & Review* 129 (Feb.).

A general international agreement is advocated as preliminary to needed regulations which have not yet been made under the English Marriage with Foreigners Act of 1906.

Master and Servant. See Workmen's Compensation.

Missionaries. "The Government of the United States and American Foreign Missionaries." By James Brown Scott. 6 *American Journal of International Law* 70 (Jan.).

"The policy of the United States is to regard the missionary as a citizen, and in the absence of specific treaties granting exceptional rights and privileges, to extend to him the protection ordinarily accorded to American citizens in foreign parts; to advance missionary enterprise in so far as it does not raise political questions and interfere with the orderly and constitutional development of the country in which the mission is located," etc.

Monopolies. "Restraints on Trade, I." By Roland R. Foulke. 12 *Columbia Law Review* 97 (Feb.).

An exceedingly able and valuable analysis of the law of restraints of trade is here set forth. The writer expresses with a precision of logic and an impartiality of view not found elsewhere, distinctions which must harmonize with the half-formed impressions of practical business men, and, while his discussion deals primarily with legal rather than with economic principles, the treatment of these legal principles, those for example of the rights of free competition and of free contract, is marked by the sound economic basis on which it rests. Of monopoly, for example, he says:—

"We come now to the case of a monopoly brought about by the efforts of the person enjoying the monopoly, and right here we must rid our minds of the notion that monopoly is a hateful thing and remember that, on the contrary, it is generally sought for by all merchants. Each buyer and seller is anxious to do all the buying and selling, as the case may be, in his line, and makes more or less effort, according to the circumstances of the case, to achieve that end. Monopoly, therefore, is a trader's heaven, the goal of every merchant. A monopoly, therefore, may arise by individual effort, as where a man, by superior business ability, succeeds in attracting all the trade to himself, that is, by successful competition. He may accomplish the end desired and achieve the monopoly by driving all others out of business. This competition may be within the limits allowed by law or may be what is termed unfair competition. Where the competition is fair, the monopolist may be said to have succeeded by the exercise of superior business ability. Now, since the principle of freedom of action and freedom of contract presents an avenue through which superior business ability will tend to drive out competition in any given line and obtain sole control over the market and thus bring about a monopoly, and since the desire for profit will incite efforts toward that end, it follows that the law by the very principle of freedom of contract relied on as condemning restraints on trade, encourages the bringing about of a state of monopoly profitable to the seller or buyer possessing it, but oppressive to the sellers or buyers who were deprived of their freedom of contract. This successful competition or business ability may be exercised by an individual or by a number of individuals acting together, and we shall find that the law makes a distinction between the two. The latter case will be discussed under the heading of combination.

"Where the monopoly was brought about by unfair competition, the common law afforded a remedy to the competitors injured by the methods of unfair competition, but a remedy which de-

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pended on the circumstance of unfair competition and not on whether or not a monopoly was brought about. It is very probable that a large part of the popular condemnation of monopolies in this country has arisen from methods of unfair competition pursued in achieving the monopoly, and it may very well be that a more stringent regulation of methods of competition would be effective in bringing about a proper condition of business activity. . . .

"It seems, therefore, as if upon the last analysis that monopoly, in spite of all the epithets which have been hurled upon it, is in itself a perfectly lawful thing, and that the only objection which the law really has is to certain methods of bringing about a monopoly, and the objection is not to the monopoly but to the methods.

"The conclusion, therefore, seems to be that monopoly is an evil, but a necessary evil; that the restraint on trade producing a monopoly may be divided into those which are lawful and those which are unlawful, and consequently that the law only condemns a monopoly when it condemns the restraint of trade which brings it about, and thus only condemns a monopoly indirectly by condemning the restraint."

"The *Standard Oil* and *American Tobacco* Cases." By Harold Evans. 60 *Univ. of Pa. Law Review* 311 (Feb.).

"In two particulars the court has extended the Act so as to render illegal contracts and acts which both at common law and under the prior decisions would have been valid, — *i.e.*, in holding (1) that contracts and combinations which, apart from their surrounding circumstances, do not restrict competition or obstruct trade to such an extent as to fall within the Act, may come within its prohibitions if done with an intent not reasonably to further one's own interests but to injure others, and (2) that the statute applies to mere acquisitions of property and other acts when done with a wrongful intent, though no combination or contract is involved."

"What's the Matter with Business? — The Views of Prof. James Laurence Laughlin." By Francis E. Leupp. *Outlook*, v. 100, p. 267 (Feb. 3).

"Clear judgment and a genius for managing large affairs are not characteristics so common as to pass unnoticed. Ought a man possessing these traits to be required to keep them out of sight, where they can be of no service to the public, merely because their practical use may place some less well-endowed person at an inequality. Is this equal justice between man? Is it progress? Is it, indeed, in any sense the 'free competition' for which we hear so loud a demand?"

"Is There Common Ground on which Thoughtful Men Can Meet on the Trust Question?" By Peter S. Grosscup. *North American Review*, v. 105, p. 291 (March).

"The day of power to so manipulate the coroation that, as a form of wielding capital, it may, in the hands of those who so choose, become a deceit and a snare, while still remaining the reservoir into which the bulk of the workable capital of the country pours, must come to an end. But how begin this process? Lead off, my answer is, by the national incorporation of every enterprise the bulk of whose raw material is drawn from states other than the company's domicile and the bulk of whose finished product is sold in states other than the company's domicile, thereby bringing their business into interstate commerce. Then construct this national corporation on lines respecting capitalization, the payment of dividends only when earned, simplicity in arrangement of securities, and the like, that as a 'form of holding property' the corporation will have become a real trust, in the old sense of that word 'trust,' for the benefit and security of its stockholders."

Negotiable Instruments. "International Bills of Exchange." By Prof. Francis M. Burdick. 6 *Illinois Law Review* 421 (Feb.).

"The examples already given show that the continental law of exchange still differs very widely from the English — so widely that there is little probability of complete unification at present. However, the delegates from Britain as well as our delegate, will attend the second Conference, to be held in 1912, with a well-grounded hope that the uniform Law, as a result of the consideration to be given it by each government, may be so modified as to bring it more nearly into accord with English law."

Partnership. See Voluntary Associations.

Penology. "Report of the Commissioners of Prisons." 37 *Law Magazine & Review* 175 (Feb.).

"The small increase in the convict population is attributed partly to the improved means of identification, which, by facilitating the establishing previous convictions, increases the chance of persons receiving sentences of penal servitude. This argument, however, is not quite consistent with the fact before stated — that there was a decrease in the number of persons sentenced to penal servitude during the year."

"The Man in the Cage." By Julian Leavitt. *American Magazine*, v. 73, p. 533 (March).

Written to show the brutality fostered by the prison system. Flogging, the punishment of the straightjacket, and cuffing-up as practised in the penitentiary at Marquette, Mich., before the legislative investigation, are described. "This prison is no worse than a hundred others that might be named. It is not an exception, it is a type. . . . Within the last five or ten years there have been a dozen similar revelations in other states — in Illinois, New Jersey, Ohio, Georgia, Texas, Kansas. All of these were as bad as Michigan, Kansas was even worse."

See Criminal Law.

Principal and Agent. "Implied Powers of Agent for Sale of Land." By Floyd R. Mechem. 10 *Michigan Law Review*, 259 (Feb.).

"It will be borne in mind that the question here to be considered is not in what form or in

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what manner authority to sell land may be conferred, *e.g.*, whether it must be by writing or may be by word or act, but whether an authority properly created and unquestionably existing for some purpose will include this one, whether authority relating in some form to land confers authority to sell it, and whether an authority clearly authorizing a sale of land confers authority to do unquestionably some other act relating to it."

Procedure. "French Courts of Commerce." By Paul Fuller, Jr. 12 *Columbia Law Review* 145 (Feb.).

"This sketch of a portion of the procedure of France is not offered with any suggestion that it would readily serve as a model," but there are "many things to be learned from the system, and from the lawyer's standpoint, none perhaps more important than the usefulness of a lawyers' association, austere, rigid in its regulations, autocratic in its methods."

See Criminal Law and Procedure, Evidence, Juries.

Public Officers. "Recovery of a Salary by a *De Facto* Officer, II." By Gordon Stoner. 10 *Michigan Law Review* 291 (Feb.).

Continuation of article noticed last month (24 *Green Bag* 149).

"An attempt has been made in this article to show that there is no basis in either the *de facto* doctrine or the legal right which a *de jure* officer has to the salary of his office for the recovery of salary by the *de facto* officer. What other legal right can there be upon which the *de facto* officer can base his claim? We can find none and none of the authorities suggest any."

Railway Rates. See Interstate Commerce.

Sports. "Lawful and Unlawful Sports, and the Legality of a Sparring Match." By N. W. Sibley, LL.M. 37 *Law Magazine & Review* 137 (Feb.).

"The history of the subject showing that prize-fighting itself only dates from about 1820, it becomes comparatively easy to understand how it is there are not many cases establishing definitely that a sparring match with gloves in a friendly encounter is a lawful game or sport, so that consent is a good defense either on a charge of manslaughter or on a charge of assault."

Torts. "Legal Cause in Actions of Tort, III" (*conclusion*). By Prof. Jeremiah Smith. 25 *Harvard Law Review* 303 (Feb.).

Professor Smith concludes this exceptionally valuable discussion by setting forth his own definition of legal cause, in the form of a short general rule — "Defendant's tort must have been a substantial factor in producing the damage complained of" — which rule is enlarged by a number of appended explanations or subsidiary rules. These rules, however, by no means exhaust the subject; the writer's purpose is simply to bring out the most important elementary principles underlying the decisions. Even if the sub-rules could all be stated definitely, "they would be," to quote Prof. Terry, "very complicated, full of fine distinctions, and hard to apply in practice." So Professor Smith thinks it undesirable to frame sub-rules of too narrow and precise content; he is satisfied to err, as he supposes, on the side of fullness as it is, and his illustrations clearly show the application of the principles that he has elucidated.

Trade Secrets. "The Law as to Trade Secrets." By A. W. Whitlock. 74 *Central Law Journal* 83 (Feb. 2).

"It is submitted that the true theory is that although a trade secret is property, it consists merely of information differing from ordinary chattels in that it is intangible and not capable of being dealt with as we deal with chattels generally. In case of a tangible chattel the purchaser from a thief is not protected, because the fault is with his *getting*. He may be in good faith and pay value, but he gets nothing, for the thief has nothing to give him but possession and that is wrongful possession. In the case of a trade secret, the wrongdoer has possession in the form of knowledge and this it is impossible to take away. So it seems from the necessity of the case that in the case of property of this kind, there is no such thing as title as distinguished from possession. That being true, the wrongful employee has title which he passes on to his transferee, leaving only an equity in the true owner. If such transferee takes in good faith and for value he should be protected."

Trusts. "Survival of Powers as Unaffected by Statutes." By Prof. Albert M. Kales. 6 *Illinois Law Review* 447 (Feb.).

"Distinguished writers in England have tended to make much turn upon the form of the words. . . . The distinctions made in the foregoing paragraphs by the present writer not only reconcile the cases, but, it is believed, do so upon more solid and rational grounds than could be furnished by the mere form of words or upon such illusive phrases as power coupled with an interest, or power *ratione officii*."

See Voluntary Associations.

Voluntary Associations. "Voluntary Associations in Massachusetts." By S. R. Wrightington. 21 *Yale Law Journal* 311 (Feb.).

An informing account of the features of a form of business organization which has been little used in other states, but has become highly developed in Massachusetts; the courts, however, have dealt rather vaguely with the legal problems, it presents, and the article gives the gist of these decisions and indicates what may be regarded as settled in the law and what is problematic.

Workmen's Compensation. "Constitutional Status of Workmen's Compensation." By Prof. Ernst Freund. 6 *Illinois Law Review* 432 (Feb.).

"There is . . . no controlling difference in constitutional principle between the abrogation

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of the fellow-servant doctrine and the liability of the employer for an accident which is due to a risk inherent to the trade. As Senator Sutherland, the chairman of the Federal Employers' Liability Commission, tersely puts it, in the one case the master is held responsible for the fault of the dangerous agent and in the other for the fault of the dangerous agency. Conceding, as the [New York] Court of Appeals does, that the legislature may abrogate the defenses both of common employment and of ordinary contributory negligence, it is inconsistent to hold that the legislature cannot create the liability which was proposed to be created by the New York act."

The writer gives some attention to optional systems of Workmen's compensation:—

"The legislature proposes to have justice administered to two parties to the same relation upon different terms, offering to each conditions unfavorable to him and giving him the chance of redeeming himself by declaring his willingness to accept the new method of relief. Either the legislature has the power to compel compensation —can it then exercise this compulsion in the roundabout way of denying justice except upon terms not applied to all alike?—or it has no such power; can it then do by indirection what it cannot do directly? This serious question goes to the very root of the laws of Illinois, Kansas, Massachusetts, New Hampshire, Ohio, and Wisconsin. In New Hampshire the difficulty is aggravated by the fact that the employer, before he can elect to come under the act, must establish his solvency by filing a bond conditioned upon the discharge of his liabilities."

"A Problem in the Drafting of Workmen's Compensation Acts." By Francis H. Bohlen. 25 *Harvard Law Review* 328 (Feb.).

The phraseology of the English acts of 1897 and 1906 is widely supposed to have acquired by judicial construction a simple, fixed meaning, but by considering the decisions Mr. Bohlen reaches the conclusion that in view of the decisions holding that disease suddenly contracted is an injury by accident, the words "injury by accident" should not be blindly retained without qualification. Furthermore, the term "by accident" differs from the term "accidental" in that "it requires that the injury shall be sustained on a single particular occasion the date of which can be fixed, and so excludes any injury, whether the disturbance of the physical structure of the body, or disease, which is of gradual growth."

"Workmen's Compensation in Michigan." By Hal H. Smith. 10 *Michigan Law Review* 278 (Feb.).

"Whatever may be said as to the effect as precedents of the opinions of the Massachusetts, Washington, and Wisconsin courts, it can, we think, be safely predicted that the activity of the legislatures of the several states and of Congress urged on by the tremendous public sentiment that appears to be behind the movement for workmen's compensation, will ultimately result in some plan which will not run counter to constitutional provisions, and can receive the fina approval from the courts of the land. That such a plan, at least for the present, must be based upon the elective system seems for the present both advisable and necessary. . . . That the elective system involves some difficulties of administration not inherent in the compulsory plan must be admitted. But the elective system does recognize the fundamental principle upon which all workmen's compensation rests, of payment for accidents that occur without the fault of the injured. The recognition of that principle in the law, coupled with any provision for a sure payment of a limited compensation, is a distinct advance upon the present system of employers' liability, and perhaps all the advance that should be attempted until the principle of workmen's compensation can be tested by practical operation in American industries."

"The Wisconsin Workmen's Compensation Law Sustained." By A. W. Richter. *Journal of Political Economy*, v. 20, p. 180 (Feb.).

Discussing the decision in *Borgnis et al.* v. *The Falk Co.* (133 N. W. Rev., adv. sheets, no. 3, p. 1) the writer says:—

"On the whole the decision is all that the advocates of workmen's compensation could wish for; the plan as worked out is sustained *in toto*, and the United States sees its first constitutional workmen's compensation law of general application in operation — a law which, though elective, offers such important inducements to both employer and employee that it is likely to find very general application and, in time, to be the sole recourse of our great army of industrial workers."

"Legislating for Labor." By Richard Barry. *Hampton Magazine*, v. 28, p. 105 (March).

"In nearly every state in this Union the English common law is the basis of all action in the courts. A great system of jurisprudence, indeed; perhaps as just and mighty a system as was ever devised. But it is a human system, and therefore fallible; most especially that part of it which deals with a terrible industrial condition which has grown up since the system was devised."

See General Jurisprudence, Industrial Accidents.

Miscellaneous Articles of Interest to the Legal Profession

American Traits. "The Middle West; II, The Reassertion of Democracy." By Prof. Edward A. Ross. *Century*, v. 83, p. 686 (Mar.).

"The tendency toward unity of institutions all over the nation is stronger now than ever before. Twenty years ago who expected there would ever so be much populistic opinion along the Hudson or so much capitalistic sentiment along the Missouri as there is today? If, then, the past is a safe guide, we may look for the East to be shaken presently with the same democratic revolution that is accomplishing itself in the states of the Far West and the Middle West.

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Biography. *Choate.* "Rufus Choate." By George Bryan. 17 *Virginia Law Register* 817 (Mar.).

"Any public speaker who can emerge from the test of a stenographic report of extemporaneous remarks in as perfect 'form' as did Mr. Choate from his jury cases must of necessity be endowed with great gifts."

Harlan. "A Tribute to Mr. Justice Harlan." By Chief Justice Edward Douglass White. *North American Review*, v. 195, p. 289 (Mar.).

A eulogy pronounced in reply to resolutions passed by the members of the bar of the Supreme Court of the United States and presented by the Attorney-General.

"He possessed a reverence for and an implicit faith in our constitutional institutions, a faith which knew no doubt and caused him to believe that the power of adaptability of those institutions was adequate to meet and provide for any possible condition, however complex or novel. . . . His methods of thought, in disregard of mere subtleties or refined distinctions, led him to the broadest lines of conviction, and as those lines were by him discerned, and differences between himself and others became impossible of reconciliation, the warfare of mind with mind was by him carried on, not with adroit fence or subtle play of reason, but with a directness and entire disregard of all narrower points of view."

"Justice Harlan." By Robert T. McCracken. 60 *Univ. of Pa. Law Review* 297 (Feb.).

"His mind was essentially simple in its workings, free from delight in subtle distinctions, resorting rather to direct and vigorous logic. He was prone to follow authority, and was never so well satisfied as when he could succeed in bringing in a given set of facts under the operation of some recognized adjudication."

Democracy. "The Prospects of Anglo-Saxon Democracy." By L. T. Hobhouse. *Atlantic*, v. 109, p. 345 (Mar.).

"Syndicalism in England is simply a reversion to older methods. . . . Emotional and fitful in its character, the movement breaks out readily into strikes to which the more stable and highly-organized unions rarely resort. It depends on immediate success, and the conditions this year were favorable to success. . . . In particular it cannot withstand seasons of bad trade and slack employment, and the last great movement of the kind, that of 1889 and 1890, crumbled away in the lean years that followed hard upon that crest of industrial prosperity. Nevertheless the revived movement is a real if not a very stable force."

Latest Important Cases

Explosives. *Sale of Dangerous Article Under Assumed Name — A Particular Brand of Stove-Blacking is Naphtha.* Mass.

According to a decision rendered by the Supreme Court of Massachusetts in *Gately* v. *Taylor et al.*, the jury may determine a compound of which naphtha is the chief ingredient, to which pigment and adhesive thickening has been applied so that it can be sold as stove blacking, "to remain really and essentially naphtha," notwithstanding the contention of defendants' expert that the article was "an asphalt paint." Consequently, where the particular brand of stove blacking purchased from the defendants had exploded and fatally injured the wife of the plaintiff, it was held that the defendants were liable for damages, under a statute making it a penal offense to sell naphtha under any assumed name and providing a civil action for any damage resulting from an explosion, independently of any question of negligence.

Initiative and Referendum. *"Republican Form of Government" — Constitutionality of Initiative and Referendum a Political Question — Courts May not Invade Province of Congress.* U. S.

In *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, 56 L. Ed. —, decided February 19, the Supreme Court of the United States unanimously held that whether the adoption by a state of the initiative and referendum is consistent with a republican form of government is a political question and not within the jurisdiction of the court, and that the duty of enforcing the provision of the Constitution, that the United States shall guarantee to every state a republican form of government, is imposed

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upon Congress. The opinion reiterates and re-enforces the general principles laid down by Chief Justice Taney in *Luther* v. *Borden*, 7 Howard, 1, and Chief Justice Fuller, in *Taylor* v. *Beckham*, 178 U. S. 548, in the distinction drawn between justiciable controversies and political questions.

The Court, Chief Justice Fuller writing the opinion, said that the contention of the plaintiff in error that the tax levied upon it under a law enacted by means of the popular initiative, without recourse to the legislature, was void, was an attack on the state itself, that is, on the framework and political character of the government by which the statute levying the tax was passed. The Court suggested that this view, if consistently maintained, would imply power in the federal judiciary, unless anarchy were to ensue, to build by judicial action, upon the ruins of the previously established government, a new one, a right which, by its very terms, implies the power to control the legislative department of the government of the United States. This statement showed the essential fallacy, said the Court, of the plaintiff's contention. The case was therefore dismissed for want of jurisdiction.

Monopolies. *Right of Patentee to Control Sales Through Restrictive Covenants—Infringement of Patent by Breach of Such Covenants.* U. S.

The case of *Sidney et al.* v. *A. B. Dick Co.*, decided by the United States Supreme Court March 11, involved the question of the right of the holder of a patent to control the market for his patented goods by means of a restrictive licenses issued with each article sold.

The Dick Company, patentees of a "rotary mimeograph," sold one of these machines to one Christina B. Skou, with a so-called "license restriction" to the effect that she should use with the machine only the stencil paper, ink and other supplies of the company's own manufacture. The bill was drawn against Sidney *et al.*, a New York co-partnership, to restrain them from aiding and abetting Miss Skou in violating the restriction by using other ink than the unpatented article supplied by the Dick Company.

The majority opinion was written by Mr. Justice Lurton (McKenna, Holmes, and Vandevanter, JJ., concurring). The Court held it to be within the right of the patentee to suppress articles protected by patent or to sell them under restrictive conditions. This right to sell under restrictions is a part of the monopoly sought to be established by the patent laws under the authority of the Constitution, said the Court, and an infringement of the conditions is essentially an infringement of the patent right, and redress may therefore be sought under the patent laws, the general law to the contrary notwithstanding, and the public policy of the state being what it may be.

A dissenting opinion was written by the Chief Justice, with which Hughes and Lamar, JJ., concurred. Chief Justice White declared the effect of the ruling to be "to destroy in a very large measure the judicial authority of the states by unwarrantedly extending the federal judicial power," and to impose on the federal courts the duty "to test the rights and obligations of the parties not by the general law of the land, in accord with the Conformity act, but by the provisions of the patent law, even although the subject considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public

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policy of the state and injuriously affecting a multitude of persons."[1]

Patents. See Monopolies.

Railway Rates. *Powers of Interstate Commerce Commission — Courts may Review its Decision Regarding Reasonableness or Unreasonableness of Rates.* U. S.

The Commerce Court handed down a decision February 28, in *Louisville & Nashville R.R.* v. *Interstate Commerce Commission*, which in effect accuses the Interstate Commerce Commission of failure to act on evidence duly presented to it, and declares that Congress never intended to clothe the Commission with an unlimited authority to determine questions of the reasonableness or unreasonableness of rates.

On account of water competition the railroad had maintained rates from New Orleans to Pensacola and Mobile so low that the Montgomery rate exceeded the sum of the locals through Pensacola and Mobile. The water competition having ceased, the Pensacola and Mobile rates were increased. This led to complaint that the railroad was discriminating in favor of Montgomery, the Montgomery rate being lower than the sum of the Pensacola and Mobile locals. The Interstate Commerce Commission then ordered not only restoration of the old rates to Mobile and Pensacola, but reduction of the through rate to Montgomery.

The Court (Archibald, J.), in reversing the decision of the Commission, recited the manner in which the rate contentions came before the Commission, and declared that the hearing provided for by the statute is not perfunctory.

"The carrier is entitled," it said, "to know and to rely upon what is adduced at it [the hearing] either for or against the existing rate, and the Commission is not authorized to disregard it and reach a conclusion not at all justified by it. If the rate attacked is shown to be unjust, it may be abrogated and a new one established. But if that is not the outcome of the hearing, and on the contrary it is clearly shown that the rate is not unjust, the evidence as to this cannot be put aside, and if it is and the Commission without reference to it proceeds to condemn the rate and fix another, its action is invalid.

"After the most careful consideration we are forced to conclude that the action of the Commission in the present instance is of that character."

The opinion then proceeded to a long examination of the evidence in the case. This raised squarely the issue which the Commerce Commission has been waiting to have raised. The Supreme Court has held that the conclusions of fact of the Commission are not subject to review by the courts. And it was held that the decision of the Commission as to the reasonableness or unreasonableness of a rate was a conclusion of fact.

"Counsel for the Commission and for the Government," said the Court, "simply rely on the authority of the Commission to determine what is a reasonable rate, and the conclusiveness of its judgment where it has done so, against which, it was argued, the courts can afford no relief unless the rate which has been fixed is shown to be confiscatory. This contention must be rejected.

[1] Somewhat similar questions were involved in the cases against the United Shoe Machinery Company, which came before Judge Putnam of the United States District Court at Boston on demurrers to indictments charging violation of the Sherman anti-trust law. While the counts charging combination and conspiracy in restraint of trade were overruled, on the ground of insufficient law contained in them, the important counts charging monopoly through the company's system of restrictive leases on patented machinery was sustained in Judge Putnam's decision rendered March 2.

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"In our judgment, it was never intended to confer on the Commission any such unrestrained and undirected power."

Mack, J., dissented.

Wills. *Statutory Requirement of Subscription at End — End Determined with Reference to Consecutive Order of Composition.* N. Y.

The New York Court of Appeals has substantially, though not so clearly as was to be desired, overruled the artificial doctrine of the *Andrews Will* case (*Matter of Andrews*, 162 N. Y. 1) in a decision recently rendered. In that case a will had been written on the first, second and third pages of a printed form, being unusual in only one respect, namely, in that the second and third pages of the instrument, instead of being left and right, were right and left, the signature and attestation clause coming at the top of the left hand page. Though the draftsman had clearly numbered the pages so that there could be no confusion regarding their order, the Court of Appeals (Bartlett, J.) said that the portion marked "2d page," following the "3d page," containing signatures of testatrix and witnesses, was not incorporated into the will proper nor connected with it in any way.

Vann, J., in *Matter of Field*, decided February 20 (*N. Y. Law Jour.*, Feb. 29), said he regarded "the decision in the *Andrews* case as extreme and as marking a boundary beyond which we should not go." Where the testator, using a short-form printed blank, had referred to "the pages hereto attached and numbered from one to six, inclusive," and these sheets were pinned to the blank space over the witness clause and signatures, it was held that the will, "when read consecutively as the mass of mankind would read it, has the signature at the physical and natural end thereof," and was therefore subscribed at the end in compliance with the statute.

Wills. *Winding-up of Testator's Business by Trustees — Moral Interest of Male Heirs must Yield to Considerations of Sound Trust Management.* Mass.

A testator, largely interested in woolen manufacturing, created from his large estate a trust, terminating in 1919, authorizing the trustees to continue his business of manufacturing only for the purpose of winding up the company, and only so long as they might find it advisable in order to close it up without serious loss. The trustees, believing the time had come when the interests of the estate made a sale of the properties advisable, petitioned the court for authority to dispose of them. The widow of the testator opposed the sale on the ground that her two minor sons needed the incentive of looking forward to active participation in a business which their forbears had carried on for more than a century, since the time of Samuel Slater, the father of textile manufacture in the United States.

In the *Slater Will* case, determined by the Massachusetts Supreme Judicial Court, March 1, the objections of the widow were overruled, and the trustees were authorized to sell the properties. Chief Justice Rugg said that the mill properties "constituted the investment of too large a proportion of the trust fund to be consistent with sound trust management. . . . These considerations overbalance the gain which might ensue from retaining the properties in the hope that the two minor sons of the testator might grow to maturity with tastes and capacities which would enable them to assume responsible positions in the manufacturing business."

Morton and Braley, JJ., strongly dissented.

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The Editor's Bag

THE PLENARY POWER OF CONGRESS TO ORDAIN A "REPUBLICAN FORM OF GOVERNMENT"

THE provision of the federal Constitution under which "the United States shall guarantee to every state in this Union a republican form of government" has never been construed by the Supreme Court as authorizing the federal courts to employ their own power for the enforcement of this guaranty.

In *Luther* v. *Borden* (7 How. 1) the Supreme Court held that the power to determine which of two contending governments of a state was legal had been given by the Constitution to Congress, and delegated by that body to the President to the extent of giving him discretion to determine when he should lend military aid and which government he should recognize as lawful. The Court said that this power of the President must be respected and enforced in the federal tribunals. In so far, therefore, as there might be any justiciable question of the authority of the President or of Congress, the Court recognized such authority, but impliedly denied the question of the legality of a state government to lie within the purview of a federal court.

In *Texas* v. *White* (7 Wall. 700) the Supreme Court construed the same provision of the Constitution as authorizing Congress to establish the "Reconstruction" governments of the states which had seceded in the Civil War, but avoided passing upon the constitutionality of particular provisions of the Reconstruction acts.

These two cases illustrate the attitude of the Court, which has been one of passive support to Congress or the President, as opposed to one of active assertion of its own prerogative. The question of the legality of a state government has thus been treated as an appropriate subject for legislative or executive rather than for judicial action, — in the terminology of the Court, as a "political" rather than as a "judicial" question. The actual intent of the Constitution might appear to be that all branches of the federal government should share the power and responsibility of enforcing the guaranty, and there would seem to be no reason in principle why state constitutions in conflict with the federal Constitution should be more immune from judicial nullification than state statutes. The Supreme Court, however, has never had the boldness to claim such authority.

At the same time, while it has been the general policy of the Supreme Court to treat the question of the meaning of the words "a republican form of government" as political and outside its jurisdiction, this policy has not been adhered to with absolute logical consistency. Otherwise the Court, in *Minor* v. *Happersett* (21 Wall. 162), would have refused jurisdiction of the question whether a state government in which women are

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not permitted to vote is republican in form.

The recent decision of the Supreme Court in the *Oregon Initiative and Referendum* case (*Pacific States Telephone & Telegraph Co.* v. *Oregon*, Oct. term 1911, no. 36) reasserts the non-interference doctrine of *Luther* v. *Borden*. It is not a doctrine, on the whole, which reveals grave hidden weakness in our constitutional system. If the federal courts may not interfere with the action of the states in adopting whatever forms of government they may choose, ranging from monarchical absolutism to the tyranny of mob-rule, Congress may interfere to maintain the older government, if necessary, in the face of internal discord and disorder, and no additional safeguard would appear to be needed. The principle of "home rule" has made such progress in the field of local government that there is much to be said in favor of giving it the broadest possible scope, in that of state government as well.

As for the narrow question whether the initiative and referendum are consistent with a republican form of government, there is a strong sentiment in influential quarters that if they are treated as simply emergency measures, to be employed on extraordinary occasions, they do not supplant, but on the other hand may even tend to reinforce, our existing representative institutions. We are disposed to agree with a writer in the *Harvard Law Review* who, after a careful study of authorities, concluded: "It seems, on the whole, that 'republican' in the Constitution is ambiguous, and that a positive interpretation that it had a meaning so narrow as to exclude direct legislation cannot be supported."[1]

[1]See 23 *Green Bag*, 80.

A PATENTEE'S MONOPOLY OF SALE

THE Supreme Court of the United States, in its decision in *Sidney et al.* v. *A. B. Dick Co.*, follows the English common law doctrine of the rights of patentees. Federal Judge Putnam, in a recent decision on the validity of indictments against the United Shoe Machinery Company, referred to a case where the Judicial Committee of the Privy Council had upheld a contract which required the users of a patented shoe machine to use fastenings and other devices not covered by the patent. More recently the Judicial Committee sustained covenants restrictive of competition in a case coming before it on appeal from the Supreme Court of Australia. (*National Phonograph Co., Ltd.*, v. *Menck*, 1911, A. C., p. 336, see 23 *Green Bag*, 596.)

It would not have been wholly impossible, perhaps, for our Supreme Court to decide the *Dick* case in the opposite way, extending the principle involved in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (23 *Green Bag* 322), which was a case of monopoly of sale of unpatented medicines. The position of Mr. Justice Hughes, who wrote the ruling opinion in the *Dr. Miles* case, and of Mr. Justice Holmes, who dissented, has not really changed, though the former now dissents from and the latter concurs in the judgment in the *Dick* case. The *dictum* of Mr. Justice Holmes in the *Dr. Miles* case would perhaps be appropriate to his attitude in this later decision: "I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."

The difference between patents and

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other forms of monopolies is so fundamental that in the present state of our commercial morality the fullest possible enjoyment of the fruits of a patent is not to be condemned as savoring of moral turpitude. When there is a tendency to make patentees the victims of that same popular covetousness which would shear all great industrial combinations of their strength, one's sympathy naturally goes out to the patentee, and one is tempted to plead that he be permitted a free hand in fixing the terms of sale of his patented product.

We feel that the decision in the *Dick* case was just, there being no evidence that the conditions attached to the sales of the mimeograph were oppressive or contrary to sound public policy. At the same time, it may be well to contradict the notion that under any view of the common law a patentee can possess an absolute monopoly of sale. If a condition were embodied in the agreement of sale, for example, to do some unlawful act, to perpetrate a crime, for example, or merely to commit a tort as a condition precedent to obtaining possession of the article sold, it would be *nudum pactum*. The right of the patentee is not paramount to sovereignty itself, and is not absolute.

While a patentee enjoys the right to fix whatever price for his article he chooses, there should be nothing in the law giving him the right to exact payment not only in money, but in forfeiture of personal liberty, or in acts done solely for the patentee's benefit tending to destroy the business of others by other means than the quality or cheapness of his product.

For these reasons, if we presuppose the existence of a definite body of law defining offenses against fair competition, it would be right to prohibit patentees from coercing their customers to commit these acts in illegal restraint of trade, and Congress may well consider the advantage of carefully drawn legislation regulating a patentee's monopoly of sale. But it would be most inequitable to sweep away, at one stroke, all the protection which the patent laws now afford a patentee in the enjoyment of the right to make profitable use of his patent. An opposite decision in the *Dick* case would have been unfortunate, and its mischief could not have been easily repaired, but the decision actually rendered leaves no very heavy burden on the shoulders of Congress.

MR. JUSTICE PITNEY

PRESIDENT TAFT has made Chancellor Mahlon Pitney of New Jersey an Associate Justice of the Supreme Court, succeeding the late Justice Harlan. Chancellor Pitney meets many of the President's requirements for a Supreme Court justice. He is just a little more than fifty-four years old, six years under Mr. Taft's "age limit," and has been a practising lawyer and judge since 1882.

The new Justice is a Princeton man. His father, Henry C. Pitney, was a Vice-Chancellor of New Jersey. His mother was Sarah Louis Halsted. Mahlon Pitney was born at Morristown, Feb. 5, 1858. He was graduated from Princeton in the class of 1879, received the Master's degree three years later, and when he became Chancellor was honored with the degree of Doctor of Laws from his Alma Mater. He was admitted to the bar in 1882 and began practice in Morristown.

Although he had an active practice, he took an interest in politics, and in 1894 was elected to Congress as a Republican in a Democratic district, and

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in 1896 was re-elected with an increased majority. He took an excellent position in Congress and did much good work. In 1898 he was elected to the state senate of New Jersey, a position which he held for a number of years, and took a leading part in the business of that body. On February 5, 1901, he was appointed by Governor Voorhees Justice of the Supreme Court, and in 1908 was appointed Chancellor by Governor Fort, being sworn in November 19 of that year.

After his term as President of the Senate he was in direct line for the Republican nomination for Governor, and he was strongly favored by many prominent men in the state.

Chancellor Pitney was married in 1891 to Miss Florence T. Shelton of Morristown. He is a man of fine presence, six feet high, of athletic frame, fond of the chase and outdoor sports, clear-eyed, and one of the most accomplished of orators. He has a beautiful but not ostentatious house in Morristown, where he lives with his wife and two sons. One of his sons is now at Princeton.

There was opposition to Chancellor Pitney's appointment that came from the labor interests, which failed to unite in a general protest. In *Jonas Glass Co.* v. *Glass Blowers' Association*, decided by the New Jersey Court of Errors and Appeals at its March term in 1910, Chancellor Pitney said that a statute of 1883 which allowed two or more persons to unite or combine by oath to persuade or encourage others by peaceable means to enter into combinations for or against leaving or entering into employment did "not legitimize an invasion of private rights." He thus put himself on record as opposed to the use of violence by labor unions in boycotts and picketing. It cannot be inferred from this decision that Chancellor Pitney's ripened judgment is hostile to peaceable picketing, and the protest from the Iowa labor union was relatively insignificant.

The appointment is highly praised throughout the country. The Philadelphia *Legal Intelligencer* says: —

"His political experience has probably been larger than that of any of the present members of the Supreme Court, with the exception of Justice Hughes and the Chief Justice, the latter of whom was formerly United States Senator from Louisiana. He brings to the Bench special knowledge and experience in the administration of equity jurisprudence in dealing with great corporate questions and has had occasion in the past to consider the responsibilities and limitations of great combinations of capital."

The *New York Times* says of Chancellor Pitney: "Many cases of moment and importance have come before him, and he has rendered decisions which have won for him a reputation for entire independence and impartiality and for soundness. Judged by his reputation in New Jersey, where he is best known, and by the respect shown for his decisions, Justice Pitney unites the qualities that constitute in a high degree fitness for the office for which he has been named — high character, ability, a just mind, and learning in the law."

According to the *New York Law Journal*, — "His judicial record has been characterized by broad-minded apprehension, abundant legal knowledge, and practical wisdom in effectuating justice. He undoubtedly possesses the requisite mental and moral caliber, and, as he is still a comparatively young man, many years of energetic service may be expected from him."

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IN RE CAIN

DEAN E. RYMAN, ESQ., of Atlanta, Ga., compiler of "Georgia Words and Phrases," sends the *Green Bag* the following information: —

No wonder we speak of "raising Cain" when we speak of getting into trouble. Not only has Cain just been convicted of murder, as was pointed out editorially by your distinguished contemporary *The Docket*, but he has also been convicted of manslaughter, stabbing, kidnapping, horse-stealing, gambling, cheating and swindling, simple larceny, betting on an election, profaning the sabbath, and running a "blind tiger" in prohibition territory. Besides these, he has a number of other petty offenses charged against him.

It seems that Cain has also had domestic troubles. He has been divorced at least five times and has tried to get that relief several times when he failed. He has been sued for not paying his telephone and grocery bills, and other instances where he has sued or been sued *ex delicto* and *ex contractu* are legion.

But Cain is now dead, I take it. At least, after a very stormy career I find his administrator being sued and a dispute as to what persons are his heirs. I think I may say "with certainty to a reasonable intent" that he died intestate, for a diligent search has failed to discover his will in any probate court in the land.[1]

MARRIED TWICE

"MRS. FINNEGAN, were you ever married?" asked the judge.

"Yes, Judge, I was married twice — twice, Judge, and then once to a soldier."

THE MURDER OF A SUICIDE

"If one counsel another to commit suicide, and the other, by reason of the advice, kill himself, the advisor is guilty of murder, as principal." — Head-note in *Commonwealth* v. *Bowen*, 13 Mass. 354 (1816).

THE acts for which the defendant was indicted were committed while he was an inmate of the prison in Northampton. The cell adjoining that of the prisoner was occupied by one Jonathan Jewett, who lay under sentence of death for the murder of his father. The two apartments were so situated and constructed that the occupants conversed freely with each other, and they availed themselves of the opportunity. Jewett's execution had been set for the ninth of November, 1915. The evidence showed that Bowen repeatedly counselled Jewett to do away with himself. Cheat the hangman, said he in effect, and disappoint the people who are planning to see you hung. He also magnified the heroism of suicide under the circumstances. On the night of the eighth, preceding the day of the proposed execution, Jewett followed the course suggested, and hung himself by a cord from the bars of his cell. The coroner's jury returned a verdict of *felo de se*. Bowen was indicted as principal for murder upon two counts. The first charged that he did counsel, hire, persuade, and procure the said Jewett the said murder and felony on himself to do and commit; the second that the prisoner murdered the said Jewett by hanging him. The only participation of which Bowen was accused was that of the persuasion with which he was particularly charged in the indictment.

[1] See vol. 2 of Table of Cases, Decennial Digest.

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The defense argued that Jewett was principal in his own taking off, and that Bowen was guilty if at all only as accessory before the fact, not as principal. They also urged that the government was bound to show affirmatively that the defendant's advice was the moving cause of the suicide.

Parker, C.J., however, took a different view. He charged the jury that if they found the facts as stated they might safely bring in the defendant guilty as principal. Further, the government was not held to prove that Jewett would not have hung himself if Bowen's advice had not pressed him to do so. The presumption of law was that unless otherwise shown (as for instance by scorn of the counsel), the advice had the influence and effect intended by the giver. It had been said in argument that Jewett's depraved character made it probable that he would have taken his own life independently of Bowen's advice. But it was in the nature of man to revolt at the idea of self-destruction. Even if Jewett had a predetermination to kill himself, yet he might have been dissuaded by a discreet person; while, on the other hand, such counsel as Bowen gave might well turn the scale and encourage and fix the intention of the one who received it. His honor also commented on the argument based upon the fact that in any event but few hours of life were left to the deceased. The atrocity of Bowen's offense was not to be considered as in the least diminished by the fact that justice was thirsting for its sacrifice, and was so soon to be satisfied. There was no period in human life which was not precious as a season for repentance. A culprit is cheered to the last by hope. Besides, he told the jury, the community had an interest in the public execution of criminals, and it was no trivial offense to take such a one out of the reach of the law.

"If you are satisfied," said he, "that Jewett, previous to any acquaintance or conversation with the prisoner, had determined within himself that his own hand should terminate his existence, and that he esteemed the conversation of the prisoner, so far as it affected himself, as mere idle talk, let your verdict say so. But, if you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly."

The jury returned a verdict of not guilty; probably, says the reporter, from doubt as to whether Bowen's advice was in any measure the procuring cause of Jewett's act. Perhaps, knowing human nature and the peculiarly trying situation of men in the jury box, we may be permitted to wonder how much effect the shadow of the gallows had upon their free judgment, despite the charge of the Chief Justice on this point. A. P. C.

THE LAW AND LEAP YEAR

SOME clever delver into the past has unearthed an interesting item anent the origin of Leap Year.

"The origin of the idea that women may woo in Leap Year is not known," he says, "but a law authorizing it was enacted in Scotland as early as 1288, and a few years later a similar law was passed in France.

"The Scotch law reads:—

" 'It is statut and ordaint that during the rain of her maist blissit Majestie, for ilk yeare known as lepe yeare, ilk mayden ladye of bothe highe and lowe estate shall hae libertie to bespeke ye man she likes. Albeit he refuses to

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talk to her to be his lawful wyfe, he shall be mulcted in ye sum one pound or less, as his estait may be, except if he can make it appeare that he is betroth to any ither woman he then shall be free.' "

A FAMILY AFFAIR

A WELL-KNOWN lawyer tells of a case on trial in one of those conservative old counties of Pennsylvania. the inhabitants whereof live pretty much as their fathers did and are seldom moved by any desire to emigrate.

Now, eleven jury jurors had been obtained, and a talesman was undergoing examination touching his fitness for the twelfth jurorship, when counsel for the prosecution suddenly interposed with: —

"Oh, by the way, Mr. Allen, I notice that you have the same name as the defendant in this case. Are you related to him?"

"Distantly, sir," answered the talesman.

"In that case, your honor," said the lawyer, addressing the court, "I shall challenge him for cause."

"He can step down if you wish, Mr. Perkins," said the judge, "but I do not think it will make any difference. The eleven jurymen you have secured are all distant relatives of the defendant."

AN IRISH JURY

AN English jury will listen attentively to the eloquent appeal of counsel, pronounce it "a first-rate speech, one of the best we ever heard," and bring in a verdict against his client.

A French jury, on the contrary, being far more impressionable, will let an eloquent advocate play upon them as though they were an instrument of twelve strings. Lachand, the great French advocate, used to sway a jury of his countrymen as he would. While defending a prisoner charged with murder, it is said that the jury did not consider whether the prisoner was guilty of murder, but whether the murdered man did not deserve to be killed.

An Irish jury is equally susceptible, and, under the spell of a lawyer's eloquence, who knows how to appeal to their feelings, often give a verdict contrary to the evidence.

A Mr. Colclough, having the right to dispose of his property, and being without children, left his landed and other estate, in the county of Wexford, to his wife. The heir-at-law, Lord Rossborough, disputed the will, on the ground of undue influence.

In those days Irishmen had a prejudice in favor of an "ould family," especially when associated with a title. The counsel for his lordship took advantage of this prejudice to make his most telling hit.

Holding up the will by one corner between his thumb and forefinger, he thus appealed to the twelve Irishmen before him, "Tell me, gentlemen, would you disinherit the ould family on a rag of a pocket handkerchief like this?"

The jury brought in a verdict against the widow, who had also excited their indignation by marrying again. She appealed the case, secured a second trial, before a jury in another county, and won her case.

A DEFINITION

AN amusing illustration of giving a definition that itself needed to be defined — a frequent occurrence, by the way, is instanced in the case of a Southern witness and a lawyer.

Some matter of boundary was in question, and a certain witness, ani-

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mated with a laudable desire to make things smooth, turned to the judge with the confidential remark: —

"You see, your honor, that there house always was cattawampus."

"What did the witness say?" asked the learned judge, not quite certain that he had heard aright.

Whereupon a smart young lawyer jumped up and explained with a patronizing air, half for the judge who couldn't understand plain England, half for the ignorant witness who couldn't choose more elegant language: —

"Your honor, the witness *said* cattawampus, but what he meant to signify was that the house was built snatchwise."

EXCUSES IN COURT

SHAKSPERE'S lines: —

> And oftentimes, excusing of a fault
> Doth make the fault the worse by the excuse,

are exemplified in a story told of Lord Eldon, who is said to have been the readiest of barristers in offering neat excuses to the court. Eldon's remarks were frequently of the most impudent sort.

A young counsel, lacking in self-control, hearing judgment against his client, exclaimed that he was astonished at such a decision. He was ordered by the judges to attend at the bar next morning, to answer for his irregular remark. Lord Eldon, then plain Mr. Scott, undertook to see his friend through the little difficulty. When his name was called, Scott rose and said: —

"My lord, I am sorry that my young friend has so far forgotten himself as to treat your honorable bench with disrespect. He is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance. You must see that it originated in that.

"He said that he was surprised at the decision of your lordships. Now, if he had not been very ignorant of what takes place in this court every day — had he but known you half as long as I have, he would not have been astonished at anything."

VERY TOUGH

A PERSON should be quite sure of his facts before he broaches a theory; that is, unless he has the impudence of the Frenchman or the wit of Lord Mansfield. The Frenchman, on being told that the facts contradicted a theory which he had rashly put forth, exclaimed, with frank impudence: —

"The facts contradict my theory? Then so much worse for the facts."

On a trial before Lord Mansfield, a witness named Elm gave his evidence with remarkable clearness, although he was more than eighty years of age. Surprised at the old man's mentality, his lordship examined him as to his habits of living, and found that he had throughout life been an early riser and a very temperate man.

"I have always observed," said the Chief Justice in an approving tone, "that without temperance and good habits, longevity is never attained."

The next witness, an elder brother of the early riser, also surprised his lordship in the clearness of the evidence he gave.

"I suppose," said Lord Mansfield, "that you also are an early riser."

"No, my lord," answered the veteran frankly. "I like my bed at all times, and especially in the morning."

"Ah, but like your brother, you are no doubt a temperate man?" asked the judge, anxious for the fate of his theory.

"My lord," replied this ancient Elm, who lived in an age when drinking was

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a fashionable vice, "I am a very old man, and my memory is as clear as a bell, but I can't remember when I've gone to bed wholly sober."

Lord Mansfield was silent.

"Ah, my lord," exclaimed Dunning, a lawyer, "this old man's case supports a theory upheld by many persons, that habitual intemperance is favorable to longevity."

"No, no," said the Chief Justice, with a smile. "This old man and his brother merely teach us what every carpenter knows — that Elm, whether it be wet or dry, is a very tough wood."

PENAL BARBARISM — AN EXAMPLE FOR REFORMERS

A SOUTHERN lawyer tells of an old chap called Job Beggs, supervisor of a county jail in Alabama, who fed and housed his convicts so well that they became really attached to him. Indeed, it is said, Beggs would actually permit them to roam about at will. It was also his custom to hire the convicts in the summer to farmers in the neighborhood, and in that way contribute to the county's treasury.

Very early one morning, the story runs, one of these prisoners appeared in the office of a lawyer.

"I understand that you're a lawyer," said the caller. "I want you to get me out of jail right away on a writ of habeas corpus."

"You must show reason why the writ should be issued."

"I have reason enough," said the prisoner, "The cruelty of the keeper makes life there unbearable."

"You're mad!" exclaimed the lawyer, "Every one knows that Job Beggs is the kindest hearted man in the world."

"Judge for yourself," continued the prisoner. "Yesterday I was working out at Mr. Taylor's and we had a big lot of hay to get in, for the sky was full of rain clouds. So when the jail horn blew for bedtime I stayed and helped get the hay under cover.

"It was after dark when I got back, and, you may not believe me, sir, but that flinty-hearted keeper had locked me out. I had to sleep out of doors, and caught rheumatism in my bones. It settled things in my mind. I'll not stay another night under the roof of a man who'll treat me like that. I want that habeas corpus before sundown."

GETTING OFF EASY

A SOUTHERN representative in Congress, formerly a lawyer in Georgia, tells how years ago he undertook the defense of an old darky who had been arrested as a chicken thief, and who in the days of slavery had been owned by the attorney's father.

It was the youthful advocate's first plea, and it was not brilliant in either construction or delivery. The darky received a pretty severe sentence, his guilt being well proved.

"Thank you, sah," said the prisoner, addressing the judge, cheerfully, when the sentence had been pronounced; "dat's mighty hard, but it ain't anything like what I expected. I thought, sah, day between my character and pore Mars Henry's speech dey'd *hang* me, sure."

TROUBLES OF THE DECEASED

AMONG the witnesses called in a certain trial at Richmond, Va., not so very long ago, was a quaint old darky named Elijah Elverson.

The first question put to Elijah by counsel was, "Did you ever hear the deceased complain of any ailment?"

"De who, sah?"

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"The deceased — the dead man!"

"Oh," said Elijah, "ef yo' refers to de dead man, I begins to un'erstan'. Ef I don't disremember, I heahs dat he had a rattlin' of de brain."

"Rattling of the brain? What is that?"

"Well, sah, it ain't exactly a misery of de stomach, but it ain't fur from it; an' it's jest 'bout as painful as flintin' at de heart, or ketchin' of de j'ints, or settlin' of de bones; an' ef I makes no mistake, it ain't so powerful fur from ringin' in de years, an' twitchin' of de skull."

A HINT FROM THE BENCH

A NEW YORK lawyer not long ago encountered a Tartar in the shape of an irascible witness who resented in no uncertain way the manner in which he was being cross-examined by the lawyer.

Finally, when counsel put to the witness certain questions that seemed to the latter to reflect upon his personal character, the irritated man on the stand burst forth with: —

"If you ask me that again, I'll give you a thump on the nose."

Immediately counsel appealed to the court, pointing out that an answer was necessary to the proper conduct of the cross-examination, and concluding with the inquiry: —

"What would your Honor advise me to do?"

"If you are determined to put that question," said the judge, "I should advise you to move a little from the witness."

POETIC JUSTICE

THE following is a case of poetic justice as meted out in France.

A well-known Parisian architect was sitting in his office when he heard a knock at the door. As he wished to be alone, he took no notice of the knock, but went on with his work. A few moments later he heard a key moving in the lock. Not doubting that his visitor was a burglar, the architect armed himself with a revolver and quietly hid behind some curtains. Presently the thief entered and proceeded to rifle the place. Then suddenly he started and grew pale. In a mirror he had seen a revolver leveled at his head from behind the curtains.

"Open the window," ordered the architect, "and shout, 'Police!' "

The burglar had no alternative but to obey, and so summoned the officer by whom he was to be arrested.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

To David Cohen was entrusted no part of the responsibility for the fate of Daniel Lynch, under indictment in New York for murder. Cohen was the first talesman called. Counsel asked him if he knew the difference between "deliberation" and "premeditation."

"I do," declared Cohen, firmly. "Them's the weapons the man killed the other fellow with." —*Virginia Law Register.*

Billy Allyne and Dan Riley mixed it up with their fists on Lincoln's birthday on Fleet street.

"They were fighting hard, exchanging blow for blow, and a great crowd was around," said Officer Falk.

"We were only fooling," said Dan to Judge Burke.

"Yes, we were friends, and just having some fun," said Billie.

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"How long had you known each other?" asked Judge Burke.

"Only a few minutes," replied Billie.

"We just got acquainted and had some fun," said Dan.

"Five dollars each for mutual assault," said the judge. — *Boston Herald.*

"Do you know what a verdict is?" asked a lawyer, challenging an Arkansas colored juryman.

"No, sah."

"Did you ever see one? '

"No, sah! I nebber was at a show in my life."

— *Oklahoma Law Journal.*

Correspondence

Demanded—Simple Justice

To the Editor of the Green Bag: —

Sir: By the consensus of authority, the paramount problem is Simple Justice. A tabulated vote of the thinkers of this country, gathered last year by the National Economic League, puts delay in the administration of justice as the third most vitally interesting question for our country and generation, and which yet awaits solution.

For the thirty-sixth year the Bar Association of the state of Illinois will meet in Chicago April 26 and 27. The main subject chosen for general discussion is "Reform in Procedure in the Courts" — the very question over which the heart of the nation throbs. Bar associations of the different states are invited to send representatives, with the expectation that the discussion may be helpful to the cause of procedural reforms throughout the nation.

The twelfth annual meeting of the National Civic Federation, where also one of the live subjects for discussion is to be "Reform in Legal Procedure," is to meet in Washington, on March 5, 6 and 7. In fact a special "program for the work of the department on reform in legal procedure will be outlined, and it is hoped that this department can be made an effective aid to all movements working for legal reform." Former judge, president of the American Bar Association and nominee for the Presidency of the United States, Alton B. Parker, is chairman of this department of the Civic Federation.

The preamble to the American Bar Association is: "Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the union, uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar," etc.

Now, it is our observation that it matters little about the number of suits brought in the courts; the final determination of the lawsuits is delayed about as long as ever; and increasing the number of judges scarcely hastens the adjudication. So delays in the administration of justice in our courts must hang upon some other causes in society. Let us, for instance, indulge in the philosophy of comparison. The half savage, half clad tribes of earth enjoy simplicity in habits, wearing apparel, and the administration of justice among themselves. As they advance in the social scale of our time standard, the former savages find living and life rapidly growing complex and cumbersome. And then, naturally, the administration of justice becomes more and more swamped with man-made law and diversified modes of administration of justice. Our forefathers of simple tastes and habits

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could find nothing to complain of as delay in justice. Their living expenses were comparatively nothing; ours are everything; their luxuries of life were few; ours are many — hence the increased cost of living to us. Men's wearing apparel is growing more complicated, hence the increase of time to put on our clothing. And this is exactly our case in putting on legal justice. As life becomes more complex, so everything becomes more complex — even justice in the courts of law. The more and more complicated and involved is life, so with matters involving and surrounding justice. They step on unison. Withal, it is the counterpart to our type of livelihood.

The administration of justice through procedure in the courts is handled by a great profession as an art and science, and this is a mystery to ordinary mortals. Any class of skillful artisans has "tricks of the trade" in which the layman is never taken into confidence. The lawyers may be unable to remedy delay in court procedure.

Wanted — Simple Justice! This ever has been the cry of the world. What is the solution? Cut out the other complicated, expensive, needless technicalities with which society abounds, and then legal reform will work out its own salvation. Instead of denouncing the laws and the lawyers, let the reformers first get on the firing line and fire — at the general obstacles which beset society's welfare.

ELMER E. ROGERS.

Chicago, Ill.

The Legal World

Monthly Analysis of Leading Events

The Lawrence strike, though now a thing of the past, leaves its traces, and has not served to quiet the social unrest which interferes with the progress of our people in arts of orderly self-government. While the view of Marcus M. Marks, that we shall never arrive at industrial justice through strikes and lockouts, may not be acceptable, readers may admit that good can come from a strike only when it is conducted in a thoroughly just cause, without resort to unlawful methods. The Lawrence strike was marked by a spirit of lawlessness, and was anything but a good example of a strike of law-abiding American citizens. The sympathy which the strikers aroused was in a large degree uninformed and unwholesome, and the drastic measures made necessary to maintain good order have left their scar. The socialistic agitator has preyed on the credulity of a public too ready to listen to his attacks on the existing régime, and hence it results that the difficulties in the path of sound legal and economic as well as social reform are increased, and the statesman for the time being yields precedence to the demagogue.

Just as the socialistic propaganda complicating the Lawrence strike tends to weaken popular respect for the lawfully constituted authorities, so the utterances of Ex-President Roosevelt's radical speech at Columbus tend to weaken popular respect for the judiciary. If Colonel Roosevelt had contented himself with saying that there was a grave question whether state courts should have the power to set aside statutes as unconstitutional, he would

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not have antagonized many a thoughtful and earnest student of our system of government, but the temptation to capture his audience with flashy rhetoric was too great, and his proposal of a recall of judicial decisions was not only ill-considered, but in the highest degree inflammatory and dangerous. Such utterances, made by a leader of such personal influence and magnetism, tend to excite the people to violent and arbitrary measures and to embarrass the cause of sound reform.

Colonel Roosevelt's advocacy of a radical remedy for whatever mischief may be done by judges out of sympathy with the social needs of their time may be viewed as an indication of popular discontent with the present administration of justice, but the legal profession is pushing certain reforms and innovations which repel the charge that it is unduly conservative. President Taft, by his advocacy of the workmen's compensation act favored by the Congressional commission, has shown that he takes a different view of this subject from that taken by the New York Court of Appeals. In many states the reform of procedure is being vigorously pressed by influential elements of the bar, notably in New Jersey and Illinois. Moreover, the decision of the United States Supreme Court sustaining the Oregon initiative and referendum law as constitutional, instead of meeting with the hostile comment which would have been inevitable five years ago, has excited no significant opposition. The various popular proposals before the Ohio constitutional convention no longer seem hopelessly demagogic. The legal profession, in fact, can be said already to have taken a hand in the reconstructive movement of the times, though properly reluctant to move too fast along untried paths.

Procedure

Resolutions were adopted at a dinner given by the Chicago Bar Association Jan. 31, providing for the appointment of a committee to prepare a complete system of rules of court, the present method of procedure being declared cumbersome and out of date.

The New Jersey State Bar Association approved the main features of the proposed practice act at a meeting at Trenton, Feb. 10, to act upon the report of the committee appointed last June to investigate and report on the method by which the administration of justice might be improved. The report of the committee was presented by Charles H. Hartshorne, chairman of the committee that prepared the report and accompanying bills. Mr. Hartshorne explained the report and the bills in detail and letters were read from Supreme Court Justices Swayze and Bergen and former Governor Fort, approving the committee's report. The sentiment of the meeting was by no means unanimous. The motion finally adopted, by a divided vote, was that the proposed practice act be approved as to its main purpose, and that the details of the act, which contains thirty-three sections, be left to be taken up later.

Personal

Julius M. Mayer, formerly Attorney-General of New York, has been appointed by President Taft to be Judge of the United States Court for the Southern District of New York. Mayor Low appointed him a Justice of the Court of Special Sessions in 1902. He was reappointed after his first term by Mayor Low, but retired in 1904 to enter the race for the Attorney-Generalship. Mr. Mayer was born in New York City in 1865, and was graduated from

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City College in 1884, and from the Law School of Columbia University in 1886.

Former Judge John D. Lawson, dean of the school of law at the Missouri State University, will retire as dean in June. He will, however, remain a member of the faculty and devote his time to teaching and writing. President Hill has nominated Prof. E. W. Hinton of the faculty to fill the vacancy. Judge Lawson is a Canadian by birth and is sixty years old. He has been in the faculty of the law school for more than twenty years and has been dean since 1903. He is an able law writer and his books have been used as text-books in several states. He is the editor of the *American Law Review*.

Bar Associations

American Bar Association. — The American Bar Association now has a membership of 4,701, gaining 1,118 in 1911, or thirty per cent. Its annual report shows there are forty-seven state bar associations and 506 local bar associations in the country. The August annual meeting will be in Milwaukee.

Connecticut. — The increase in membership at the rate of about twenty per cent in the last two years was referred to by President George E. Hill, in his annual address, as one of the assuring features of the activity of the Connecticut State Bar Association. The annual meeting was held at Bridgeport, Conn., on Feb. 12. Hon. Bourke Cochran of New York, F. Trevor Hill of New York, Charles W. Botsworth of Springfield, Mass., and Daniel Davenport of Bridgeport spoke at the banquet. The following officers were elected: Hadlai A. Hull of New London, president; Charles E. Phelps of Rockville, vice-president; James E. Wheeler of New Haven, secretary and treasurer.

New Hampshire. — Herbert Parker, former Attorney-General of Massachusetts, will deliver the annual address at the next meeting of the New Hampshire State Bar Association, to be held in May or June.

Miscellaneous

The American Society of International Law will hold its sixth annual meeting at Washington, D. C., April 25–27. The entire session will be devoted to consideration of the questions which might properly enter into the program of a Third Hague Conference and the proper organization which the Conference itself should receive.

The New York Lawyers' Club, whose valuable library and quarters and furnishings were destroyed in the fire in the Equitable Building, will move by July 1 to new quarters on the twentieth and twenty-first floors of the United States Realty Company's building at 115 Broadway. More than 700 members have signified their desire to continue the club in the new quarters.

A steady increase in the number of persons committed during the past year for public intoxication and disorderly conduct is reported by the New York State Commission of Prisons in its annual report to the Legislature. The commission reports that the congestion in the state prisons continues. In Sing Sing the daily average was 1,720, with a cell capacity of 1,200. This compelled the housing of approximately 200 prisoners in one of the chapels and the doubling up of a considerable number of the remainder in the dungeon cells. Commenting on the low cost of maintenance in the State prisons, the commission says it seems questionable whether

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men can be properly fed and clothed with the amounts expended for such purposes.

Speaking before the Society of Medical Jurisprudence at its annual dinner in New York, Feb. 3, Dr. Jacob Gould Schurman, president of Cornell University, took the legal profession to task for its failure to keep up with the great strides made by medicine and the other professions in the last few years. "Law has not made the progress, either in a scientific or humanitarian direction," he said, "that medicine has made. I believe that the legal profession in this country is falling far short of the demands the public has a right to make. Lawyers are helping their clients to accomplish ends, generally selfish ends, by advising them how to keep within the law and out of prison. Just as the medical men are lifting their practice to keep step with the latest discoveries, so the lawyers must try to lift the legal profession to meet the demands and changed conditions of our time."

The President has expressed his approval of the legislation proposed in the report of the Congressional Employers' Liability and Workmen's Compensation Commission, and in a special message urges that it be enacted. The bill eliminates the common-law doctrine of negligence and the defenses of assumption of risk, fellow-servants' fault and contributory negligence. Compensation with a general basis of an equivalent to one-half wages, is to be paid in every case except where the injury or death is caused by the wilful intention of the employee to injure himself or another or in case of intoxication on duty. The bill declares that it is the policy of Congress to consider the burden of payments for personal injuries as an element of the cost of transportation and directs the Interstate Commerce Commission to recognize and give effect to this policy. The bill would provide that every common carrier engaged in interstate or foreign commerce by railroad shall pay compensation to any employee who sustains personal injury in line of duty or to his dependents in case of his death. It makes the remedy exclusive by reason of the compensation being complete satisfaction. It abolishes all existing common-law and statutory remedies, and applies to all railroads in the District of Columbia as well. Jury trial rights are preserved, but are to be deemed waived except on demand.

Obituary

Blake, Edward, K.C., who led the Opposition in the Canadian Parliament from 1880 to 1887, died in Toronto March 1, aged seventy-eight. His political career began in 1867, when he entered the House of Commons, where he soon became powerful as a Liberal leader.

Cutting, William Bayard, who died March 1, on a train on whichhe was being rushed home from El Paso to New York, was appointed Civil Service Commissioner by Mayor Strong of New York, and was especially prominent because of the attention which he devoted to civic movements and to various charitable causes. Educated at Columbia College and Columbia Law School, he was elected president of the St. Louis, Alton & Terre Haute Railway Company seven years after his admission to the bar, and he was a director in many large corporations, and a trustee of many important institutions in New York City, including the Metropolitan Museum of Art, Columbia College, and the American Museum of Natural History.

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Gleason, James, who died Jan. 30, was considered one of the ablest admiralty and probate practitioners of the Portland, Ore., bar. He was a native of California.

Hatch, Judge David Patterson, a prominent lawyer of Los Angeles, died Feb. 21, aged sixty-five. He had served as district attorney and county judge. He wrote "Scientific Occultism," "The Blood of the Gods," and other books.

Hendrick, S. J., former Speaker of the lower house of the Texas legislature, died at Henderson, Tex., Feb. 12. He had been county judge for fourteen years.

Lanning, William M., United States Circuit Judge, died in Trenton Feb. 16, of heart trouble, aged sixty-three. Before that he was a federal district judge. He had served one term in Congress. In 1885 he published "Help for Township Officers." In 1887, with G. D. W. Vroom, he compiled and published a supplement to the Revised Laws of New Jersey, and in 1895 a new edition of all the general statutes of New Jersey. Judge Lanning was a member of the special commission that framed the present comprehensive township laws, and of the Constitutional Commission of 1894.

Morgan, J. Willard, former state comptroller of New Jersey, died at his home in Camden, N. J., late in February. Mr. Morgan, who was one of the leading lawyers in South Jersey, was born at Blackwood in 1854. He was an active Republican worker for many years.

Post, Hoyt. — Having been an active member of the Detroit bar for forty-nine years, Hoyt Post, president of the Detroit Bar Library Association, died on June 31. From 1872 to 1878 Mr. Post was official Reporter for the Michigan Supreme Court, and for several years was a member of the Michigan Fish Commission.

Spence, Thomas W., head of the law firm of Quarles, Spence & Quarles, died in Milwaukee Feb. 24. He was born in Dungannon, Ireland, in 1846, coming to Ohio when he was two years old, and being valedictorian of his class when he was graduated from Cornell University. While residing at Fond du Lac, Wis., he served in the Wisconsin legislature from 1879 to 1884, and was chairman of the State Republican Convention in 1884. He became a partner of the late Judge Joseph V. Quarles in 1881, the firm moving to Milwaukee seven years later.

Terry, Henry C., a prominent lawyer of Philadelphia, died Feb. 14, at the age of sixty-five. While mainly concerned in litigation in Philadelphia courts, federal and state, he was well and favorably known to the bench of the Supreme Court of the United States and Court of Claims at Washington. His most notable successes were in cases for and against corporations, though he had a large mercantile and Orphans' Court practice.

Weaver, Gen. James B., died at Des Moines Feb. 6. He was candidate for President on the Greenback-Labor ticket in 1880 and on the Populist ticket in 1892. He was graduated at the Cincinnati Law School in 1856, but did not follow the law as a profession.

White, Trueman C., retired, of the New York Supreme Court, died in Buffalo Feb. 7. He was a veteran of the Civil War, and had been on the bench for several years when, in 1896, he was elected to the Supreme Court. It was Justice White who presided over the trial of Czolgoz, the assassin of President McKinley.

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THE MARQUIS DE OLIVART SHAKING HANDS WITH HIMSELF
A PICTURE WHICH GAVE HIM HUGE ENJOYMENT

By courtesy of the Boston Herald

(*See p. 233*)

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The Green Bag

Volume XXIV May, 1912 Number 5

The State University Law School: II. Its Duty to Democratize Legal Knowledge[1]

By Andrew Alexander Bruce
Associate Justice of the Supreme Court of North Dakota

AMONG the many marvels of modern days has been the growth in efficiency, standards and ideals of our state universities. These universities have come to stay. They are the result of democracy. They are in a large measure necessary to its perpetuation. They are an outgrowth of the idea which was expressed in the clause of the North-West Ordinance, which ordained that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education should forever be encouraged." They will be permanent because back of them and inspiring them are farms and towns and villages and hamlets, and because in them are expressed the ideals and the intellectual yearnings of free and democratic peoples. They are in a large degree the highest expressions of our democracies. They are a measure of the hope that the people have in themselves and of the trust which they have in the future. They are becoming more and more woven into the bone and tissue of the states which have created them. Already, of the forty-eight American states, thirty-eight have established state universities pure and simple, and already in most of the states of the Union the state university has become the most important single institution of higher learning. In states not a century old we already have institutions, which number their students by the thousands, whose buildings and equipment represent the expenditure of millions of dollars, and whose incomes, voted annually by the representatives of the people, exceed those of most of the ancient foundations of Europe.

The state university is the people's university. Its function is primarily to furnish leadership — to educate those who may lead in the democratic advance. Its function is to furnish to the state an intelligent, self-respecting, self-supporting, law-loving and law-knowing citizenship. In a nation which is governed by law, and by law alone, in a

[1] This is the second in the series of articles dealing with the State University Law School, [Professor Charles M. Hepburn, dean of the Indiana University School of Law, having written on "Its Rise and Its Mission" in the April *Green Bag*. Professor Walz will write the third paper of the series, on the subject: "The State University Law School: Its Duty to Teach the Law of the Jurisdiction." Judge Harger has also promised an article, and it is hoped that others will follow.—*Ed.*

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republic which is every day approaching nearer to the theories of a pure democracy, in an age of the initiative, of the referendum and of the recall, the state university law school cannot be merely a "lawyer incubator." It should be organized for a larger purpose than for merely training practising lawyers. Law is nothing more or less than applied political economy, applied sociology and applied social ethics. It is in a large measure the expression of the social ethics of the people. In a country where every one is presumed to know the law, and which is governed by law and by law alone, a knowledge of legal principles is vitally necessary to an effective citizenship.

What is true of England is to a greater extent true of the United States, and what was clear to the great but aristocratic Englishman, Blackstone, should be still clearer to the more democratic American student. "To demonstrate the utility of some acquaintance with the laws of the land," says the great English writer, "let us only reflect a moment on the singular form and polity of that land which is governed by this system of laws; a land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the Constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit, which is only to be affected by a general conformity of all orders and degrees to those equitable rules of action by which the meanest individual is protected from the insults and oppression of the greatest. As, therefore, every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least with which he is immediately concerned, lest he incur the censure as well as inconvenience of living in society without knowing the obligations which it lays him under. And this much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond the contracted sphere in which they are appointed to move; but those on whom nature and fortune have bestowed more ability and greater leisure cannot be so easily excused. These advantages are given them not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves without some degree of knowledge in the laws."

What was true of the England of Blackstone is equally true of America today. Here, indeed, the duty and the necessity is infinitely greater. England was, and still to a great extent is, a country of precedent and tradition. It is a country with a homogeneous people. Above all it is a country which has been accustomed to entrust its legislation to a trained and educated aristocracy. It is a country, it is true, which has a large measure of popular suffrage, but it is still a country which is willing to yield to leadership, and where the masses respect the educated classes. There men like Gladstone and Morley can stay in political life indefinitely. Here we have our democracy enthroned. We have democratized law making, but we have not democratized legal knowledge. We are about to institute the initiative, the referendum, and the recall. We mercilessly criticize the law, and our judges, but few of us read, and still fewer are able to understand, the decisions which we criticize. It is only where there is law that there is liberty, and where there is law there must be lawyers. Where the sovereign power is in the people and the people are the law-givers, it is very

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necessary that a knowledge of the principles of law and of jurisprudence shall be diffused among the people generally. Without such a knowledge, indeed, an intelligent democracy is quite impossible. Without it no one properly understands and realizes his duties and liabilities as a citizen and as an owner of property, or his true status in the community of which he is but a unit and a part. Without it no one can be capable of intelligent citizenship. Even if the dream of the socialists were to be fulfilled, and an age of paternalism in government were to come upon us, there would still be a demand for a widespread knowledge of the law. There would still be a demand for the legal arbiter and the interpreter — the lawyer and the judge. Socialism, indeed, is a system under which human conduct and activity is everywhere controlled and regulated by law. It is all law. We will never, perhaps, come to socialism. We are daily becoming more socialistic and our governments are becoming every day more and more paternalistic. There can be no doubt that as a community becomes older, lawsuits become less dramatic and jury trials less frequent; but there is also no doubt that individual conduct and freedom comes to be more and more regulated by law, and that it becomes more and more necessary that a knowledge of basic legal principles shall be spread over the community. One isolated in the wilderness may do largely as he pleases, as his conduct affects no one else. He who lives in crowded communities, among his fellows, must so use his own as not to injure the rights of others and of the community as a whole, and in fairness there should be given to him the opportunity to somewhere learn what these rights and these limitations are. As the problem of existence grows more and more complex, and the industrial struggle grows keener and keener, men will begin to look more and more upon the government as a partner or as a protector, and will more and more frequently rush to the legislatures for help.

We have well established in our legal system the principle that ignorance of the law excuses no one. Although ignorance or mistake of fact may be pleaded as a defense or as an excuse in a civil or criminal action, every one is absolutely presumed to know the law. It seems to follow as an inevitable conclusion that the state should furnish, somewhere in its educational system, some means or some place where this fundamental knowledge, so necessary to good and effective citizenship, and which all are absolutely presumed to possess, may be acquired, and that a state system of education which should be lacking in such opportunities would be markedly defective. Though the question may sometimes arise as to whether or not we have too many practising lawyers, no one will for a moment contend that legal knowledge can be too widely diffused among the rank and file of the community; or that the lawyers we do have should not be properly and thoroughly trained, not only in the law itself, but in the duties which the lawyer and the citizen owe to society and to the state. No one would contend that the furnishing of these opportunities and of this training is not a legitimate function of the parent state.

The province of the state university law school indeed is, and should always be, not merely to educate practising lawyers, but to furnish a knowledge of legal principles to any citizen who may desire to learn them. It should furnish a center where jurisprudence can be studied as a science, and from which sooner or later suggestions may come

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which shall tend to clarify the legal atmosphere to the same extent that the studies of the scientist in the laboratory and the university have clarified that in the medical world. The practising lawyer must, from the nature of things, be a partisan. The time of the judge is largely occupied in deciding individual controversies. There should be some men who can study our legal systems thoroughly and dispassionately, and the fruits of whose scholarship and investigation can be used when codification or legal reform is contemplated.

If it is necessary that we should maintain agricultural experiment stations, and furnish institutions for the study of the science of agriculture, it would also seem that we should furnish equal facilities for the study of government. For law, as we before said, is merely applied political science, applied social ethics, applied civilization. The time indeed is approaching when patriotic citizens can no longer be content to remain in ignorance of the great principles which bind us together, of the rules of conduct which control us, nor refrain from taking an intelligent part in shaping our laws and in directing the public sentiment which, in every truly representative government, the laws must and should formulate. Macauley said that the twentieth century would decide the fate of democracy in America and in the civilized world. De Tocqueville suggested that the crisis would come when the public domain was exhausted. That time has arrived, and we are now no longer a frontier people. If any of us really desire to belong to the governing classes, we must understand the principles which underlie our government, the present status of our legal thought and of our legislation, and the influences which guide our legislatures and our judges. It is often as important to know one's rights when upon a railroad train as it is to know the story of the discovery of the use of steam. It is often as important to know when a contract is or is not binding as to know how to conjugate a verb. It is as important to know when a judge exceeds his powers, when a corporation violates its charter, or a public official his duty, as it is to know the solution of a problem in geometry or the plot of the latest novel. It is as important to know the common law and the history of our legal institutions as it is to be learned upon the subject of Koptic Carum or the laws of the Medes and of the Persians.

The problems which confront the American nation are great and complex. A vast, cosmopolitan country, bound together by law, and by law alone, and where universal suffrage exists, is something which, as a continuous entity, many have declared to be an impossibility. Its continuance depends upon the training of an intelligent citizenship, by which law is respected, and which is capable of making and enforcing wise laws. Though controlled and guided for a hundred years by our lawyers, we have, as a nation, sneered altogether too much at law and at lawyers. We have been able to exist and keep ourselves purged of anarchy in spite of our criticisms, because we have been largely a nation of property owners, and therefore conservative. We need criticism, but we need *intelligent* criticism. No man can criticize a statute or a decision until he has an acquaintance with the body of the law which that statute or decision modifies and changes, or expands. As wealth concentrates in the hands of the few, as immigration increases, as the discontented and radical classes grow larger and larger (where there is democracy there will always be discontent), the number of intelligent,

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thoughtful, *law-knowing* and law-loving men and women must also increase, or anarchy and discord will be the result. Our criticisms on the law and on the judiciary must no longer be captious and based on lack of knowledge. They must be constructive and intelligent.

The state university law school should be ready to furnish to all the knowledge which all should possess. A clear line of demarcation should be made between the right to study law and the right to practise law. No man should be allowed to practise law who has not a thorough preliminary training, and whose attainments are not of the best. As a rule both a college and a law school diploma should be prerequisites. It would be perfectly reasonable to require an apprenticeship in a law office in addition thereto. When it comes to the study of law, however, the matter is an entirely different one. We can hardly say to the citizen, "You are absolutely presumed to know the law. Ignorance of law is no defense, and yet we will not allow you to study law or to enter a law school until you have first obtained a college diploma." It is somewhat illogical to maintain a system of government under which anyone may be elected to the city council, to the state legislature, or to Congress, in which anyone may make the law, but to say that no one shall study the law unless he has first obtained a college degree.

The privately endowed university may teach what it pleases and restrict its advantages to whomsoever it pleases. The state university must be prepared to meet the needs of the parent state that maintains it.

Bismarck, N. D.

The Sovereignty of the Air

By Denys P. Myers

LEGAL thought has followed closely, in fact preceded, the solution of the problems of flight. Legal regulation of air traffic was studied as early as 1901, and the question has received more or less continuous attention since that time. With the advent of actual flying by monoplanes and biplanes of numerous design, the activity of writers with ideas on the legal effect of opening up a new element grew rapidly.

Almost before there was a case before any court in the world dealing with a purely aerial problem, provision had been made to solve the legal questions bound to arise. Late in 1909 the International Juridic Committee on Aviation was organized at Paris, and it began issuing a monthly periodical devoted to aërial locomotion in its legal aspects in January, 1910. This committee, while private in character, aims to be representative of the civilized world, and the International Committee is accordingly made up of national delegates named by the National Committees which have been extensively organized in the countries of Europe, the United States and Canada.

The International Committee began work by outlining a code of aërial law and is elaborating it article by article. The method of work allows full discussion and opportunity for the expression of opinion. National committees decide upon a text under a given head, trans-

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mitting their projects to the International Committee, which in plenary session selects a final wording by majority vote. The result is unofficial and therefore not binding on any government, but the very plan of elaboration entitles the articles of the code to the utmost respect. Here, for the first time in the history of the world, an international effort to set the legal standards of all nations regarding a new development of intercourse which science has rendered possible is being made simultaneously with the advent of the thing itself.

Following hard upon the organization of the International Committee came a diplomatic conference at Paris in May and June, 1910, the call for which had antedated the formation of the committee and which was empowered to reach a decision, if possible, upon a legal code for the air. The conference found itself unable to produce a set of rules satisfactory to the delegates of the eighteen states represented, and it adjourned until November, 1910, when it again adjourned, this time *sine die*. Thus official international action failed of its purpose in its first attempt to legislate for the airman.

Simultaneously with the meeting of the diplomatic conference, a congress of private character, though international in scope, was held at Verona, Italy. It was called the International Juridic Congress for the Regulation of Aërial Locomotion, and the result of its meeting was the adoption of a set of opinions, which together indicate the broad bases upon which the Congress believed international legislation should be predicated.

These separate movements to secure a firm legal foundation for the control of aerial flight are notable, but they have not been successful enough to prevent controversy, and the very keystone of any body of aerial law is unfortunately the thing most at issue. What shall be the conception of the airspace for purposes of legislation and law? Shall it be free after the analogy of the sea or shall it be considered as an extension of the earth, subject to entire sovereignty or to such sovereignty as the earth sees fit to exert over it? Around this alternative a considerable battle has waged, and bids fair to continue. It seems likely that the sovereignty theory will win, on the score that it gives the subjacent state greater power over its atmosphere.

It is certain that complete control over the atmosphere by the owner of the land is an idea in consonance with our common law, as well as with the *droit civil* of France, where aerial freedom has its only serious advocates. Some two dozen American and English cases point clearly to full terrestrial jurisdiction, or, from the national point of view, sovereignty. Controversy has arisen because of an attempted analogy with the sea and a desire to extend the "high sea" theory to a newly conquered element. The analogy is wrong in practice and therefore wrong in law, which has for one of its important functions the recognition of distinctions not apparent to the layman, and of effecting justice by that recognition.

Circumstances of a nature peculiar to the element have made it advisable to consider the sea as outside of any national jurisdiction, chiefly because the land inhabitant has no general interest in what occurs upon the sea. But this conception has been modified by various servitudes upon the freedom of the "high sea." Text writers, appealing to the imagination, explain that the high sea is free because it defies any effort to possess it, because it is fluid and immense and uncontrolled.

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Why, then, should there be a three-mile limit? Probably not a thousandth part of the water included in the three-mile line could at any moment be actually "possessed" by means of cannon, yet nevertheless the line extends for legal purposes through the sea outside of every coast. The waters interior to the line are part of the same immensity to which those exterior to it contribute, and they are fully as uncontrolled in the sense in which that term is used in this connection; namely, incapable of submitting to prescription.

It seems more reasonable to base the practice of according the three-mile limit of water a special consideration upon a less imaginative foundation. Impossibility of full control over the sea, of course, has played its part, but it has not played, in my opinion, more than an incidental one. Mankind has had no general interest in the sea itself, except as it was useful for transportation. His life has been lived on land and if he ventured on the water it was with a terrestrial purpose in view, to secure something he could use to advantage on shore or to deliver on foreign soil cargoes that in turn would provide him substance. He has had no other regard for the sea itself.

The sea, being thus of utility, has been employed to the extent that has proved feasible. It was not until Bynkershoek published his *De Dominio Maris*, in 1703, that the theory of the three-mile limit really entered into the concepts of jurisprudence. In that day the efficiency of gunpowder had increased the range of the warrior, and commerce to foreign parts was a well-recognized field of activity. Throughout the earlier ages, gunpowder had for the most part not existed and commerce, instead of being foreign, was done on a coasting trade basis. The two or three centuries immediately preceding Bynkershoek were the incubating time in which the world was ripened to receive his theory.

Bynkershoek analyzed and solved a need of his time, the desirability of exerting a wider jurisdiction than had theretofore been thought necessary. And the very basis of his theory was that developments in his world had brought a certain part of the sea within the sphere of interest of the state. With gunpowder an armed ship could stand a mile off shore and pepper a fort full of holes. The increase of commerce multiplied the concern of diplomats in their sea frontiers. So, the need having arisen, the solution was forthcoming, and the exact nature of the answer to the problem is significantly called, in Europe, the jurisdictional sea or littoral, rather than the three-mile limit. The French terms express the underlying idea much better than our customary English descriptive one. This portion of the sea is jurisdictional because the land-state has a presumptive interest in anything that happens so close to its shore. The moral is that when the land-state felt its interests widening it widened its authority to meet the new situation.

If this reasoning is correct, the high seas remain "high" because the land-state has not sufficient practical interest in it to warrant it to set up a claim to sovereignty over it, which would be difficult to enforce and barren in results. A general substitute for the state's failure to extend its sovereignty over the waste of waters is found in the extensive regulations of admiralty and the maritime navigation rules. These were found to give the state quite as good satisfaction in respect to its real interests on the sea as a preposterous claim to jurisdiction, and this is doubtless the reason why the extravagant conten-

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tions of England, Portugal and other countries were allowed to apse.

Sovereignty in the light of these considerations might be described as the measure of the state's interest in a territory, or domain, and I believe that from the philosophic point of view the description will meet the test of application. The high sea, then, is extra-sovereign because the state's interests upon it are too tenuous to make it worth while for sovereign power to attempt to stretch its might that far. What is the result when this test is applied to the air?

The entire art of aviation is based upon physical or mechanical principles. It is in no sense due to primarily natural causes. The balloon floats because of the physical fact that certain gases at a certain temperature and in sufficient quantity are light enough to maintain themselves in air and carry besides a weight proportionate to the difference between their density and that of the air. The aeroplane depends upon its power, which is strong enough to create a counter-wind capable of sustaining its weight. The aeroplane travels fast enough for its weight to be distributed over a body of air that as a whole is dense enough to sustain it. Or, to explain it in a different way, the aeroplane at a given thousandth of a second is supported by a column of air extending from its lower surface to the ground That single column is not dense enough to poise it, and if the machine suddenly stopped dead, it would fall straight down, although provided with its guiding apparatus and planes specially designed to get from the air all the lift there is in them. An aeroplane flies because it moves fast enough through the air for it to be supported, not by a single column, but by many such within the space necessary for gravity to get in an effective pull downward. The principles of sustentation, particularly through developing the aerodynamics of the entrant edge, may be much better understood in time, but the ultimate desire of soaring flight is too remote a possibility to build any legal system upon.

Soaring flight is the counterpart in the air of seaworthiness. A seaworthy craft remains floating in its element of water by the operation of the law of nature, which decrees that water is heavier than the thing which displaces it. Such a craft needs power of sail or motor only to move from place to place. The craft can stand still in water. No humanly constructed machine can permanently remain at rest in the air. Birds accomplish soaring flight by altering the position of their wings and so forcing the wind under them in such a manner that it carries them whither they will. Rigidity is an essential of an aeroplane, and so far as we can see will always be a primary feature of it. The balloon, while capable of greater sustentation, still gives no promise of remaining in the air for long periods, and it seems far too much to hope that it can be so directed to land where it wishes, except under very favorable conditions. Nor does it give promise of ability to weather out a storm in its own element, a thing any seaworthy craft with half a chance will do.

The important distinction between the sustentation of sea and aircraft just set forth would lose its significance were it not for the position of the air in which balloon and aeroplane travel. The sea is at the side of the land where men dwell, and nothing that can occur upon it has any concern for the land, except as the loss of persons or cargo or damage to the craft itself affects individuals on land. With these exceptions, everything that happens at sea is as far removed in respect of interest from the

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land-dweller as if it occurred in the depths of darkest Africa, if there is yet such a place. We read of a wreck at sea — we who have no maritime investments of loved ones or money — and by no possible method of philosophy can we conjure up a legal interest in the incident. Even if a wreck is driven ashore on adjacent property, the circumstance does not set us to figuring how we can protect our own land from similar molestation. For nature has decreed that there shall be a shore which is partly taken by the sea daily through the action of the tides, and we have removed our land interests invariably far enough away from the reach of the waters not to be closely concerned with the beach. In other words, the beach or shore is a natural neutral zone, inevitably dividing the sea from the land.

All aircraft operate above, not at the side of, the land. Except over water, no aviator can even throw out ballast without it reaching somebody's property, and there is no neutral zone of beach to receive it, or act as a buffer between the two elements. The sea-wreck affects only the individuals who have entrusted persons or cargo to the vessel; it sinks in a waste of water where no man has an interest. The aerial wreck will fall upon occupied territory, will affect those landholders who have no specific interest in the machine or its cargo.

This difference must be clearly kept in mind, and I believe is of sufficient fundamental importance to be the deciding factor in the conclusion which shall be legally drawn as to the freedom or sovereignty of the air space. The air is an appanage indivisible from the earth, and any use made of it should be predicated upon legal theory that recognizes that fact.

Cambridge, Mass.

The Acquisition of the Olivart Collection By Harvard Law School

THE Harvard Law School is most fortunate in the acquisition of the largest private library of international law in the world, the collection of the Marquis de Olivart, numbering 60,000 volumes. The library comprises upward of 15,000 titles. It is printed in every modern language, and there are 1,550 volumes in Latin, some of them dating back to the fifteenth century. There are also a number of extremely rare and limited editions. The collection has been pronounced by competent authorities the most valuable of its kind in the world.

The Marquis is an authority on international law, vice-president of the International Congress, a former head of the University of Law in Madrid and the major domo of the court of King Alphonso. He visited this country recently, and was delighted with the new home of his books, which came over in February.

The Marquis, on his visit to Washington, was banqueted by the American members of the International Law Congress with two other eminent foreign jurists, Professor Lange of Christiana, Norway, and Professor Fiore of Florence.

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The Efficient Handling of Judicial Business

By W. L. Goldsborough.[1]

IT HAS been a matter of surprise to me, from my Philippine view-point, that throughout the extensive discussions in recent years in the United States by Presidents and people, lawyers and laymen, of means for bettering the administration of justice and lessening the law's delays, no one has urged the crying necessity for systematic managment and disposal by the judges of the business coming before their courts, and of effective disciplinary measures to keep judges up to this important branch of their work. The tardiness, technicality, and expense involved in the present rules of procedure governing the selection of juries, the production of evidence, new trials, appeals, etc., have been well ventilated, but the only suggestions which I have seen in line with what I mean are President's Taft's endorsement of the Philippine law requiring decisions to be rendered within a reasonable time, and Mr. Frederick P. Fish's statement that "there can be no real reform in the United States courts until there is a judge in control of each case from the time the pleadings are completed, with a definite feeling of responsibility on the part of the judge that he is to control the procedure."

After some twelve years of active practice, first in the state and federal courts of New York City, and later in those of the Philippines, during which I was finding it increasingly difficult to reconcile our tolerance of unsystematic handling of court business, with our pride in, and insistence upon, orderly methods in other lines of endeavor, I went on the bench in Manila in 1905, and was thus given an opportunity to observe the system, or rather lack of system, from within, and to determine for myself whether there was any good reason why courts should not be put upon a business basis.

Judges of learning and ability were serving on the court when I became a member of it. Its jurisdiction extended throughout the islands. Cases were to be tried in the capitals of most of the numerous provinces, some of which were difficult of access. Yet there was no regular division of the work among the judges, by districts or otherwise. I soon came across cases at which each of several judges had nibbled at various times, and then passed on to something more inviting. There were other cases in which no action whatever had been taken for a year or more It could hardly be called neglect, because, to use a homely phrase, what is everybody's business is nobody's business, but the fact remained that cases which could and should have been advanced months before were untouched. Discussion of the situation with my associates led to no satisfactory result, so I carried the matter before the Commission — the legislative body of the islands; and finally, in 1907, an act (No. 1648) was passed providing, among other things, that "all cases arising in the . . . city of Manila shall be assigned to the . . . judges of the court by rotation, as nearly as may be, and all cases arising . . . outside of the city of Manila shall be assigned by districts to the . . . judges." Incidentally the aboli-

[1] Member of the bars of Maryland (1890), New York (1892), the Philippines (1901), and Colorado (1911); member of the Philippine Code Committee; one of the faculty of the College of Law; Univ. of the Philippines; and Commissioner on Uniform State Laws from the Philippines.

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tion of a most iniquitous fee system was secured. The act did not, however, embody all the reforms that I had asked for.

I served on the bench for several years after the passage of the act above referred to with some satisfaction to myself, and, I believe, to litigants. I prepared and kept in my desk a tabulated list, to which I could refer at any moment, showing the exact status of each case pending in my district. On the first of the month this list was brought up to date, the cases finally disposed of during the month being struck off, the new cases added, and the progress in each pending case indicated. With due regard to the real interests of the parties, and to the demands upon the time of counsel, I tried to see that each case was progressing. Some dilatory members of the bar probably dubbed this unjustifiable meddling, but the great majority undoubtedly approved. There were times when my zeal was inclined to lag, for in many cases I could have avoided work, without being criticized, until the lawyers made a move. But a realization of the anxiety and the actual suffering in the case of poor persons, which litigants would undergo while the lawyers and myself dallied in the usual way, was enough to bring me to my senses, and I would reach for my tabulated list.

Meanwhile any doubt which I may have had on the subject had been removed. There is absolutely no reason why courts should not be put upon a business basis. Laws should be passed determining just what actions and special proceedings shall come before each judge of first instance, rendering him responsible for the methodical dispatch of all matters placed under his control, and attaching penalties, from suspension of pay to removal, for failure in that regard. Some form of report to, and inspection by, a central authority is also necessary, because judges are human and have been known to disregard laws which could be evaded with impunity. In the Philippines trial judges are required by law to render their decisions within three months after submission (Act No. 1552, Sec. 1); in Maryland the period is two months (Constitution, Art. 4, Sec. 23); in California, one month (Code of Civil Procedure, Sec. 632). But no one will maintain that judges in each of these jurisdictions do not at times exceed the statutory period without reasonable excuse. Lawyers naturally hesitate to complain for fear of antagonizing the judge. In one case in the Philippines, where the lawyers did complain, the judge said that the clerk had not called his attention to the cases. But the law, of course, placed the responsibility on the judge, and not on the clerk. The report should be rendered quarterly at least, and should show the status of each action and proceeding, and the date of each important step taken in it since the last previous report. Matters in the hands of examiners, executors, trustees, etc., should be included, for the judge of first instance should be required to exact promptness from all such persons, as they also are inclined to be dilatory if not followed up. The central authority might be the appellate court, one of whose members might be excused from decision writing in order to examine the reports and make necessary inspections. Apart from the examination of reports and inspections, prejudiced persons should have the right to call the attention of the appellate court to violations of the law. In case of a violation of the law, it would be the duty of the appellate court to summon the delinquent trial judge before it to show cause why the proper penalty

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should not be imposed. At the hearing the government should be represented be the Attorney-General, and the trial judge by counsel, if desired.

It may be argued that laws such as are suggested above would trespass on the dignity of the courts, and tend to lessen our respect for them. It does not seem to me that such would be the result. The proposed provisions leave the judge as independent as ever in forming his judicial opinions, and are addressed entirely to what may be called his administrative functions — the business management of the court work. The better judges would be aided by such laws because they are already disposed to do what the laws would require, and their hands would be strengthened in the right direction. Indifferent judges would be rendered more efficient. And judges who could or would not bring their courts up to the required standard would be removed and replaced by competent men. Presently the courts would become known as places where prompt action was the rule, and, unless I am greatly mistaken, their dignity would be enhanced, and respect for them increased, in consequence.

There are few positions in which incompetence or indolence can do more harm than on the bench. The judge who imposes unduly severe sentences is merciless occasionally, but the judge who fails to see that the questions brought into his court are kept moving toward their solution is, in his utter disregard for the sufferings of care-ridden humanity, merciless always.

The Judicial Character, as Made by English Judges

By Henry C. Riely
of the Richmond (Va.) Bar

TO A REAL lawyer this must be an absorbing subject. He generally desires and looks forward to the possibility of judicial service. If such promotion comes, apart from the fitness that must depend primarily upon his own qualities, exertions, and experience, he will find no better light for his path than that which shines from the lives of the great judges of the past. To condense some of this precious light within a narrow compass is the purpose of these comments. They consist of but passing a word as to most of the names mentioned, based upon reading not exhaustive, but perhaps sufficient to give at least a partial view of some of the great men of the English bench and to afford opportunity to learn something of the more obvious lessons of their lives.

As almost every lawyer did until more modern days, we begin with Coke. His will be a great name in the law always — certainly as long as the English common law is known and studied. The imperfections of his character, so apparent in his earlier life, were held more in restraint while he sat on the bench, and he exemplified much that a judge ought to be. Nothing in his judicial life is more interesting than his encounter with James the First — that paradox of a monarch, whose own judicial discrimination was so exquisite, we are told, that he could taste of the water from the cauldron in which some poor wretch had been boiled to death and pronounce the unhesitating judgment: "This was a witch," or "This was not a witch." The incident is well known but is always

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worthy of repetition. In a case where his own interests were involved, the King sought to overawe the judges of England and to commit them to a certain course in advance. The other judges expressed compliance. Coke's answer was: "When the case happens, I shall do that which shall be fit for a judge to do." It was the noblest illustration of the independence that marked his whole life. Yet, admirable as was Coke's conduct, it has many parallels in English judicial history. The time has not come often since those days of intensified royal prerogative when the test would have been similarly applied, but, to the credit of the English bench, few of the judges who have succeeded Coke would have been less true to duty. Lord Chelmsford's firm refusal, at a much later time, to submit to interference at the hands of Disraeli with his judicial appointments, is but one of a number of instances showing that Coke's spirit has ever since been alive in England.

Sir Matthew Hale, that modest, virtuous man who gravely warned his grandchildren against the evil influence of "pledging healths," is in many respects the antithesis of Coke, the grim, militant lawyer, who, with all his merits, neither possessed nor cultivated those gentler virtues for which Hale was so conspicuous. But they stand on common ground in the high conception of a judge's duty that both held and exemplified. Hale's views were expressed in a series of rules for judicial conduct which he composed and closely followed. They embody the essentials of strict uprightness, industry, independence, self-restraint, and that rarer quality of the open mind, which, in his words, is to be not "prepossessed with any judgment at all, till the whole business and both parties be heard." He has given an example to both judges and lawyers in the practice that he observed of speaking "in few words and home to the point." No purer character is to be found in England's judicial annals, and perhaps none have been more learned and enlightened. His virtues stirred the heart of the Puritan Richard Baxter to write of him in words of unmeasured praise, in part as follows:

"Sir Matthew Hale, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice — (who would not have done an unjust act for any worldly price or motive) — . . . that pattern of honest plainness and humility, who, while he fled from the honors that pursued him, was yet Lord Chief Justice of the King's Bench, after his long being Lord Chief Baron of the Exchequer; living and dying, entering on, using, and voluntarily surrounding his place of judicature with the most universal love, and honor, and praise, that ever did English subject in this age, or any that just history doth record."

All lawyers do homage at the shrine of Holt. In America there is a custom to speak of the "Great Chief Justice." In England, though no single judge stands out with such pre-eminence, probably the name of Holt as naturally rises to the thoughts when this term is used as that of Marshall does in this country. He stands for strength, for soundness, for courage, for common sense. He lived at a time when witchcraft and supernatural appearances were yet believed in, and the individual who announced himself as the messenger of the Almighty, charged with a demand that a *nolle prosequi* be granted for a certain prisoner then awaiting trial, had reason to hope that he might overawe the Chief Justice. But Holt, observing that the Almighty would never have

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given to him a direction which should have been addressed to the Attorney-General, rebuked the deceit and committed the false messenger to prison. He has a peculiar interest for American lawyers, because, unlike most of those who have reached high judicial office in England, he did not combine political activity in the houses of Parliament with the discharge of his duties as a judge. In the words of Lord Campbell, he was a "mere lawyer," possessing a "passion for justice" and a "genius for magistracy" — qualities displayed during a long judicial service and resulting in a record that has made Holt "the model on which, in England, the judicial character has been formed."

As Chief Justice Holt's days were drawing to a close Lord Hardwicke, against the judgment of his mother, who wished him bred to some "honester trade," was entering on those studies, which, aided by his great powers of mind and long experience, were to give him the consummate knowledge and mastery of equity for which he is pre-eminent. It was not unfitting that as the great judge who knew so well and so soundly administered the common law was laying down his work, he who was to expound so admirably and in a large measure to create the present system of English equity was taking up his own. Individual judgments will differ, but Chief Justice Holt and Lord Hardwicke, each in his own sphere, are perhaps the highest types in the two great branches of English law. But Lord Hardwicke was greatly superior to Holt in culture and general fitness for high judicial position. He succeeded by persistent efforts, which were characteristic of everything he undertook, in making himself an admirable English scholar, a quality which his judgments reflect; and he spared no pains to inform himself on all subjects that would furnish any direct aid in the discharge of his duties as a judge. The result of such thoroughness, aided by such ability, was the creation of a type to serve as a model for all judges who have followed him. His self-control, his desire to do justice, his courtesy and consideration, left nothing to be desired in his demeanor on the bench. More learned and more gifted perhaps than any who appeared before him, he was yet ever patient and attentive, anxious to gather any light that counsel might give, and, without untimely suggestions and interruptions, he heard the case through to the end, when a complete grasp of the facts considered in the light of the law, which none knew better than he how to apply, enabled him to give a sound judgment.

Scotland has given some eminent judges to England. Of these, when every point is considered, Lord Mansfield is easily the greatest. It would require more than a paragraph or two to do justice to what he was. From the beginning he applied his remarkable mental powers to the acquisition of a broad and thorough learning, seeking to liberalize and to strengthen his mind by gaining a real acquaintance with history, literature, philosophy, and the classics, and by association with men of literary attainments and culture. In his study of law itself, he did not tread merely in the narrowest circle of professional learning, but sought out and made his own the Roman civil law, international law, and the systems of modern European countries other than England. These habits of study he continued throughout a long life, covering nearly the whole of the eighteenth century; and so when at fifty-one, after many years of experience at the head of the English bar and in parliamentary life, he was called to preside as Chief Justice

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of the King's Bench, he was fitted as few have been at any time to fill so important a post. But his attainments, his rare mental powers, would not alone have made him, as some have thought him, the greatest of English judges. Lord Mansfield loved justice, he felt his obligation as a servant of the public, he was unflinching in his courage and independence, and he had in marked degree that somewhat rare combination of qualities which make up what may be called the judicial faculty — something capable of no exact definition, heaven-born, perhaps, and certainly, by some, not to be acquired. The administration of his court was beyond criticism, and he presided with a dignity and consideration unsurpassed even by Lord Hardwicke. Coke, Holt, perhaps others, were more deeply learned in the common law, had greater reverence for it, and are more thoroughly identified with it. But Lord Mansfield's accomplishments for jurisprudence went much beyond the work of any of these. With a breadth of vision impossible for men whose only learning was the common law, he saw the need of something more expansive to apply to changing commercial conditions, and, building on other systems with which his extensive studies had given him familiarity, he instituted, and in large measure perfected, a new system of law for the world of trade and business. Judicial history has few instances of opportunity so admirably embraced. He well deserves to be characterized, in the terms so often used of him, as "The Great Lord Mansfield."

Lord Camden is hardly to be placed among England's greatest judges, but there is a charm about him that some greater names do not possess. It is the attraction of noble character, always nobly exerted, rather than of uncommon powers. While Attorney-General, he thus expressed his conception of his duty as public prosecutor in an important capital case before the House of Lords: "My Lords," he said, "as I never thought it my duty in any case to attempt at eloquence where a prisoner stood upon trial for his life, much less shall I think of doing it before your Lordships: give me leave, therefore, to proceed to a narrative of the facts." Living long, as most of the noted English judges did, he was true always to this spirit of justice and moderation; and in all his conduct, both as judge and legislator, he acted on the belief that he was charged with an obligation to aid in making the law the servant of truth and freedom. Indeed, there was about him, as one of his contemporaries has recorded, a "kind of benevolent solicitude for the discovery of truth." Approaching his duties in this spirit, when called to fill the highest judicial office in England, and possessing much more than ordinary powers and attainments, he did not need the more brilliant qualities of some of his greater contemporaries to make of him the trusted and respected judge that he became.

If we may trust Lord Campbell's narrative, Lord Thurlow enjoyed a reputation as a great judge that he did not deserve. His immense self-confidence, his overbearing and often threatening manner, his oracular and contemptuous method of speech, awed those who came in contact with him and impressed them with a belief in his possession of powers which a critical consideration of his acts and utterances does not support. Yet even Lord Campbell, who, whether in the spirit of the impartial historian or for some other reason, finds little to praise in Lord Thurlow, admits the native vigor of his intellect and the influence which he could exert over the minds of men. And it could not well

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be that the man, alone of all others, of whom Dr. Johnson admitted that when he had to meet him "he should wish to know a day before," was otherwise than the remarkable being which, in his own day, he was certainly thought to be. But purely in his character as a judge — and it is in this aspect that we are concerned with him — Lord Thurlow suffers by comparison with others. He had the opportunity of practice before both Lord Hardwicke and Lord Mansfield, but apparently the admirable example of judicial propriety which they set failed to impress him. Unusually fitted by nature to preside with dignity and to incite respect, he often failed to do either; and though the trespass of his undisciplined nature on the rules of strict decorum sometimes excites amusement, it transcends all notions of what should be expected from the first magistrate of a great country. It was hardly possible that so vigorous a mind and forceful a character should not have been reflected in judgments that command respect, but there is little to indicate that he imitated his great contemporaries in their ambitious efforts to fit themselves for their important work and to improve the systems of law which they administered. He was careless and immethodical and, if current report spoke the truth, he was even sometimes content to deputize the writing of his opinions. No taint or suspicion of corruption ever rested upon him, but impartial consideration of his conduct forces the conclusion that to Lord Thurlow the holding of his high office was more important than its efficient and useful administration.

It is not often that from one family come two such men as the brothers, William and John Scott. Both won great reputations as judges and both lived to extreme old age. The elder, Lord Stowell, died past ninety and was hardly less honored for his charming and cultivated personality than for the soundness and learning of his judgments in admiralty and international law. John Scott, familiar to every lawyer as Lord Eldon, almost reached his brother's years, for he died in 1838, in his eighty-seventh year. Although his judicial life had closed ten years earlier, for more than twenty years prior to his relinquishment of the Great Seal he had sat continuously in the Court of Chancery, a longer tenure of that high office than any Chancellor enjoyed except Lord Hardwicke. Lord Campbell has thought fit to call attention to many serious defects that Lord Eldon possessed as a judge, and it is certain that he was dilatory in the discharge of judicial business and was of that turn of mind which abhors all change and opposes reform intended for the correction of existing abuses. But difference of political views, and the sharp antagonism that this frequently brought about, may explain much of Lord Campbell's unfavorable comment. It is well to remember also that the latter's trustworthiness as a biographer has been severely questioned. Even the somewhat hostile atmosphere of the "Lord Chancellors" does not becloud the great qualities that marked Lord Eldon's judicial career, and that explain the reverence in which his name is held. Probably no one has surpassed him in that characteristic which a judge ought to acquire, if he does not possess it by nature, of courteous and patient consideration for the counsel who appear before him. His complete knowledge and understanding of the law which he administered, the soundness of his application, and his desire to do justice, which never yielded to any other motive, ensured a right judgment in every case. In the clearer light of later years some

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faults he had are more apparent, but all who seek judicial excellence would do well to study his life on the bench and, in large measure, to follow the path by which he passed to the great emience that he reached.

The year 1750 is the birth year of two noted English lawyers — Erskine and Ellenborough. The first, the foremost advocate of his own and perhaps of any time, was also Lord Chancellor, and the other became Chief Justice of the King's Bench and as such enjoyed an ascendency that few judges have had. Erskine's enthusiastic, gifted and intrepid nature fitted better into the stress and excitement of life at the bar, and the administration of the dry doctrines of the Court of Chancery, with which his previous experience had not made him familiar, added nothing to his reputation during his short term of office. But Lord Ellenborough's is a name to conjure with. In him the law seemed to be vitalized. When he spoke, men rendered respect and obedience. Like a true successor of Lord Coke, he was unwavering in his independence, as faultless in his understanding as he was thorough and comprehensive in his knowledge of the law. Yet with all his gifts and learning, his qualities of manner and presence entered largely into his judicial reputation, and there is perhaps no more striking instance among English judges of the part that mere personality plays in the respect and authority which a judge acquires. In his strong and able hands all felt a sense of security, and he ruled without question in the Court of King's Bench. His career on the bench was marred only by his rough and overbearing manner, a thing apparently inseparable from some natures when raised to high position, and a fault common to more than one English judge of justly great reputation. In Lord Ellenborough's case, as Lord Campbell has well said, the defect is forgotten, "while men bear in willing recollection his unspotted integrity, his sound learning, his vigorous intellect, and his manly intrepidity in the discharge of his duty."

When death ended Lord Ellenborough's tenure of office, it was fortunate for the public interests that the high post which he had filled passed to the no less able keeping of Lord Tenterden. Without the gifts and accomplishments that give a charm to the lives of so many men of reputation, and having accomplished nothing brilliant in his whole career, Lord Tenterden is yet one of the most interesting characters among English judges. Judging by his inheritance alone, life did not open a very wide prospect to him. The son of a barber in a small town could not have a reasonable hope of reaching the Chief Justiceship of England. And so, many adverse conditions had to be overcome. But he surmounted them all. When he entered upon his office, he was ripe in legal learning, thoroughly disciplined in mind, impressed with a high sense of the trust committed to him, and possessed of a just estimate of its requirements. His attitude towards judicial duty is nobly expressed in his comment to a friend, who congratulated him on his promotion from the bar, that "the search after truth is much more pleasant than the search after arguments." The period during which he presided in the Court of King's Bench is described by Lord Campbell as a "golden age" in which "law and reason prevailed." And while he suffered at times from the same infirmities of temper that had marked Lord Ellenborough, the administration of his court was in most respects beyond exception. Discipline was maintained, argument kept within proper bounds, the just limits of decision ob-

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served, and law and justice made the basis of all.

As we approach more modern days, few, if any, of the figures in the forefront are more attractive than that of Lord Lyndhurst. Born in Boston, though brought up and living all his life in London, he is one of the two native American lawyers who have won great distinction in the law in England, the other being Judah P. Benjamin. He possessed the acutest of intellects, and was able, on occasion, to master and apply the law at the bar with singular skill and to administer it on the bench with equal force and clearness. But he was more of a statesman than a lawyer, and it has been questioned whether he was really great as a judge. Whatever his deficiency, however, in completeness of legal learning, there can be no question, perhaps, that, as became the successor of Lord Eldon, he was as well fitted by nature to hold high judicial office as any who preceded or followed him. His clear head, his ready perception, his willingness to hear argument, his open mind, his thorough self-command, made a fortunate combination of qualities that resulted in his admirable manner on the bench and in the sound and satisfactory judgments that he rendered. It is probably true that many surpassed him in technical learning, and it may be, as some have asserted, that his heart was not in the law. He has at least given an example of judicial propriety and fitness that suffers in comparison with none. Lord Westbury, whose searching intellect and bitter tongue made him the keenest and least favorable of critics, expressed the opinion, near the close of his long life, that Lord Lyndhurst's was the finest judicial intellect that he had known.

Few can reach the heights won by the great names so briefly touched on here, because, in truth, there is not room there. Many must be content to find the end of their journey on the slopes below. Opportunity is not impartial of her favors, and lends her aid to only a few. But all may hope to rest upon the heights; for it is a lesson of judicial history, not only in this country of supposedly greater opportunity, but in England as well, that from the smallest beginnings have come names forever great in the records of Westminster Hall and Lincoln's Inn. Lord Tenterden's rise to greatness from the humble position of the son of a barber of Canterbury has been recorded. The great Sugden began life under the same conditions. But he who reads the latter's life in the spirit of emulation will find little of encouragement except in the fact of his humble origin and small prospects; for Sugden was no ordinary being carried to the front merely by determination and strict application, aided, as is usual in such cases, by good fortune. No doubt he had his full share of these qualities and exerted them to his advantage; but he must have been gifted with powers of mind which not the most patient and intelligent cultivation will develop in most men. What lawyer within the experience of any of us could in an evening examine and digest for appropriate action on the morrow no less than thirty-five briefs; and then, regardless of the rest that most would seek after such labors and in view of those to come, would proceed to a late sitting of the House of Commons for a contest of wits with those who were shaping the course of a great nation? Our wonder increases when we learn that he lived to the age of ninety-four. Upon the bench he carried the same extraordinary powers. His "piercing intelligence," as one of his biographers has called it, penetrated to every nook and corner of the case and

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cast light upon the whole pathway to be traveled in delivering judgment. Argument before such a judge could not have been always an unmixed pleasure. Consciousness of knowledge and mental grasp greatly inferior to that of the listener must have been far from comforting to many of the counsel who addressed him. At least, we learn that Sugden was not always patient and considerate under such circumstances. But in spite of such faults, which are scarcely inseparable from the possession of a mind so powerful and independent, he must be regarded as among the first of English judges. Deep and accurate learning, an experience such as few lawyers have had, and a remarkable intellect combined to make him a judge who, for soundness and force of decision, has perhaps not been surpassed.

The roll is not complete: only a few high points have been touched, and many great names remain — Lord Nottingham, the first to make of English equity a real system; the gifted and scholarly Somers, who so well knew a judge's duty, as exemplified by the simple but noble answer with which, on a noted occasion, he met the argument of hardship, that a judge "ought not to make the parties' case better than the law has made it"; Lord Kenyon, pictured in no enviable light by Lord Campbell, but whom Lord Campbell himself compels us to respect in describing the courageous and honorable course that he always pursued; Brougham, with mental endowments rarely surpassed, more versatile, perhaps, than any of the great men of English history, but too undisciplined and eccentric to attain the essentials of high judicial character; Lord Cottenham, comparatively unknown when made Lord Chancellor, but found to have rare gifts as a judge, and who, because of his admirable judicial demeanor and the excellence of his judgments, has left the highest reputation; Lord Westbury, the very embodiment of intellectual power, under whose touch the most abstruse and difficult of legal problems appeared simple and easy of solution, but whose deficiency of moral faculty led him into errors that have inevitably dimmed his great reputation; Lord Campbell himself, the biographer of most of those mentioned here, who was not without some of the faults which he so faithfully recorded of others, but whom to hear in his best moments on the bench was "like listening not only to law living and armed, but to justice itself"; Lord Cairns, of intellectual force not inferior to Lord Westbury's, though of a different order, pronounced by Mr. Benjamin to be the greatest lawyer before whom he ever argued a case, and who to learning and mental power added all the other more serious qualities that make up judicial excellence; Lord Selborne, celebrated not only as a remarkable judge but as one of the chief benefactors to English law in the judicature act of 1873, for which he was chiefly responsible; and many others,—especially among those who did not reach the foremost places in the judiciary, some of whom, in their less conspicuous posts, exhibited qualities that might well have accompanied the highest judicial honors that England could confer. Blackstone was a *puisne* judge. Buller, thought by most of his contemporaries the superior of Lord Kenyon and Lord Mansfield's choice for his successor, held a subordinate judgeship until his death. Sir William Grant, a great master of equity, stopped short of the first prize in the Court of Chancery. There are many other instances.

As we look back on them all, some things stand out most prominently. A

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superficial but interesting fact is the great age that so many reached. The sound mind and the sound body seem to have met. Of those mentioned all but six reached their seventieth year. Lord Mansfield died in his eighty-ninth year. Lords Lyndhurst, Brougham and St. Leonards (Sugden) each lived until past ninety. Coke was eighty-two, Camden, eighty, Lord Chelmsford, eighty-five. Lord Eldon and his brother, Lord Stowell, have already been mentioned. Of fourteen judges who held the office of Lord Chancellor during Queen Victoria's reign the average length of life was over seventy-nine. One, Lord Halsbury, still survives and is strong of body and clear of head at eighty-six. It is promised to those who serve the higher law that "length of days, and long life, and peace" shall be added unto them. May we not believe, from the facts here briefly recorded, that the scriptural promise has been given a wider application?

Looking somewhat more deeply, a study of their lives leaves the conviction that, with rare exceptions, they owed their promotion, not to mere chance circumstances, but to their appreciation of the difficulties of their calling and to the perseverance and industry which they applied in overcoming them. Native mental gifts played their part, but of their success the language of Lord Campbell, in speaking of Lord Hardwicke's great achievements, may be used, that "like everything else that is valuable, it was the result of earnest and persevering labor." The account of Lord Mansfield's great exertions to prepare himself for his legal career would cast a damper over the spirits of most young men looking to the law as the avenue to success and distinction. The statement is made of Lord Eldon that so thorough and comprehensive had been his preparation that before he had ever pleaded a cause he was fit to preside on the bench. Lord Nottingham. Lord Somers, Sir Edward Sugden, indeed all who won real distinction, laid out their lives on the same principle and reaped the fruits of it.

Such preparation must have preceded true success; but any real knowledge of the history of English judges will impress one with how well in almost all respects the great majority measured up to a high standard of judicial fitness — in natural ability, in knowledge, in independence, in general judicial demeanor, in the labor and practical skill necessary for the thorough and efficient administration of the large duties they were called to fulfill. Individual faults have been recorded. Occasionally a poorly fitted or even incompetent selection was made. Owing also to the parliamentary duties required of those filling the highest judgeships, political considerations in a measure controlled in the appointments to these posts; but even in these instances the choice was nearly always made from men whose mental worth and accomplishments had raised them to a position of leadership at the bar. The object appears to have been that the judge should be a real expert — the very best that his country could afford for the work to be done.

But as judicial integrity is the foundation stone of any administration of justice, so better than all else is the record of high character. Abuses have existed. Justice has been sometimes delayed, and many judges, who, with the opportunities before them, should have been the initiators of reform, were slow to take steps for the simplifying of the complicated and expensive legal machinery of the courts and for the abolition of outworn and unjust laws. But it has been rare in the last two or three hun-

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dred years that an Englishman might not feel assured, in approaching a court of justice, that no consideration in the mind of the court would outweigh the desire to reach a right judgment. Perhaps the mere fact that the judges kept themselves honest does not merit praise, but even in England the same high standard has not always been maintained. A reminder of a time when less creditable conditions existed is found in the words quaintly spoken of Sir Randolf Crewe, that Chief Justice of the King's Bench who forfeited his office rather than sanction the illegal practices of Charles the First in obtaining supplies of money. Contrasting his independent conduct with that of the corrupt judges who yielded to the King's wishes, Hollis, a member of Parliament, finely said: "He kept his innocency when others let theirs go . . . which raises his merit to a higher pitch. For to be honest when everybody is honest, when honesty is in fashion and is trump, as I may say, is nothing so meritorious; but to stand alone in the breach — to own honesty when others dare not do it, cannot be sufficiently applauded, nor sufficiently rewarded."

It is an honorable record, the making of which has counted much in the creation of the English national character and in the strength and permanence of the English government. And with those qualities in individual judges that have most fixed attention now in mind, from the rapid summary that has been made, the typical judicial character may be builded. More than one noteworthy trait existed in all, in some nearly all were combined. But selecting some quality that was marked in each, and choosing only from the best that England's proud record of judicial history gives, the qualifications might be these: The purity of motive and exalted virtue of Hale; the independence of Coke; the rugged strength and common sense of Holt; the great professional learning of Eldon and of Campbell; the humanity, the love of truth of Camden; the majesty of presence and authority of Ellenborough, without his tendency sometimes to pervert these gifts; the mental acuteness and power of expression of Sugden and of Westbury; the open mind, the courtesy of manner, the remarkable memory, the readiness to hear argument of Lyndhurst; the ceaseless industry of Cottenham; the self-command, the close but restrained attention to argument of Lord Cairns; the discipline, in a wide sense, maintained by Tenterden; Lord Nottingham's hatred of a delayed cause; the innate judicial faculty of Hardwicke and of Mansfield, as well as their general culture and enlightened attitude toward their profession; the integrity, the desire to do justice, the courageous firmness in the discharge of duty that marked them all. Such a standard might not be exacted, but it is one to be contemplated and striven for.

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The Activity of the Illinois Bar Association in Procedural Reform

AN IMPORTANT conference on procedural reform took place at the thirty-sixth annual meeting of the Illinois Bar Association, held at Chicago, April 26–7, all the state bar associations having been invited to send delegates. In addition to the discussion of reform of procedure, the subject of recall of judges and judicial decisions also furnished a topic for consideration.

Thirty states responded to the request to send delegates. The discussion was opened by an able address by Horace Kent Tenney, the retiring president. It was not necessary, he said, to choose between the old common law system and an enormous code. It was desirable rather to take the wise middle course founded upon the two essentials of a short and simple practice act to be passed by the Legislature and of power in the courts to regulate matters of procedure. A great advance would be made, he thought, if the Supreme Court of the United States could be empowered to formulate a practice act for use in the federal courts throughout the country, a change that would result not only in direct benefit to litigants in those courts but would serve as an excellent example for lawyers in the various states.

The spirit of the meeting was shown by the hearty applause given to a story related by Mr. Tenney at the banquet. According to his story, the relator was sitting around a courtroom one day in pursuance of our time-wasting methods, waiting for his case to come up, while two lawyers engaged in a long and tiresome argument as to the soundness of a declaration. Mr. Tenney's client listened patiently to the subtleties of the disputants until patience ceased to be a virtue, when he turned to his attorney and said: "Why don't they let the fellow who is suing say that the other fellow is a damned scoundrel and that he is ready to prove it?"

"So far as reform in pleading is concerned," comments the *National Corporation Reporter*, "that is the whole story in a nutshell."

President Tenney's address was eminently constructive, but other speeches served quite as much, perhaps, to stimulate thought. There was frequent allusion to the unwieldy New York code, which as framed by David Dudley Field contained only 300 provisions, but which has been encumbered with amendments by the Legislature — though, said William Nottingham, the delegate from New York, it may yet be redeemed to usefulness, since a commission is now at work upon a draft of a brief and less complicated act. It was shown that Indiana has suffered in much the same way as New York, thereby "achieving a remarkable waste of time in getting down to the issue which is to be submitted to the court for decision."

The abominations that frequently attach to expert testimony came in for condemnation; so did the elaborate systems which, in some states, make it almost impossible for a poor litigant to take an appeal. Victor G. Gore of Michigan attacked the Chicago court procedure in criminal cases as dilatory. George Bryan, representing Virginia, declared that under the present system the right of appeal was denied many litigants owing to the great expense involved. The Chicago Municipal Court

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was held up as a model "poor people's court," by Horace G. Lunt of Colorado.

The delegate from Indiana urged the devising of a system whereby one appeal should suffice and the parties be saved the burden which in many states is put upon them by the ordering of a retrial.

On the other hand there were delegates who, like Victor G. Gore of Michigan, found reason for jubilation — he because "we are free from the complexities of the codes of New York and Indiana and equally free from the antiquated system prevailing in Illinois; our constitution gave our Supreme Court power to regulate legal procedure, and practice proceeds under the direct control of the Supreme bench." John G. Schaick of Missouri also ventured a boast to the effect that in jury trials that state no longer insists upon a unanimous verdict, but requires merely the concurrence of nine men, thus admitting that principle of majority rule which is recognized everywhere in this country except in courts. Alfred G. Ellick of Omaha, representing Nebraska, also urged that the jury system of the country be changed so that the verdict of a majority of a jury shall be accepted. The delegate from Washington, H. H. Field, congratulated himself and his brethren that the Legislature of that Pacific state has concerned itself chiefly with substantive law and has not bothered much about questions of practice. The representative of Tennessee, Albert W. Biggs, recalled with pride that his state was not making very large additions to the existing tonnage of printed reports. "Every lawsuit can be taken to our highest court," he said, "and the Supreme Court of Tennessee disposed of about 1,500 cases last year; but no opinions were written save in the important cases, as the court has abandoned the practice of writing opinions which merely reaffirm a previous decision upon the same question of law."

The representative of Wisconsin, B. R. Goggins, suggested that the appellate courts should disregard all errors committed in the trial of a case save those which have wrought actual injustice to the litigant who complains of the judgment. The argument of Mr. Schaick, of Missouri, went further. "Where the jury is instructed in writing," he said, "the Court should require the lawyers to state their objections to these instructions before they are read to the jury, and should not allow error in such instructions, to which no objection is made at the time, to be made the basis of complaint in the upper court as a means on the part of the defeated party of obtaining a reversal. The judge should be permitted to comment upon the evidence, so that the jury in determining its weight and credibility may have the benefit of his views. Finally, the Appellate Court should never be permitted to reverse a case unless upon an examination of the whole record it appears that there has been a miscarriage of justice."

Major Edgar B. Tolman, president of the Chicago Bar Association, in advocating a reform of rules of procedure, said:

"Nearly all the evils of the present system of procedure are due to the fact that sometimes on both sides of a case there is a desire to delay the administration of justice in the particular controversy, and for that reason resort is too frequently had to technicalities. Fully half the changes agreed upon as necessary can be accomplished by rules of court without the slightest change in existing law."

John H. Wigmore, Dean of the College of Law of Northwestern University, emphasized the necessity for changes in legal procedure. Delay, expense and

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uncertainty, he said, characterized the administration of justice. He had investigated conditions in the five states, where the delegates had found nothing to criticize, and, taking cases at random, he declared, fully one-half had required from two to four years to be decided.

As a remedy for present conditions Dean Wigmore advocated that the courts be given power to make their own rules of procedure. There should be a general revision, but the courts are better qualified than the Legislature to make it, he declared.

Albert D. Early, chairman of the committee on law reform, introduced a resolution which was unanimously passed, that the report be presented to the Supreme Court of Illinois with the recommendation that it do as much as possible toward putting in effect the court rules outlined, and also that a bill be presented in the Legislature embodying reforms requiring legislative action.

In substance, the jurists and lawyers who spoke agreed upon these proposed reforms:

Discard the common law and legislative code methods of regulating court procedure.

Leave the matter with the judge; let him use his common sense.

Do not limit the admissibility of evidence by rules of procedure which have long since become antique.

Spurred on by a vigorous speech by Judge Marcus Kavanagh of the Superior Court, who declared that many evils and abuses in court procedure ought to be remedied, and who declared that the Supreme Court had avowedly overruled itself 150 distinct times, the Association took steps to call a conference of judges, bar associations and judicial bodies, for immediate adoption of a reform program, and to consider a revision of existing rules of court.

This action was taken after the committee of law reform, though its chairman, Edgar B. Tolman, had submitted a report with the following recommendations:

"That the bar associations of each county and the members of the bar of each judicial district, where there is no bar association, meet at the earliest practicable date to consider the revision of the existing rules of court and the drafting of additional rules, with a view of putting into operation the principles of procedural reform embodied in the 'conference bill' to be introduced at the next session of the Legislature."

Some of the reforms proposed were the following:

"That pleadings in cases at law shall state concisely and with reasonable certainty the real cause of action and the real defense, and shall be verified.

"Rules of court should be few in number, clear and simple in expression, without hampering bench and bar by hard and fast rules.

"They should be uniform in principle and essence, so that there may be harmony in practice in different localities.

"Leave shall be given to either party in a suit to file written interrogations to be answered under oath, touching any matter pertinent to the controversy, such answers to be received in evidence.

"Rules of court should obviate unnecessary expenditure of time and energy by forbidding the doing of useless things. They should reduce to a minimum that delay in the administration which amounts to a denial of justice.

"They should seek to make the administration of justice certain and the judgments of courts stable by affording an opportunity of preventing or curing errors during the trial, rather than by an appeal and a retrial.

"They should reduce to a minimum the consequences of an error of venue by facilitating the transfer to the right

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court, without unnecessary interruption to the course of justice."

THE JUDICIAL RECALL

The recall of judges was vigorously advocated by R. M. Wanamaker of Akron, O., judge of the Court of Common Pleas, who declared that there is too much regard in the courts for the rich, and too little for the poor. "There is too much usurpation of legislative power by the courts," the said, "too much expense to the litigants, too much delay, and too much uncertainty."

James H. Wilkerson, United States Attorney in Chicago, spoke in opposition declaring that if the recall was adopted it would be used "in times of excitement and popular unrest, when the people need protection the most from their own unwise conduct." The adoption of the recall, Mr. Wilkerson said, "would in effect be to declare our judicial system a failure."

Albert Martin Kales, of the Chicago bar, spoke in favor of the recall of judicial decisions, asserting that no one had ever advocated the application of the recall to all decisions involving constitutional questions, because that would include decisions by the federal Supreme Court. Mr. Kales declared that the amendment of a state constitution in respect to the "life, liberty and property clause" amounted through the course it must take to a popular recall.

Charles H. Hamill of the Chicago bar, answering Mr. Kales, commented upon the cases cited by Colonel Roosevelt, and said: "When general propositions affecting all men alike are submitted to our vote, we are impelled by a combination of patriotism and fairness with self-interest to declare in favor of that which makes for righteousness, but, in my judgment, it would be a most dangerous expedient to remove from the control of men trained by tradition and experience to weigh the rights of others and submit to a general vote, perhaps in time of great popular excitement and prejudice, the rights of a small group of men whose interests might, for the time being, seem opposed to the welfare of the community at large."

Chief Justice Orrin N. Carter of the Chicago Supreme Court made a very earnest defense, at the banquet, of the conception of judicial power which prevails in most American courts of last resort, under which so many statutes have been held unconstitutional because they invaded, in the opinion of the judges, the inherent or natural rights of the individual. Speaking on "The Courts and Unconstitutional Law," he said:

"Great social and public questions cannot be settled speedily. It is only on the 'roaring loom of time' that a new form of government can be created. Extreme positions are taken on both sides of all important questions. Truth is rarely reached except as the outcome of clashing opinions.

"The chief work of a court should not be to create new conditions by making new laws but rather to adopt and adjust the fundamental principles of law to the ever changing conditions of society.

"We need change and reform, but more than social or political reform do we not need individual, personal, moral, and mental reform?"

S. S. Gregory, president of the American Bar Association, who also spoke at the banquet, declared that the country was practically on the verge of a political revolution.

"When popular discontent is so prevalent as it is now," he said, "something is amiss with either the Constitution or the

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form of government. It would be idle to deny the expressions of dissatisfaction which are coming from the people, not merely with the law, but with the other institutions of our government. We are living in an age of political revolution."

Mr. Gregory charged the lawyers of the country with the duty of standing side by side, reme . ering the traditions of their profession to do its part in bringing about remedial legislation and reformed court rules.

The election of officers for the ensuing year resulted as follows: President, Harry L. Higbee, Pittsfield; vice-presidents, Robert McCurdy of Chicago, William R. Wright of Effingham and Edwin M. Ashcraft of Chicago; secretary-treasurer, John F. Voight, Mattoon.

The Law of Restraint of Trade

THE keen, thorough-going analysis of the subject of restraint of trade, made by Mr. Roland R. Foulke, of Philadelphia, in two recent articles in the *Columbia Law Review*, forms the most valuable contribution to this subject that has appeared in any legal publication for a long time. The *Green Bag* takes pleasure in reproducing Mr. Foulke's view of the subject because a sound law of monopoly is surely to be built only on the foundation of clear and accurate economic thinking. Mr. Foulke himself summarizes his discussion as follows [1]:—

"Trade consists of buying and selling. The factors involved are the buyer and seller, and the chief elements of a sale are (1) person, (2) place, (3) time, (4) price, (5) thing sold. Freedom of trade exists when each individual is entirely unrestrained in his individual action in buying or selling as to each of the elements mentioned. This freedom depends on the common law principle favoring freedom of contract, which in turn is opposed at times by the principle protecting the rights of the community. Freedom of trade presents an opportunity for the existence of competition. Competition in trade consists in endeavoring to make one or a number of sales or purchases which one or several other parties are also endeavoring to make. Competition, so far as it is successful, is an interference with the trade of the party competed against, who has no standing under the law to complain unless the competition is unfair. Competition among the sellers operates to the advantage of the buyers, and *vice versa*. Competition in either case may be to the disadvantage of the parties competed against and, when carried to excess, exterminates competition and leaves the buyer or seller, as the case may be, without the benefit of any competition at all. Competition, therefore, is beneficial to a certain extent, always more or less injurious to the parties competed against, and when carried to excess produces the same state of affairs as the absence of competition. A person who has freedom of trade may compete, and restriction on this freedom of trade diminishes, to that extent, his capacity to compete. Competition may therefore be the indirect result of freedom of trade. The market is the contract be-

[1] *Columbia Law Review*, March, 1912, pp. 246–251.

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tween the buyer and seller, and consists of the transaction between these parties.

"The market is controlled when all or the larger part of the buying and selling is in the hands of one person or a combination. Restraints on trade may operate (1) equally on some one or all of the buyers and sellers, (2) on some one or all of one or the other of them, (3) and as to one or all of any of the elements we have mentioned, and may be voluntary or involuntary, direct or indirect. A direct restraint specifically prohibits an individual from some act of trade or restrains him in the manner of doing some act of trade. An indirect restraint is the restraint imposed on another person by reason of this direct restraint. The various restraints of trade are as follows[2]: (1) Monopoly, which is a state of facts and exists when all the buying or selling of a particular commodity is in the hands of one person or a combination or persons acting as a unit. A monopoly is objectionable as a restraint on trade of (*a*) those who may seek to engage in the same trade but cannot do so with any chance of profit because of the monopoly; (*b*) of the persons buying or selling, as the case may be, from or to the monopoly; (*c*) and when the monopoly has been brought about by a combination or contract it is a restraint on the trade of the parties to the combination or contract. The only real evil of a monopoly is its aspect as a restraint on the trade of those buying or selling to the monopoly. The amount of the buying or selling controlled by one person or a combination may be sufficient to confer all the advantages and bring about all the evils of a monopoly, although no perfect monopoly be in effect achieved. The question is, what size of business is to be treated as a monopoly? This question cannot be answered on the authorities.

"Monopolies are of different origin — those arising by grant from the state, by accident and by nature, seem to be lawful. So, also, where the monopoly arises by the exertions of an individual, the law cannot interfere without repudiating the principle favoring freedom of individual action and contract. When the monopoly is brought about by associated action or combination, the law is different. Monopoly, therefore, is probably in itself perfectly lawful, and the law only objects to certain methods of bringing it about. Competition, regulations by the state, and the action of public service corporations are also restraints on trade; the latter is peculiarly the subject of legislative regulation. A restraint may be imposed on trade by the performance of a covenant contained in a contract, which performance may be an act either of omission or commission, and may restrain the trade of (1) the covenantor, (2) the covenantee, (3) a third person. Our concern is only with the first, in which case the performance of the covenant may involve (1) total cessation of trade, 2) (restriction on the manner of trading generally as to one or more of the elements we have referred to. The first is generally found in contracts relating to (1) a sale usually of a business, (2) dissolution of a partnership, (3) employment of a servant; the second in contracts of (1) formation of a partnership, (2) agreement among competitors, (3) agreements between buyers and sellers. The one eliminates competition, the other modifies it.

"The performance of a covenant in restraint of trade is a direct restraint on the trade of the promisor or promisee, and an indirect restraint on the trade

[2] For Mr. Foulke's table of restraints, see 12 *Columbia Law Review*, Feb. 1912, p. 105, note 21.

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of the several parties whose freedom of trade may be diminished by the performance of the covenant. Covenants in restraint of trade may also be divided into (1) those entered into by an individual, (2) those entered into by a combination, (3) those entered into by several individuals for the formation of a combination or by one person in aid of a combination.

"A covenant not to trade was illegal at common law as against public policy when the restraint imposed by the performance of the covenants was unreasonable. The objections on the score of public policy may be reduced to four heads. These are (1) effect on the covenantor, (2) effect on the covenantee, (3) effect on competitors, (4) effect on persons buying from or selling to the covenanatee, and in each case we must consider (1)) the case of a covenant to abstain from trade, (2) the case of a covenant merely to trade in a particular way. The objection that the covenantor was injured by the performance of a covenant to abstain from a particular trade is no longer of any force when occupations may be changed with facility. This objection never did apply to a covenant merely to trade in a particular manner. The performance of the covenant is in each case distinctly advantageous to the covenantee, as he is giving a consideration for it. Competitors are benefited in each case because the performance of the covenant to that extent diminishes competition. The persons buying from or selling to the covenantee are injured by the removal of the customer, thus diminishing their freedom of trade by narrowing the market. They have no ground to complain of such removal unless the covenants are taken by some form of combination, which thereby acquires control of the buying or selling. The law cannot interfere except in the case of a combination without repudiating the principle favoring freedom of individual action. There is little danger under modern conditions of an individual acquiring a monopoly by taking covenants in restraint of trade. The other cases of covenants in restraint of trade are those between buyers and sellers, which, in the case of individuals, appear to be unobjectionable.

"When we consider the subject of combination, we must recognize the distinction between individual action and associated action. So far as the law of restraints on trade is concerned, the right of association is regarded as a peculiar privilege, the exercise whereof may lead to results injurious to individuals and to the public, and therefore to be circumscribed and jealously dealt with by the law. The argument that what one man may lawfully do several together may do is not sound, because the law regards the potency of numbers, and the principle as to the lawfulness of an individual act cannot be carried to its logical conclusion because of the counter principle as to the unlawfulness of associated action. The two principles are logically inconsistent, and the most that the law can do is to strike a rough balance between them. A combination in restraint of trade is where two or more individuals conduct their respective buying or selling, as the case may be, with respect to one or more or all of the elements we have noticed, according to some common rule which they have voluntarily adopted. A combination may appear in several forms, which are (1) two or more individuals buying or selling separately in pursuance of some contractual obligation existing between them; (2) a partnership buying or selling; (3) an association; (4) a corporation; (5) a trust. The same principles probably apply to all these forms. In practice,

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however, the distinction between the cases cannot always be easily drawn, and two or more of them are sometimes involved together.

"A contract is to be distinguished from a combination. The contract precedes the combination, and the combination is the result of and grows out of the performance of the contract. The law may condemn the invalidity of a combination in several ways: (1) by refusing to enforce the terms of the combination among the parties to it; (2) by refusing to recognize the combination as having any validity in a controversy between it or its members and persons not members; (3) by interfering through the agency of the state or private individuals interested, not parties to the combination, to prohibit the continuance thereof or prevent its coming into existence, which case arises under statute and is excluded from this discussion, and in each case we must distinguish combinations between buyers or sellers and combinations between buyers and sellers. The validity of a combination in each case is to be discussed under the following four headings: (1) as between the members of the combination; (2) as between the combination and competitors; (3) as between the combination and persons buying from or selling to it; (4) as between the combination or members thereof and third persons unconnected with the trade. As to the first, the authorities do not enable us to lay down any principle from which it can be said when a combination is or is not valid as against its members. The most that we can venture is that where the combination obtains control of the market, the law will condemn it by refusing to enforce it among the parties thereto, but no answer can be made to the question of fact, which is, when does a combination have control of the market?

"In the aspect of a combination as against competitors, there are two branches of the subject,—the combination competing, the combination eliminating competition. Where the combination competes, the restraint is on the trade of the parties competed against, and their right, if any, sounds in tort. Where the combination eliminates competition, it does so by taking covenants not to trade, which may be annexed to the purchase of a business or taken from parties whose business is not purchased. Although a distinction has been suggested between the two, it is apprehended that there is none, and the invalidity of the covenant in each case depends on the circumstance that the covenantee is a combination and is, by reason of the covenants, acquiring control of the market. Since, however, the covenant is invalid because of the illegality of the covenantee, thereby obtaining control of the market, an innocent covenantor should be permitted to enforce the contract. Although this distinction has been suggested in some cases, it cannot be said to be supported by authority. When the law undertakes to interfere as between the buyer and seller on behalf of or against a combination, it presses more freely on the principle of freedom of contract than in any of the cases heretofore discussed. While in those cases the law merely refuses to enforce a contract already made, in this case the interference may involve the making of a contract for the parties. The principle seems to be striving for recognition that an individual may be assisted by the law in obtaining favorable terms from a powerful combination. This principle has reached its fullest develop-

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ment in the law of public service corporations, and persons engaged in public callings, where the law compels the parties to deal with all persons alike on reasonable terms. In each case, in considering the aspect of the combination as against third parties not connected with the trade, the rule generally is that the combination may enforce any right it may have, irrespective of the circumstance that it is an illegal restraint on trade."

Reviews of Books

Chamberlayne's Modern Law of Evidence

By Charles C. Moore

The Modern Law of Evidence. By Charles F. Chamberlayne, Esq., of the Boston and New York bars, American editor of Best's Principles of the Law of Evidence (1883), editor of the International Edition of Best on Evidence (1893), American editor of Taylor on Evidence (1897), editor of third American Edition of Best on Evidence (1908). Matthew Bender & Co., Albany, N. Y. Four large royal octavo volumes. ($28.)

THE author of this work adds another name to the scroll of Harvard men who have earned an unstinted measure of enduring gratitude of the legal profession. As the editor of Best and of Taylor, and the author of other strikingly meritorious work, he has been immersed in the law of evidence almost continuously for thirty years.

Lord Campbell's description of the treatise on "Merchants' Ships and Seamen," by Charles Abbott (afterward Lord Chief Justice Tenterden), accurately depicts Mr. Chamberlayne's volume by contrast with various productions misbranded as law books. "Instead of writing all the legal dogmas he had to mention, and all the decisions in support of them, on separate pieces of paper, shaking them in a bag, drawing them out blindfolded, connecting the paragraphs at random with conjunctions or disjunctives ('And,' 'So,' 'But,' 'Nevertheless'), he made an entirely new and masterly analysis of his subject; he divided it logically and lucidly; he laid down his propositions with precision; he supported them by just reasoning; and he fortified them with the dicta and determinations of jurists and judges methodically arranged. His style, clear, simple, and idiomatic, was a beautiful specimen of genuine Anglicism." (Lives of the Chief Justices, Cockroft's edition, vol. 5, p. 289.)

"Modern" is an appropriate word in the title of the work. "The great difference between the modern and the ancient world is the growth of the scientific spirit, and the meaning and value of evidence," says Arthur C. Benson in his essay on *Egotism*. Mr. Chamberlayne devotes several interesting sections to a discussion of "Evidence as a Science"; and throughout his work the object of the law of evidence, viz., "the establishment of truth by the use of the perceptive and reasoning faculties," is conspicuously exhibited.

The order of treatment has been determined by the extent to which the operation of the function of administration is present in the practical handling of various branches of the law of evidence. The first volume defines administration itself, states the canons under which it is rationally exercised, the

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general relations between matters of fact and rules of law, and the various functions of judge and jury. Its final chapters are properly appropriated to a limited consideration of the vast subject of *Knowledge*, divided, for convenience, into *Judicial*, *Common*, and *Special*.

The second volume, following out the same line of treatment, discusses the branches of the law of evidence in which the element of administration, always unavoidably present, is least operative. It begins with "Burden of Proof," and "Burden of Evidence," and therein "the writer makes a very useful distinction," says Judge Ward in The John H. Starin (C. C. A. 2d circuit, November, 1911), 191 Fed. Rep. 800, 801. Then come "Presumptions"; "Inferences of Fact"; "Presumptions of Law"; "Pseudo-Presumptions"; "Administrative Assumptions"; "Admissions; Judicial"; "Admissions; Extra-Judicial"; "Admissions; by Conduct"; "Offers of Compromise"; "Confessions"; "Former Evidence."

In the third and fourth volumes attention is given to the operation of the four so-called exclusionary rules — Opinion, Hearsay, *Res Inter Alios*, and Character.

Among the many tens of thousands of cases cited in this 1911–1912 treatise, a vast number are cases recently reported. It is written primarily for the use of busy practising lawyers, and there is no grossness in the suggestion that, apart from its value as a scientific exposition of the law of evidence, it is entitled to a prominent place on lawyers' shelves, because of the unquestionable fact, attested by Matthew Arnold, that "far more of our mistakes come from want of fresh knowledge than from want of correct reasoning." (Literature and Dogma, Introduction.) And the author and publishers will of course keep the volumes up to date by means of supplements issued from time to time, as is customary with works of such magnitude and exceptional merit.

At the end of volume two is an elaborate and skilfully compiled "Temporary Index to Vols. I and II."

The portly volumes are strongly bound and in every other way creditable to the publishers.

POLLOCK'S "GENIUS OF THE COMMON LAW"

The Genius of the Common Law. By Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D., of Lincoln's Inn, Barrister-at-Law, honorary Fellow of Corpus Christi College, Oxford. Carpenter Lecturer, Columbia University, 1911. Columbia University Press, New York. ($1.50 *net*.)

THESE lectures, which pursue the method neither of a technical treatise nor or of a historical account, have a charm all their own hard to define. Sir Frederick Pollock has done much more than to summarize, within the confines of a short work remarkable not less for plenitude of matter than for artistry of form, the more salient qualities of the common law both in its development through the centuries and in its present estate. He has also introduced many pregnant observations, pertinent to the matter in hand, which radiate light into related subjects of broad expanse and deepen the interest by the frequency of present-day applications. The reader will find the book an inspiration as well as a diversion, for it presents with equal vividness the traditions of the common law and the ideals which it has transmitted to the profession of practising lawyers.

We believe that an appreciation of the profitableness of knowledge of the early history of the English law is rather more abundant, among American

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lawyers, than the opportunity to delve in a subject which the investigations of such gifted expositors as Pollock, Maitland, Vinogradoff, and Holdsworth have made anything but dull. Many a lawyer has a historical curiosity which he is painfully forbidden to indulge, by the pressure of more insistent interests, and to such this book will be a boon by reason of its rapid yet wonderfully illuminating survey of the vicissitudes of the common law, in its vacillation between royal prerogative, baronial privilege, and popular Germanic tradition, in its wavering struggle to perfect itself as an instrument of justice, in its attempts, not wholly successful, to remedy archaic formalism by amateurish and piecemeal reforms, and in its adaptation to the needs of a changing social and economic environment, accomplished with little violence to a mediaeval structure fairly capable of adjustment to modern conditions.[1]

LAW FOR THE FARMER

Law for the American Farmer. By John B. Green of the New York bar. Rural Science Series. Macmillan Company, New York. Pp. 368 + index 70. ($1.50 *net.*)

THIS volume is not intended as a text-book for lawyers; its aim is rather to give to those practically engaged in farming an idea of their legal rights and liabilities. As one examines the list of subjects treated, it is surprising to notice how wide a range of legal subjects are involved in agricultural pursuits. Land titles, water rights, sales of personal property, common carriers, contracts, health regulations, police power of municipalities, factors and commission merchants are a few of the many topics discussed. The work very sensibly limits its scope "to enable the farmer to recognize his rights and duties when a controversy likely to ripen in a litigation is impending, and to act in such a wise that he shall not unwittingly sacrifice the first or neglect the second to his injury and the embarrassment of counsel whose services he may finally retain."

The treatment is directed to present each topic so as to be intelligible and helpful to the layman rather than to expound disputed or difficult law points. Yet at the same time, the book will prove useful to lawyers as a fingerpost, pointing the way to decisions and discussions that might otherwise prove elusive. The style is readable, and the sane common sense of the author is nowhere better displayed than in the grouping of topics so that each heading is adequately presented. The farmer of today must be something of a business man as well as a tiller of the soil, and such a book as this fits him to guard his rights and avoid many difficulties that he must face. It is rightly entitled to an important place in "A Rural Science Series."

LEE M. FRIEDMAN.

ASHLEY'S LAW OF CONTRACTS

The Law of Contracts. By Clarence D. Ashley, Professor of Law and Dean of the Faculty of Law in New York University. Little, Brown & Co., Boston. Pp. 292 + 18 (index). ($3 *net.*)

DEAN ASHLEY'S short work on contracts takes us back to our law school days. It assumes a working knowledge of *Raffles* v. *Wichelhaus*, *Vasser* v. *Camp*, *Norrington* v. *Wright*, and many other cases with which the professors are accustomed to train or strain the intellect of the law student. We are glad to see a book of this sort written by one who has long taught law under the "case system." When I was in law school the "case system" was

[1] For a short summary of the lectures, see 23 *Green Bag* 626.

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so worshiped, or so interpreted, that I felt almost dishonest when I looked into a text-book. I used to regard the treatise in much the same light that I had previously regarded the "literal translation" that was so often convenient, not to say necessary, in my collegiate struggles with the great Latin and Greek authors.

In one or two of our law courses the instructor was accustomed to give us brief summaries that cleared the air and served to arrange the cases and principles for permanent remembrance and use. In contracts, however, the instructor paid us the high compliment of assuming that we ourselves were able to systematize and co-ordinate the work, and that we would receive great advantage from writing our own text-book or treatise. It may be that some could, and that a very few did, do something of that sort. But to me the whole subject of contracts seemed disjointed, unconnected and irreconcilable. The subject would have been more thoroughly understood and more easily remembered if its different theories and its many parts had been correlated and systematized. It is my idea that at least in the first year of law school the instructor should from time to time give the students brief summaries of the work that has been gone over, and should refer them to some treatise that gives an authoritative discussion of the fundamental points involved, and should then ask each student to write out and submit his own summary. If this were done from time to time during the whole year the student would be kept up to his work, his knowledge of his subject would be increased, and the necessity of heavy "cramming" at examination time would be somewhat avoided. Moreover, he would be surer to get a broad view of the subject, and some idea of the atmosphere that plays so important a part in legal decisions, and he would pay less attention to unimportant and minor details.

For use in connection with a case-book course on contracts it would be difficult to imagine a more satisfactory book that this one by Dean Ashley. The author has taught the subject so many years that he must have acquired an accurate knowledge of the many difficulties that confront the student, and he certainly has a pleasing way of making clear the most abstruse points. There is no attempt to make a digest of all the cases on contracts, but leading decisions are given from time to time to illustrate the text. The author cares less for decided cases than for the analytical reasoning of the great thinkers. And accordingly we constantly find him referring to Langdell, Ames, and Keener. It thus seems to me a safe and valuable book for the student. He will not get the most out of it till he has read his cases, but having read them, this book will round out the discussion of the classroom and will fix in his mind a connected and scholarly view of the whole course.

The book should also be read by the busy practitioner. It is surprising how much the busy lawyer forgets about fundamental principles. There are plenty of able and successful lawyers in New York City who think consideration is necessary for a valid deed, or who are firmly convinced that "for value received" is conclusive in a promissory note. The trouble is that we spend our working hours digging out what some judges in our own Court of Appeals or Appellate Division have said upon the particular questions that are at present paying us fees. Obviously it is impossible for us to read such long works as Parsons on Contracts just to refresh our recollection of the basic principles

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of our subject. Dean Ashley's book, however, is in such small compass that it can be read, and it will refresh our recollection of all we learned at law school. Moreover, it gives us a positive and clear statement of the fundamental principles that should enable us to present our arguments and decisions with greater intelligence and effect.

Personally, I found most satisfaction in the sections on mutual assent and consideration. They cleared up a number of propositions that always used to be quite hazy, not to say foggy, in my mind. The sections on conditions precedent and contracts for the benefit of third persons will also be found especially helpful. We hope that this valuable short discussion of the principles of the law of contracts will be very widely read.

FREDERICK T. CASE.

NOTES

The report of the Thirty-fourth Annual Meeting of the American Bar Association, held at Boston last August, has been issued from the office of the secretary, George Whitelock of Baltimore. It shows, if anything, increasing activity in the fields to which the Association has already devoted its attention, and a gratifying increase in membership, 1,118 new members having been added during the year.

The Canadian Law List for 1912 is a useful handbook, containing complete lists of the judiciary of the Dominion, and the names of barristers and solicitors in all the provinces, with many additional features. (Published by Canadian Legal Publishing Co., Toronto.)

BOOKS RECEIVED

The Law of the Air: Three lectures delivered in the University of London at the request of the Faculty of Laws. By Harold D. Hazeltine, LL.D., Fellow and Law Lecturer of Emmanuel College, and reader in English law in the University of Cambridge. Hodder & Stoughton, publishers to University of London Press, London. Pp. 144 + 8 (notes). ($1.50 *net.*)

The History of the British Post Office. By J. C. Hemmeon, Ph.D. V. 7, Harvard Economic Studies. Harvard University, Cambridge. Pp. 239 + 17 (appendix) + 5 (index). ($2.00 *net.*)

Principles of the Constitutional Law of the United States. Student's Edition. By Westel W. Willoughby, Professor of Political Science in the Johns Hopkins University, author of "The Constitutional Law of the United States," "The American Constitutional System," etc. Baker, Voorhis & Co., New York. Pp. 553 + 23 (index).

Criminal Responsibility and Social Restraint. By Ray Madding McConnell, Ph.D., instructor in social ethics, Harvard University, author of "The Duty of Altruism." Charles Scribner's Sons, New York. Pp. 339. ($1.75 *net.*)

Foreign Companies and Other Corporations. By E. Hilton Young, M.A., of the Inner Temple and Oxford Circuit, Barrister-at-Law, City Editor of *The Morning Post.* University Press, Cambridge, Eng.; G. P. Putnam's Sons, New York. Pp. 309 + 9 (appendix) + 14 (index). ($4 *net.*)

The Origin of the English Constitution. By George Burton Adams, Professor of History in Yale College. Yale University Press, New Haven. Pp. 341 + 28 (appendices) + 9 (index). ($2 *net.*)

Argument of the Hon. Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910. Edited with Introduction and Appendix by James Brown Scott, of Counsel for the United States. The World Peace Foundation, Boston. Pp. cli, 374 + 149 (appendix). ($3.50.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Ante-Nuptial Contracts. "Ante-Nuptial Contracts in Illinois." By Noble B. Judah, Jr. 6 *Illinois Law Review* 503 (Mar.).

Setting forth numerous requirements which must be complied with to ensure the validity of such contracts, under Illinois law.

Bankruptcy. "A Surety's Claim against his Bankrupt Principal under the Present Law." By Evans Holbrook. 60 *Univ. of Pa. Law Review* 482 (Apr.).

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"To sum up, the position of a surety who has not paid anything on account of his principal's debt is apparently as follows: he cannot petition to have his principal adjudicated bankrupt, because his claim is not provable: he cannot prove his claim in his principal's bankruptcy, for the same reason; yet he is (and has been since the inception of his contract of suretyship) a creditor having a provable claim, capable of being preferred by his principal, and subject to all the various effects of receiving a preference; and when, after his principal's bankruptcy, he has paid the latter's debt, he may or may not be able to recover from his principal, according to the jurisdiction in which suit must be brought."

Chinese Law. "A Study of Chinese Jurisprudence" (Conclusion). By Pan Hui Lo. 6 *Illinois Law Review* 518 (Mar.).

"The system of procedure in China for the administration of the law is peculiar and essentially different in many respects from that which prevails in America and Europe. In the first place, we have no such a thing as a jury. The magistrate or judge, as the case may be, tries the case alone, and has to decide it according to law and equity. He has not only to scrutinize all evidence but to find more in case of insufficiency to secure a conviction. Confession by the accused is considered necessary to the settlement of the case. So, unless the case be abandoned, the accused must be confined and tortured until he breaks down and makes a clean breast by telling all his misdeeds and gives the names of all who have been associated with him. The modes of torture are very many and very severe. They are recognized in the code but are particularly not set forth as are the punishments proper, being very much left to each official."

Collateral Attack. "Is a Judgment Open to Collateral Attack if Rendered without Written Pleadings as Required by Statute, or if the Writings do not Comply with the Statutory Requirements?" By John R. Rood. 10 *Michigan Law Review* 384 (Mar.).

The author thinks that no good reason can be assigned for answering the above question in the affirmative. The article sets forth reasons why a judgment, under such circumstances, should be sustained.

"So-Called Equity Jurisdiction to Construe and Reform Wills." By Prof. Henry Schofield. 6 *Illinois Law Review* 485 (Mar.).

Discussing matters suggested by the point that want of equity jurisdiction is not ordinarily a good reason for collateral attack on a decree in equity.

Contracts. See Legal History, Marriage and Divorce.

Corporations. "The Formation of Companies under the English Company Law: A Comparison with American Legislation." By Harry Shapiro. 60 *Univ. of Pa. Law Review* 419 (Mar.).

"In England, upon filing a statement by the company, that the shares have been allotted and several minor details have been performed, the registrar issues the second certificate stating that the company is entitled to carry on the business for which it was incorporated. Only two states in our country have this system of double certification. It is submitted that it is better to divide the process by which the right to do business under corporate existence is acquired, into two stages: *first*, the formation of the corporation, and *second*, the organization, thereof."

Criminal Procedure. "Delays in Courts of Review in Criminal Cases." By Frank K. Dunn. 2 *Journal of Criminal Law and Criminology* 843 (Mar.).

"The delay or failure of justice in Illinois on account of delay in the appellate tribunals or on account of reversals on technical grounds is inconsiderable. . . .

"More than a reform of criminal procedure are needed a quickening of public opinion to a regard for law and a desire for its observance, and a raising of the standard of morality and justice."

Criminology. "The Problem of Causation of Criminality." By William Healy. 2 *Journal of Criminal Law and Criminology* 849 (Mar.).

"We find that if a young delinquent is approached from the rational standpoint of inquiry, in nearly every case he will respond with a totally different attitude from that assumed toward the police or the court, and not only he, but his family usually will, with the inquirer, regard himself as a problem to be solved and will often give information that should not be neglected if a common sense adjustment of the case is undertaken. Many a fellow with quite a career wakes up for the first time to self-consciousness and self-help from the moment that a thoroughgoing inquiry is started by your putting your hand on his shoulder and saying, 'Old man, what can be wrong with you that you are getting into so much trouble? Let's try together to find out all about it.' From the responses received we learn that it is extremely rare that thorough and rational explanations have been sought previously by anybody — parents or officials.

"We see also that many forms of adjustment of cases may be indicated — that these may be either segregative, therapeutic, deliberately constructive, or strictly disciplinary. In all common sense the action taken should not be swayed on the one hand by the existence of a definite retributive system, nor on the other hand, by a sentimentalism which connotes coddling. The real gist of the matter willl inevitably remain that despite theories and systems a most careful study of individual delinquents will be necessary in order to know what is best to do with them. The new Hungarian law with its intimate study for a week or two by several qualified persons before determination of the measures to be pursued with the young offender is a splendid start on the right road. Any objection to the time or cost of such study can be

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readily overruled by the provable importance of heading off a criminal career."

"Obligatory Psychiatric Examination of Certain Classes of Accused Persons." By Olof Kinberg. 2 *Journal of Criminal Law and Criminology* 858 (Mar.).

The following benefits are anticipated as certain to result from this system:

"1. A certain number of insane persons will be discovered, and given over to a special method of treatment, and will accordingly be eliminated from the number of recidivists;

"2. An important number of psychically abnormal persons will be recognized and can be disposed of in accordance with the nature of their abnormality and the degree of their danger to society;

"3. The peril to society of those criminals neither insane nor abnormal may be established by the courts much more accurately than at present, and thus afford a basis of great importance for the measurement of punishment;

"4. By the delivery of all records to a central statistical bureau, there will come into existence within a few years a full collection of casuistic materials dealing with the real *criminal* types of the country, which will make possible a profounder statistical basis for dealing with the problem of crime."

See Penology.

Defamation. "*Jones* v. *Hulton:* Three Conflicting Judicial Views as to a Question of Defamation." By Prof. Jeremiah Smith. 60 *Univ. of Pa. Law Review* 365 (Mar.), 461 (Apr.).

Clearly bringing out the view that neither malice nor negligence is a necessary element in actionable defamation, and urging that useless legal fictions be abandoned.

"While the judicial movement, in cases of physical damage, has been from imposing absolute liability toward requiring culpability, the movement as to defamation has been the reverse. In early times, wrong intent or wrong motive was considered necessary to a recovery for defamation. This, as has been explained, was largely due to the theory as to the basis of jurisdiction in the ecclesiastical courts, at a time when the highest secular courts did not entertain suits for defamation. After the higher secular courts took jurisdiction of such suits, they gradually came to regard wrong mental attitude as unessential, and, by their decisions on various points, practically treated the action for defamation as belonging under Class 3, *ante;* . . . an exceptional class of cases, where a man is held to act at his peril; and, if damage ensues, is absolutely liable, entirely irrespective of fault."

Direct Government. See Recall of Judges.

Equity Jurisdiction. See Collateral Attack.

Federal and State Powers. See Interstate Commerce.

Full Faith and Credit Clause. See *Res Judicata.*

General Jurisprudence. See Legal History.

Government. "The Supreme Court — Usurper or Grantee?" By Professor Charles A. Beard. *Political Science Quarterly*, v. 27, p. 1 (Mar.).

Whether the framers of the Constitution intended that the Supreme Court should pass upon the constitutionality of acts of Congress, is the question considered. The treatment is largely historical, being based upon a search in the documents of the period in which the Constitution was taking shape. The conclusion reached, after an impartial and unusually able study, is different from that which has figured prominently in much recent controversy. It is that in view of the principles entertained by leading members of the Constitutional convention, "it is difficult to understand the temerity of those who speak of the power asserted by Marshall in *Marbury* v. *Madison* as 'usurpation.'"

"The Progressive Unfolding of the Powers of the United States." By Governor Simeon E. Baldwin. *American Political Science Review*, v. 6, p. 1 (Feb.).

"The construction of the 'common defense and general welfare' phrase, first used in the Articles of the Confederation, which has been generally accepted, has been that laws to that end must be confined to taxation, and to taxation for purposes such as fall within one, or a group of, the specially enumerated powers of Congress. It is quite within the range of possibility that the courts will abandon this position (which the Supreme Court has never, I believe, formally adopted), and hold that any law is valid which Congress deems appropriate to provide for the common defense and to promote the general welfare, provided it contravene no particular provision of the Constitution."

"The State Governor, I." By John A. Fairlie. 10 *Michigan Law Review* 370 (Mar.).

A Governor wields larger influence over legislation through his power of disapproval than is indicated by the number of bills disapproved. Bills which it is known will be disapproved will not be passed, — or may be amended to meet the Governor's objections before their passage. Fear that the Governor may disapprove measures in which they are especially interested may also lead some members of the legislature to vote for other bills known to be favored by the Governor.

"The Unwritten Law and the 'Great Emergency.'" By George Harvey. *North American Review*, v. 195, p. 433 (Apr.).

"Why, we are asked, was not the prohibition [that no President shall serve a third term] incorporated in our written Constitution? And why should heed be paid to a 'mere sentiment'? The answer to the first question, we believe, will be found conclusive in the record presented above. History responds to the other. Our Saxon ancestors owed their freedom to the preservation of their customs, such as now constitute the

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fundamental law of England. Few of those customs were as firmly established as this one of ours by uninterrupted use and universal approval of people and Presidents for more than a hundred years."

See Recall of Judges.

Husband and Wife. See Ante-Nuptial Contracts.

Indeterminate Sentence. "Indeterminate Sentence and Release on Parole." (Report of Committee F of the American Institute.) By Albert H. Hall. 2 *Journal of Criminal Law and Criminology* 832 (Mar.).

"The Minnesota law, together with the rules and regulations of the board appointed thereunder, meets most of the objections that hitherto have been raised to such measures, and we believe furnishes a practicable and workable plan, and with efficient and wise administration will work out justice to both society and its offending members, and promote the welfare of both. . . .

"The principle and system of imposing a sentence of indefinite or undetermined duration of confinement as punishment for crime, and the conditional release therefrom on parole, the granting of the parole and final termination of the restraint to be determined by a governing board within the limits prescribed by law, has been demonstrated beyond question as a marked advance in penal administration."

A feature of the report is a synoptical comparative table exhibiting the chief provisions of the statutes of Indiana, Connecticut, Michigan, Massachusetts, New Hampshire, Illinois, Colorado, Kentucky and Iowa.

See Penology.

Intent. See Defamation.

International Arbitration. "The Pending Arbitration Treaty with Great Britain." By W. C. Dennis. 60 *Univ. of Pa. Law Review* 388 (Mar.).

An extended criticism of the various objections to the treaty.

Interstate Commerce. "State Taxation of Interstate Commerce, II." By H. J. Daven port. *Political Science Quarterly*, v. 27, p. 54 (Mar.).

"The state can reach the unearned increments" in the case of property employed in interstate commerce "only to the extent to which these may be reached through the general *ad valorem* property tax. . . . Under our law as at present declared, and under any probable declaration of that law, it must lie solely with the federal authority to make good the social claims to this particular fraction of the social estate."

Judgments. See Collateral Attack.

Legal Education. "The Strength of the American Law Schools." By Dr. Richard Henry Jesse. 21 *Yale Law Journal* 391 (Mar.).

"Until law schools in the United States generally require for admission four years in the high school and at least two in a college of arts, they cannot be classed with those in any of the countries named in our first paragraph, if England alone be for a moment excepted. Do our schools generally do this? Nay, verily; for perhaps three-fourths of them do not really exact anything beyond ability to read and write, manhood, an application, and a fee."

Legal History. "The Genius of the Common Law; I, Our Lady and her Knights." By Sir Frederick Pollock. 12 *Columbia Law Review* 189 (Mar.). "II, The Giants and the Gods." *Ibid.*, p. 291 (Apr.).

See p. 255 *supra.*

"The Origin of Assumpsit." By George F. Deiser. 25 *Harvard Law Review* 428 (Mar.).

"The Statute of Westminster II was in a sense the first adventure of the common-law procedure in broad, general classification. If it were within the scope of this essay, we might trace the action of trespass on the case until assumpsit was given a separate existence, and trespass on the case became the remedy for enforcing the payment of damages for breach of duty. It is desired to make clear at this point only, that breach of a promise, agreement, or undertaking was regarded, even in the earliest cases, as at the most a very doubtful trespass; the agreements, contracts, undertakings, fell naturally and easily into the broad and flexible remedy afforded by the statute, and the development of assumpsit as a separate action was a matter only of time and the frequency of litigation over broken promises. When once this is understood, it is an easy matter to follow the subsequent development of assumpsit in Mr. Ames' History of Assumpsit."

See Defamation.

Malice. See Defamation.

Marriage and Divorce. See Ante-Nuptial Contracts.

Monopolies. "Restraint on Trade, II." By Roland R. Foulke. 12 *Columbia Law Review* 220 (Mar..).

See p. 250 *supra.*

"The Spirit behind the Sherman Anti-Trust Law." By Charles A. Boston. 21 *Yale Law Journal* 341 (Mar.).

"To the extent that bigness disestablishes or threatens to disestablish justice, threatens domestic tranquility, prevents the common defense, disturbs the general welfare, and deprives or bids fair to deprive this generation and posterity of the blessings of liberty, just so far is it a meanace, and just so far should it be forcibly interrupted by law. Seldom is it possible to define precisely any dangerous line. In building, a margin of safety is always provided; in banking, a reserve. It is not unreasonable to provide by law a safe margin, within the danger line, which bigness can not pass. In the anti-trust law, this was provided by the condemnation of the acts having the dangerous tendency which is was designed to prevent."

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Parole. See Indeterminate Sentence.

Penology. "When the Prisoner Returns." By O. F. Lewis. *North American Review*, v. 195, p. 479 (Apr.).

"In the field of correctional institutions the American jail is the white man's burden. Has not the time come when the house should be put in order? So much for the institution that stands at the beginning of the crime ladder. Secondly now, how can we reduce the percentage of recidivism in crime? . . . By the extension of the indeterminate sentence along practical lines, and especially by the extension of the supervision of paroled prisoners."

"An Ounce of Correction; a Pound of Corruption." By Julian Leavitt. *American Magazine*, v. 73, p. 719 (Apr.).

Discusses tuberculosis in prisons, and other evils largely due to the inefficiency of our management of penal institutions.

See Criminology, Indeterminate Sentence.

Perpetuities. "The Rule in *Whitby* v. *Mitchell*." By Charles Sweet (London). 12 *Columbia Law Review* 199 (Mar.).

"It will be observed that in the opinion of the Real Property Commissioners, the reason why limitations of successive life estates to unborn descendants were held to be bad beyond the first generation, was that if they had been allowed they would have enabled land owners to create 'perpetuities,' or perpetual settlements of land in the nature of unbarrable entails, and if we compare this explanation with Mr. Fearne's explanation of the rule which we now call the Rule in *Whitby* v. *Mitchell* (1889, 42 Ch. D. 494, 1890, 44 Ch. D. 85) — namely, that if land is limited to an unborn person for life, with remainder to his children, this last remainder is absolutely void, because it 'tends to a perpetuity' — it is clear that the case referred to by Mr. Fearne is merely a specific example of the general rule, stated by the Real Property Commissioners, that the limitation of successive life estates in land to unborn descendants tends to create a perpetuity, or unbarrable entail, and is void, except as to the first generation."

Pleadings. See Collateral Attack, Legal History.

Principal and Surety. See Bankruptcy.

Procedure. See Criminal Procedure.

Professional Ethics. "The Shyster Lawyer." By Ashley Cockrill. 21 *Yale Law Journal* 383 (Mar.).

"The shyster is with us in large numbers. In this day of corporations and large monied interests he is perhaps more numerous and prosperous than in any previous period of the history of our profession. He certainly tends more largely than all other things to disgrace and deprave the profession of law. He is far more harmful to the profession itself than to the community in which he practises. He should be eliminated from the profession and banished from the bar. That cannot be accomplished until public opinion condemns; and the public will never condemn until the bar itself does so."

Real Property. See Perpetuities.

Recall of Judges. "The Operation of the Recall in Oregon." By James D. Barnett. *American Political Science Review*, v. 6, p. 41 (Feb.).

"Our experience is yet too limited to justify any general conclusion as to the operation of the recall in Oregon. It is often denounced in strong terms by its critics, although there is no serious thought of abolishing it. It is as often extravagantly praised by its friends; but, whatever are its merits, the democratic nature of the recall has very much more to do with its popularity than any practical results which it may have thus far accomplished."

"The Recall." By Dean C. B. Seymour. 21 *Yale Law Journal* 372. (Mar.).

"It is possible that this review of the history of Kentucky giving in detail the facts of political conflicts may show that the possibility of such violent changes is not a mere matter of theory, and that in the case of one great commonwealth vast injury would have been wrought had the right of Recall been entrusted to a body less stable than the body to which that power was entrusted by the Constitution."

Res Judicata. "*Res Judicata* as a Federal Question." By Edwin H. Abbot, Jr. 25 *Harvard Law Review* 443 (Mar.).

"1. The Supreme Court of the United States has jurisdiction upon a writ of error to review a ruling by a state court as to the effect of a judgment of a federal court, or of a court of another state, of a territory, or of the District of Columbia, whether the error alleged be that too great or too little faith and credit was given to such judgment.

"2. The Supreme Court of the United States has jurisdiction to review and correct upon a writ or error a ruling by a state court that a judgment rendered in the same state or in a foreign country without jurisdiction binds and estops the appellant.

"3. Assuming that a valid judgment binding upon the defendant has been rendered by a court of the state in which the judgment is drawn in question or of a foreign country, the Supreme Court of the United States has no jurisdiction to review the effect given thereto as an estoppel, whether the alleged error be that too great or too little effect as an estoppel has been given."

See Collateral Attack.

Restraint of Trade. See Monopolies.

Torts. See Defamation, Legal History.

Wills. See Collateral Attack, Perpetuities.

Workmen's Compensation. "A Problem in the Drafting of Workmen's Compensation Acts, II." By Francis H. Bohlen. 25 *Harvard Law Review* 401 (Mar.).

Contains a valuable and thorough treatment of the topic, "arising out of and in the course of employment."

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"The Economic and Legal Basis of Compulsory Industrial Insurance for Workmen, I." By James Harrington Boyd. 10 *Michigan Law Review* 345 (Mar.).

In this first instalment, it is shown that "not only that the common (and liability) law remedy in its present form does not furnish compensation of any kind in to exceed 12 per cent of the cases of injuries to employees, and even in those cases in which compensation is paid, the compensation paid does not on the average exceed one-fifth of what is regarded as adequate compensation, but also that no modification of the common law remedy can be made whereby these results will be materially improved. Hence that the old common law remedy must be abandoned and a new remedy substituted therefor."

Latest Important Cases

Contracts. *Liability of Subscribers to Newspapers — Implied Acceptance.*
Kas.

Defendant's father-in-law subscribed for a newspaper for a specified time, to be sent to defendant. After the time of the subscription had expired, plaintiff continued to send the newspaper to the defendant, who directed that it be stopped, but continued to receive it from the post-office. The plaintiff afterward sued for the subscription price.

In *Austin* v. *Burge*, in the Kansas City Court of Appeals (137 S. W. 618, *N. Y. Law Jour.*, Apr. 19), it was held that a contract to pay for the subscription arose by necessary implication. The Court decided the case in accordance with the rule that one who receives a paper from the publisher without refusing or returning it becomes liable for the subscription price. *Fogg* v. *Atheneum*, 44 N. H. 115, 82 Am. Dec. 191; *Ward* v. *Powell*, 3 Har., Del. 379; *Goodland* v. *LeClair*, 78 Wis. 176, 47 N. W. 268; *Weatherby* v. *Bonham*, 5 C. & P. 228.

We agree with the *New York Law Journal* that "it would seem that the principle of implied acceptance and obligation to pay is carried to extreme length in these decisions. Where a person has given definite notice that he will no longer subscribe, we can see no reason why he should be compelled to return one or more copies of the paper as an earnest of his declination."

There are, however, possible circumstances under which acceptance might reasonably be considered to be implied, as where, for instance, the person receiving the publication has due notice of the liability he may incur and fails after such notice to order the publication discontinued. The publisher obviously can have no right to renew a subscription without the subscriber's actual or implied consent, but there are circumstances under which such consent may be implied from the silence of the person who continues, without protest, to accept the publication for an unreasonable length of time.

Copyright. *No Right of Action for Infringement Until Copies have been Deposited for Registration — Premature Injunction Obtained by Newspapers.*
N. Y.

An injunction was obtained by the *New York Times* March 8 restraining the publisher of the *New York American* from copying the *Times's* copyrighted account of Amundsen's journey to the South Pole. On March 9 the defendant published what the court styled a "colorable copy" of the copyrighted narrative printed by the complainant in its issue of the same date. The complainant then applied for punishment of the defendant for contempt of court.

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Judge Lacombe in the federal District Court April 6 (*New York Times Co.* v. *Star Co.*) denied this application, on the ground that plaintiff was not entitled to maintain the action, inasmuch as the two copies required by statute had not yet been "deposited in the Copyright Office or in the mail addressed to the Register of Copyright." The statement in the bill asking for the injunction, that complainant was "about to file two complete copies of the best edition when published," was held not to show any right of action for infringement of copyright. The court could see no hardship in this ruling, as a person entitled to copyright the work he is publishing presumably "has copies of it in his possession and could at once deposit in the mail the two copies required."

Interstate Commerce. *Carriers May be Required to Give Information Regarding Intra-State Business — Interstate Commerce Commission.* U. S.

In *Interstate Commerce Commission* v. *Goodrich Transit Company & White Star Line*, October Term, 1911, nos. 879–882, decided April 1, the Supreme Court of the United States, reversing the Commerce Court, sustained an order of the Interstate Commerce Commission requiring interstate carriers to include their intra-state business in their accounts, on the theory that while the Commission had no power to interfere in the conduct of purely intra-state business, the information required might be of value in enabling it to make reasonable rates and prohibit unfair and unreasonable ones in the carriers' interstate business.

This was the first case from the Commerce Court to be considered by the Supreme Court, and the Commerce Court was reversed.

The Commerce Court had held that the Commission had power to require reports only regarding traffic carried under joint arrangement with railroad carriers, but not as to purely intra-state and port to port business.

Mr. Justice Day said a mistake had been made by the Commerce Court in confusing knowledge of intra-state commerce with regulation of it. He said it was within the power of the Commission to require a "show down of the whole business," intra-state as well as interstate.

Justices Lurton and Lamar dissented.

Literary Property. See Copyright.

Police Power. *Right of State to Regulate Practice of Medicine — Osteopaths.* U. S.

A state may constitutionally prescribe conditions to medical practice, and may require the diploma of a legal or reputable college of medicine of applicants for a license to practise the art of healing, without violating the rights of osteopaths under the 14th Amendment. Such was the holding of the United States Supreme Court in *Collins* v. *Texas*, 223 U. S. 288. Mr. Justice Holmes, who wrote the opinion, followed the Texas court in the latter's decision that osteopaths are included in the Texas act relating to the practice of medicine, and read the statute as applying to the practice of medicine in a broad sense, rather than merely to forms of medical practice characterized by the administration of drugs. "It is intelligible," said the Court, "that the state should require of him [the osteopath] a scientific training." It is to be presumed, therefore, that the statute permits osteopaths to practise their art if they "have gone to a reputable school in that kind of practice."

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The Editor's Bag

ENTITLING CASES

THE suggestion of the *National Corporation Reporter*, regarding titles of cases, seems a good one. It is that the title of the case, after appeal, read simply "*John Smith* v. *Henry Jones*," as in the court of first instance, without words to indicate whether plaintiff or defendant is the appellant, and that where there are several parties on one side only one of whom joins in the appeal, the title read as in the court below, solely with the addition of "William Jones, appellant." This is a simpler mode of entitling cases than the cumbrous methods which seem to have been often employed.

The Illinois statute requires reviewing courts to observe the same order of parties as in the trial court. In states where no such rule obtains, it is likely to be treated as an innovation impossible of accomplishment without legislation. In the interest of simplicity and uniformity, it seems highly desirable, however, to establish such a sensible convenient rule if possible in all jurisdictions.

WHO'S THE JUDGE?

IT IS human nature to try to shift burdens to others, and it is only natural for judges to express the feeling that the "law's delay" is "the lawyers' delay." The proclivity of lawyers to request adjournments, and to be unprepared when cases are called for trial, is notorious, but to place the blame for delays on the lawyers is to argue in favor of the "umpire" theory of the function of the court — the theory that it is the lawyer, and not the judge, who tries the case. Are plaintiffs often nonsuited when counsel comes into court unprepared? This reminds us of the gentle rebuke of the physician to the woman who found difficulty in regulating the conduct of her infant daughter — "Well, who's the mother?"

HOW THEY RAN

MALACHI CASEY was in court as a witness, and with each succeeding question put to him his never brilliant mental powers became more and more confused. At last he was asked to tell about the situation of a certain flight of stairs.

"How do those stairs run?" asked the examining counsel, whose patience was well nigh exhausted by his efforts to elicit information from Malachi.

"Phwat is it you're askin' me now?" repeated Malachi, bewildered.

"I asked you how those stairs run?" repeated the counsel, with great distinctness of enunciation.

"Thim stairs!" muttered Malachi, evidently cursed with doubt. Suddenly his stupid face brightened. "Why, sor," he said, with his eyes fixed on the counsel, whose gaze he felt sure would now be approving, "If wan is at the fut

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of thim stairs, they run up; but stand at the top of thim an' they run down, sor!"

A UNIQUE LEGAL BOND

A RATHER unique bond, by which John P. Montgomery of Phillipsburg, Missouri, agreed to forfeit the sum of $500.00 to his prospective wife, Martha A. McFall, if, after marriage, he failed to treat her "as a good husband should," has been brought up for the second time in two years before the Springfield (Mo.) Court of Appeals.

A lawsuit won in the Circuit Court of Laclede county, by Mrs. Montgomery against her husband and his bondsmen, has been submitted to the Appellate Court, and will be decided, in all probability, at the April call. The bond on which the action is based was once before held legal by the same court. "Public policy" is the main point about which the case revolves.

The courts hold that public policy is contravened when a man enters into a contract whereby marriage is held in contempt and its dissolution facilitated; but, on the other hand, it is strictly in keeping with public policy when a man signs a contract whereby marriage is favored, and the marital relation maintained. The Montgomery contract is in the latter class.

John P. Montgomery, the defendant in this case, asked for the hand in marriage of Miss Martha A. McFall, the nineteen-year-old daughter of a neighboring farmer, in November, 1907. The girl's parents objected, but Montgomery was so insistent, that the court says: "It is obvious to the most casual observer that there was some strong inducement."

Montgomery finally overcame the objections of the elder McFall's in a way that is substantially without parallel in any court. With P. M. Montgomery, his brother, and Mrs. Margaret E. Montgomery, his mother, he entered into a contract worded as follows:

"Know all men by these presents: That I, John P. Montgomery, having agreed to and married Martha A. McFall, bind myself, and also the following securities, to wit: P. M. Montgomery and Margaret E. Montgomery, in the sum of five hundred dollars — $500 — to the effect that I will treat her, Martha A. McFall, in a good and proper manner as a husband should treat his wife, and will not maltreat nor abuse her in any manner, and if I should fail to treat her as above stated, then this obligation shall become due and payable upon myself and bondsmen, provided that the said Martha A. McFall shall conduct herself in a proper manner in every respect as the wife of the said John P. Montgomery.

"(Seal) John P. Montgomery,
P. M. Montgomery,
Margaret E. Montgomery.

"Done this 15th day of November, 1907."

Following the consummation of these strange nuptials, there was born to the couple a child, who is now being supported by its mother, it is alleged, at the home of her parents.

Soon after the marriage the husband and father deserted his new home, and Mrs. Montgomery immediately took steps to see that her husband forfeited the amount of the bond under which her parents had permitted the marriage to take place. A lawsuit was prepared and filed. The suit came to a sudden and abrupt termination, however, when Judge L. B. Woodside, of the Laclede County Circuit Court, sustained a demurrer filed by the defendant. This ruling was made on the grounds that "The obligation sued upon is against public policy, and is void in that it in-

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vites and encourages a separation of man and wife as a source of pecuniary profit."

Mrs. Montgomery appealed and the case was heard at the March, 1910, term of the Springfield Court of Appeals. After due consideration, Associate Judge Argus Cox wrote an opinion in which he declared the contract to be within the restrictions of public policy, remaining in full force, and giving Mrs. Montgomery a right under the laws of Missouri to sue her husband, notwithstanding his arguments ot the contrary. By Judge Cox's decision, the judgment of the lower court was reversed and the case remanded for a new trial. At the second hearing in Laclede county, Mrs. Montgomery was awarded judgment for $500 and the costs of the prosecution.

In the second appeal the husband bases his argument on another instrument of writing, by which, he says, his wife, for the sum of $25, signed away her rights to recover on the original bond. Mrs. Montgomery answers that she did not understand the import of the release when she signed it. The instrument was crudely drawn, as follows:

"Both of the above named parties have been dissatisfied, and agree to separate by the said J. P. Montgomery paying to the said Martha A. Montgomery $25, and they further acknowledge that they both agree to the above contract this 2d day of December, 1907."

Fraud is charged by Mrs. Montgomery against her husband. She says she was told that the second paper was merely for the purpose of releasing Montgomery from the original bond until he could prepare a home for his family. By bringing forward witnesses from among her neighbors to swear to the same thing, the wife proved this point to the satisfaction of the court from which the case has been appealed.

A CALL FROM THE OFFICE

THE old gray-haired attorney closed his heated argument to the jury. Then, wiping the perspiration from his face, he turned to the young attorney representing the other side and most politely asked:—

"Will you excuse me, Mr. Baughman, just for a moment before you begin your argument. I must call up my office at once."

Baughman hesitated for a moment, and then, not wishing to appear to the jury unfair to his adversary nor disrespectful of old age, he smiled a willing assent, and turned to watch the effect on the jury. He therefore did not see the twinkle in the old attorney's eyes as he turned to leave the room.

Five minutes passed, and the old attorney had not returned. Baughman grew impatient. He began to walk back and forth, continually rolling his chain between his fingers, looking at his watch and glancing at the door each time it opened.

Ten minutes passed, and the old attorney had not returned. Fifteen minutes passed. Twenty minutes passed. Baughman was getting suspicious. "I wonder what is keeping him," he thought. "Is the old man really stooping to play a trick on me? Is there any reason why he should not want me to go right on with my argument?" he asked himself. "No," he thought. "He is too kind an old man to play a trick on me," and so it was that Baughman would not let himself become angry.

Thirty minutes passed, and then the old lawyer stepped into the room and began a most profuse apology to all. "I just simply couldn't get my office,

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and I am so sorry to have kept you all waiting," he said.

Baughman watched and caught the old attorney's eyes, and riveted his own upon them. The wrinkled eyes were twinkling — yes, he saw they were laughing at him. What did it mean? Could it be possible that the old man had tricked him? If so, why? Was there any reason why he did not want him to begin his argument to the jury at once? Yes, there was. The old man's argument had been before them for a full half hour. They had had time to fully consider it and receive its full effect. The concise, logical argument which Baughman was ready to launch into, had become somewhat confused by the long, impatient wait. The longer experience of the older attorney — yes, possibly even from personal experience in his youth, had enabled the old man to foresee this. "He *has* tricked me," cursed Baughman to himself, as his face reddened and there exploded within him all the pent-up fury that had been brewing during that long, impatient wait.

Baughman jerked his eyes off the old man, and tried to calm himself. But he could not. He began his argument, which came in jerks, and almost causing him to stutter. His anger had the better of him, and he realized that his words carried no weight.

Again he turned to the old attorney. His face was turned away from him, but Baughman could see he was chuckling with laughter.

"I am convinced of it now," Baughman cursed to himself. "That is what I get for granting his request." And Baughman was sorely tempted to begin a personal tirade against the old man, but his better self stopped him with the admonition, "You don't have to practise law that way."

Baughman caught himself and stood and glared at the old man for a long while. Then gathering himself together he turned to the jury and briefly summarized his case as best his anger would permit him. When he sat down he knew the jury had perceived the trick far better than his own words could have portrayed it.

The old lawyer rose, rather abashed, and began to speak. The jury looked at one another and smiled. Then realizing that his trick had been discovered, he closed as best he could, and sat down and waited for the verdict.

Within a few moments the jury returned, bringing in a verdict for the full amount in favor of the young attorney, in what had been up to that time a very doubtful case.

A DILEMMA

THE error of a clerk involved a decidedly confusing situation in a New York case, confusing, at least, for the German person referred to. He might well have been pardoned, in the circumstances, for the incoherence of his testimony.

On a jury day in the first district court a stolid-looking German presented to the justice a certificate from the commissioner of jurors. After a rapid glance at the document, the justice ordered the man to raise his right hand, and administered the oath.

"Your name is Henry Dismer?"

"Yes, your honor."

"This paper," continued the court, "requests me to excuse Henry Dismer from jury duty on the ground that he is dead. Now remember that you have sworn to tell the truth, and think well before you answer. Are you dead?"

"No-o, your honor," was the bewildered reply, "I don't think I am."

"You claim that you are alive?"

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"Y-e-s, your honor."

"That will do. Now take this paper back to the commissioner of jurors."

The man did so. When the commissioner examined the certificate, it bore the following endorsement in the justice's handwriting:—

"The deceased, appearing before me in open court, insists, under oath, that he is not dead. Please investigate, and if his testimony be false, have him indicted for perjury."

OUR LIBERAL MARRIAGE LAWS

A CORRESPONDENT in Kansas City writes to us as follows: "Recently I tried a divorce case here, where marriages and divorces were much in evidence. In August, 1910, my client married a man. At that time he had another wife in Missouri and one in Kansas. In September, 1910, wife No. 1 obtained a divorce. In January, 1911, wife No. 2 procured an annulment of her marriage, on the ground that he had another wife living. The decree provided that the decree should not become absolute until after six months after such entry.

"In February, 1911, wife No. 3 had her much-married husband arrested here charged with bigamy. He pleaded guilty and was sentenced to two years in the penitentiary. Wife No. 3 thereupon mortgaged her property, retained new counsel, had the plea of guilty set aside and husband admitted to bail. She remarried him, however, which marriage took place within the six months. Case here was dismissed.

"Wife No. 2 had him arrested and brought to Kansas, on another bigamy charge. He pleaded guilty and was fined $500.

"Wife No. 3 obtained an absolute divorce, so he is now a single man again. Can you beat it?"

COMMON-SENSE LAWYERS

THE most eloquent advocate is not always the most successful jury lawyer. Jeremiah Mason of Boston was not an orator, yet few lawyers could cope with him in a struggle before the twelve men of the jury-box. He never declaimed; his mind was too logical for that, and he cared little for rhetoric. But he talked to his jury as if he and they were engaged in a friendly arbitration, in which both were anxious to get at the facts of the case. James Scarlett was the inferior of Henry Brougham in the art of oratory. Yet he won five verdicts to Brougham's one. A countryman, who had served as a juryman in several cases in which the two great lawyers were opposing counsel, on being asked what he thought of them, said:—

"That Lord Brougham is a wonderful man. He can talk, he can; but I don't think much of Lawyer Scarlett."

"Indeed," rejoined the questioner. "You surprise me. Why, you have been giving Scarlett all the verdicts."

"Oh, there's naught in that," replied the simple-minded countryman. "He's lucky, you see; he's always *on the right side*."

Scarlett won compliments and verdicts, too, which were better than praise, by his habit of conversation with the jury. Instead ofad dressing them collectively, as most lawyers do, he would select one or two, usually one, and reason with him on the subject until the man apparently was convinced. The one whom he selected was not always the foreman, but the juror who seemed the most intelligent, and therefore most likely to have influence with his colleagues.

Sometimes he would change his tactics and select the juryman who seemed the

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most stupid. Once, when he had made an unusually long address to the jury, another lawyer, who had been impatiently waiting to get the ear of the court, joked him on his prolix speech.

"Did you see that fellow in the fustian jacket?" asked Scarlett. "Well, I saw that his head could hold but one idea at a time, and I was determined to get my idea into it, and I did."

In a breach of promise case Scarlett was counsel for the defendant, who was supposed to have been cajoled into the engagement by the plaintiff's mother. The mother was a witness, and completely baffled Scarlett in his cross-examination of her.

To an ordinary advocate this would have been fatal to his client. But Scarlett turned it into a success.

"You saw, gentlemen of the jury," he said, "that I was but a child in her hands. What *must my client have been ?*"

In an action for nuisance, the plaintiff's chief witness was a woman. She lived near the alleged nuisance and swore strongly in favor of the plaintiff. Scarlett began his cross-examination by inquiring about her domestic relations, her children and their illnesses.

So sympathetically did he put his questions, that the lady became confidential and freely talked about her family affairs. The judge, thinking these matters irrelevant, interfered: but Scarlett begged to be allowed to proceed. On the conclusion of the cross-examination, he said: —

"My lord, I call no witnesses. This lady has sworn that she has brought up numerous and healthy children in the vicinity of the alleged nuisance."

The jury, amused as well as convinced, gave a verdict for Scarlett's client.

ENCOURAGING THE WITNESS

THE bullying lawyer is unhappily still to be met with, and his confusion is always the signal for rejoicing among the spectators. A distinguished Colonial judge recalls how he once tried a case in the Supreme Court of one of the British possessions.

The learned barrister who appeared for the defendant had an unfortunate habit of bullying his own witnesses. If they did not answer him precisely as he wished, he would attack them with, "My dear man, do attend to me," or with, "If you can't speak up like a man, I must abandon your case."

In this instance the defendant, whose name was Jonas, was rather obscure in his answers. Counsel questioned him more severely, but poor Jonas only grew more confused. At length the barrister became exasperated and shouted:

"My good man Jonas, do come out of that whale's belly of yours and answer my questions properly."

This was too much for the judge, who could not restrain his amusement, while the witness was so infuriated that he refused to answer, and the case was lost.

CAUSE AND EFFECT

THEY were returning from the funeral of their friend Mills, who but recently had begun the practice of law.

"I understand," said Jenkins, "that Mills leaves very few effects."

"It could hardly have been otherwise," responded Brown; "he had so very few causes."

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

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USELESS BUT ENTERTAINING

A number of Greeks who were very loquacious and poured forth a steady stream of inarticulate words in rapid succession had been testifying on behalf of the plaintiff. The opposing attorney had used every means of stopping them, but to no avail. At last, losing all patience with them, he yelled at the witness testifying:

"I tell you to stop! Keep quiet there, you! Shut up! Shut up, I say!"

"Vel, I don't vant to say a word, only I vant to tell the truth — the truth — that is all, the truth — the truth, you know — the truth —"

"Shut up, I say! The truth! The truth! Yes — that is the trouble with all of you Dagoes: You all want to tell the truth, and I object to it."

A Swede, the husband of the plaintiff in the personal injury suit, was testifying.

"Do you remember the name of the proprietor of the fruit store on the corner, where they took your wife after she was injured?" asked the opposing attorney.

"Sure, I remember it as if it was yesterday. I will never forget it. He brought her a glass of water."

"Well, what was his name, then, if you remember?"

The witness here hesitated a few moments, and then said awkwardly, "Now, that is funny. I can't think of that name now."

"Was it Baisilius Deamantopulos?" asked the attorney.

"Yes, that is it. That is it. Why, I know it just like I know my own name."

"Well, what was it, then, if you know it so well?"

Here again the witness hesitated for a long while, and then, all perplexed, stammered out, "By God, that is funny! I can't think of that name now."

A remarkably brief and effective summing up was once quoted by Lord James in an afternoon speech.

It was delivered by an Irish judge trying a man for pig stealing. The evidence of his guilt was conclusive, but the prisoner insisted on calling a number of witnesses, who testified most emphatically to his general good character.

After hearing their evidence and the counsel's speeches, the judge remarked: "Gentlemen of the jury, I think that the only conclusion you can arrive at is that the pig was stolen by the prisoner, and that he is the most amiable man in the county." —*London Chronicle.*

Correspondence

PROFESSOR DODD'S PROPOSAL REGARDING DECISIONS ON THE CONSTITUTIONALITY OF STATUTES

To the Editor of the Green Bag: —

IN YOUR March number you refer editorially to "Prof. W. F. Dodd's radical proposal that the power to pass on questions of the constitutionality of state statutes be taken from state judges." If the reference here is to my article in the December number of the *Michigan Law Review*, my language has pretty clearly been misunderstood. What I said was the following:

"State courts now exercise power to declare state laws unconstitutional as violative of either the state or federal constitutions, and under present conditions the decision of a state court in such a case is final. The really serious difficulty at present is with decisions of state courts declaring laws unconstitutionale as violativ of 'due process of law,' or the 'equal protection of the laws,' and

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it is possible without the recall to remedy this situation. Practically all of our state constitutions contain guaranties as to 'due process' and 'equal protection' equivalent to those in the Fourteenth Amendment. If the constitutionality of a state law is contested as violating these provisions, the state court may hold the state law invalid as violating either state or federal constitutional provisions or both. If such a state decision is based on federal constitutional grounds it is final, for at present there is no appeal to the United States Supreme Court from a state decision upholding a federal constitutional right which is set up, even though the state decision is less liberal than decisions of the United States Supreme Court. If a state court bases its declaration of unconstitutionality on state constitutional grounds, here again its decision is final, unless overruled by a change in the state constitution.

"But if state courts have abused their power to declare state laws unconstitutional on 'due process' and 'equal protection' grounds, it is possible to remedy the situation by two measures, the one involving a change in state constitutions, and the other an act of Congress:

"(1) The states may strike the 'due process of law' and the 'equal protection of the laws' clauses from their constitutions. These clauses must mean the same thing in state constitutions as in the federal constitution, although it must be said that they are often interpreted to mean different things, and since the Fourteenth Amendment, state constitutional provisions of this character have served no useful purpose, for private rights are adequately safeguarded by that amendment.

"(2) If the guaranties of 'due profess' and 'equal protection' were stricken crom the state constitutions, we would still have these guaranties in the Fourteenth Amendment *enforcible by both state and federal courts*. The power of a state court to declare a state law to be a violation of the federal Constitution is beyond state control. And the 'due process' and 'equal protection' clauses, as limitations upon the states, are now too firmly embedded in our federal constitutional law to be changed. But if the 'due process' and 'equal protection' clauses are stricken from state constitutions, state decisions declaring state laws unconstitutional upon these grounds must be based on the federal constitutional provisions, and it should be possible without great difficulty to obtain a prompt and uniform interpretation of these federal clauses for the whole country by an amendment to the Federal Judicial Code, so as to permit review by the United States Supreme Court of state decisions holding state laws invalid on federal constitutional grounds."

Where federal and state constitutions contain practically identical limitations upon the states, the state limitation in such a case serves to safeguard no rights not adequately safeguarded by the federal limitation. This is especially true as to our state "due process laws" and "equal protection of the laws clauses," which in so far as they serve any purpose merely serve as a basis for illiberal state decisions holding a law not "due process of law" under state constitutional provisions when the same law would pretty clearly not be held by the United States Supreme Court to violate the "due process of law" clause of the Fourteenth Amendment.

What I propose is therefore, (1) a reduction of the power of state courts to *declare laws invalid on the basis of state constitutional provisions* identical with limitations upon the states in the federal

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Constitution, and (2) that state decisions based on federal constitutional grounds be reviewable by the United States Supreme Court. Such a plan is not so radical as it may appear at first sight, and under it I think we might accomplish the principal end aimed at in the recall of judges and the "recall of judicial decisions." And this end is primarily that of restraining illiberal and often irresponsible declarations by state courts that state laws are invalid as depriving of "due process of law" or "equal protection of the laws" under the state constitutions.

W. F. Dodd.

Urbana, Ill.
April 12, 1912.

[We regret exceedingly having done Professor Dodd an injustice, by failing to set forth his proposal with greater precision. Our comment on his proposal was based on the extracts from his article in the *Michigan Law Review* published in our February issue (24 *Green Bag* 89). We had in mind his suggestion that the power to rule state statutes unconstitutional, on the ground of their conflict with state constitutional provisions of "due process of law" and "equal protection of the laws," be taken from state judges, which Professor Dodd would accomplish by striking these provisions from the state constitutions. As Professor Dodd would allow an appeal to the United States Supreme Court from all decisions of state courts involving the "due process" and "equal protection" clauses of the federal Constitution, the final determination of the constitutionality of statutes would rest with the federal tribunal rather than with state courts. The observation to which Professor Dodd objects was thus offered in good faith, though it should have been couched in terms more specific than those which we thought it safe to employ, in sacrificing explicitness to brevity. —*Ed.*]

AN ODD FORM OF "COLLATERAL"

To the Editor of the Green Bag: —

Sir: On May 25, 1846, one Hudgins borrowed $65 of Ramspeck and gave his note therefor. In most respects it is a very usual instrument, but after stating terms and time of payment the note says: "for the settlement of this note promptly at maturity I hereby pledge my word as a Gentleman, and for the consideration aforesaid I hereby for myself and family expressly waive all right of homestead or exemption which by the Constitution or laws of Georgia are allowed to us or our families."

Has such collateral any market value now? Can you suggest any way the sheriff could put one in possession if this mortgage had been foreclosed?

I wonder if this is but an humorous effort of some ante-bellum joker or whether it was an actual trade. The note bears all the marks of being an "ancient document," and from the fact that it is not marked satisfied, I wonder if the collateral was required. Old timers tell me that in their boyhood days they saw such instruments in circulation.

Dean E. Ryman.

Atlanta, Ga.
March 21, 1912.

[The conceptions of our law are highly elastic, and the judicial mind infinitely resourceful, so it may be possible for some one of our readers to cite an authority sustaining waiver of statutory exemptions made for the benefit of survivors as a valid consideration. Such a decision would be worth including in our museum of legal oddities. —*Ed.*]

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The Legal World

Monthly Analysis of Leading Events

The reassuring developments of the month are seen in the growing opposition to the recall of judges, and in the increasing strength of the movement for reform of procedure.

The New York State Bar Association, at a special meeting in Albany, April 13, adopted resolutions condemning the judicial recall, and creating a committee to co-operate with the American Bar Association to the end that the principles involved in this revolutionary movement might be explained to the people. The Union League Club of New York unanimously adopted resolutions condemning the recall of judges as "dangerous and revolutionary," and in New York City a committee of twenty-five leading lawyers also formulated a plan for organizing the entire legal profession of the country for effective opposition to the agitation for the recall. Activity, however, has not been confined to New York State. The Ohio constitutional convention rejected the recall of judges proposal, after listening to arguments of William J. Bryan in its favor.

In the reform of procedure, progress is visible in Missouri, notwithstanding the reactionary attitude of the Supreme Court of that state as shown by its willingness to quash indictments for purely technical defects. The Missouri Bar Association has received the report of one of its committees making numerous recommendations for the improvement of procedure. In Oregon the highest court is enforcing the constitutional amendment which prohibits the granting of appeals on merely technical grounds. In New York County, the new system of handling the call calendar has tended to diminish congestion in the courts.

The cause of reform of legal procedure has taken a long step forward in the passage by the New Jersey Legislature of bills proposed by the Committee of the New Jersey State Bar Association upon improvement in the administration of justice. The most striking feature of the principal bill is its reduction of the procedure provisions of statute law to the small compass of thirty-two sections, leaving to the courts to regulate the details of practice by rules susceptible of amendment from time to time, as experience prompts. A provisional set of rules, eighty-one in number, and of forms of pleading and other judicial documents, thirty-seven in number, accompany the bill.

A depressing sign of the times is the failure of the general arbitration treaties, which have again failed to receive the endorsement of the United States Senate. The treaties, in the mutilated form in which they have passed, no longer provide for the decision of a joint high commission on what issues are justiciable, but direct that the arbitrable differences shall not include questions which affect the admission of aliens into the United States, the admission of aliens to the educational institutions of the several states, the territorial integrity of the several states, or of the United States, the alleged indebtedness or moneyed obligation of any state of the United States, or any ques-

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tion which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy. With these exceptions, all differences which it has not been possible to adjust by diplomacy, and which are justiciable in their nature, shall be submitted to arbitration at The Hague tribunal.

The movement to improve the situation arising under the Sherman act is possibly gathering some momentum. The Merchants' Association of New York has presented a "Memorial to Congress," suggesting a new law supplementary to the Sherman anti-trust act of 1890, and intended, while leaving the latter in full effect, to remove the uncertainties which now encompass it, and to make it workable without being oppressive. The National Civic Federation has adopted a resolution proposing a commission to interpret the Sherman anti-trust law, similar to the Interstate Commerce Commission. A bill which is to be presented to Congress would give to the proposed commission power to inquire into a combination or proposed combination and pass upon its legality, but would grant the right of appeal to the courts as under the interstate commerce act.

The Ohio Constitutional Convention to Date

Delegates to the fourth constitutional convention of Ohio have estimated that probably thirty amendments to the charter of the Commonwealth would be submitted for popular ratification at the polls next autumn. In the deliberations since Jan. 9 four important propositions have been approved for submission.

Chief among the amendments is one providing for woman suffrage. The proposal passed the convention by a large majority vote, primarily because many delegates desired to let the determination of the question rest entirely with the electors.

An amendment to provide for the licensing of the liquor traffic will limit the traffic to one saloon for 500 population, prohibit brewery-owned saloons, and preserve all existing local option laws.

The other two amendments approved by the convention provide for the construction of a modern system of highways throughout the state and reform of the jury system.

By a vote of 78 to 28 the judicial reform proposal was adopted, most of the opposing votes being cast by lawyer delegates. Its main objects are to prevent long delayed litigation and to reduce the inequality between the rich and poor in courts. The changes made are many and important. The Supreme Court is estopped from setting a law aside as unconstitutional unless five of the six members of the bench concur in such judgment. Cases may be carried from the Common Pleas to the Court of Appeals either on error or appeal, but the judgment of the Court of Appeals is final except in cases raising constitutional questions or felonies. The Court of Appeals cannot reverse a judgment of the Common Pleas Court on weight of the evidence except by unanimous vote of the judges of the court. On other grounds a majority of the court may reverse. All decisions made are to be reported and the reasons for holding given in the reports.

A provision allowing courts to accept three-fourths verdicts in civil cases has also been adopted.

The convention has rejected the recall of judges. Two reports were presented

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and considered, and the vote passed was adverse in the proportion of 57 to 45.

Proposals have been adopted to amend the constitution so as to give either branch of the legislature power to conduct investigations separately; attaching double liability to state bank stock; amending the veto clause so as to take away from the Governor the power to veto bills partially, except as to appropriation bills, and making a three-fifths instead of two-thirds vote necessary to override a veto.

The convention has also adopted a proposal providing for uniform taxation on all property, excise, franchise, income, inheritance and mineral output taxation.

A majority — perhaps as large as 70 per cent — of the delegates have been classed as "progressive." Ohio is the first eastern state to attempt the revision of its organic law since the direct legislation movement began.

Personal

The *Virginia Law Register* publishes an editorial tribute to Judge Thornton L. Massie, who was recently murdered by friends of a convicted felon in Carroll County, Virginia. It truly observes that all America, as well as Virginia, may well be proud of the memory of a scholarly and able jurist, a conscientious and efficient public servant, a "gentleman unafraid." The *New York Law Journal* adds: "The example of his death at the post of duty, faithful to the institution of which he was the embodiment, is an inspiration to those who contend for preserving such institution in its integrity."

That France may show Americans the way to get justice is the opinion of ex-Judge John D. Lawson, who, as a representative of the American Bar Association, is soon to go to that country to spend a year in studying its legal ways at short range. The results of his inquiry and of observations he made in a visit to England last year are to be laid before the Law Reform Committee of the Bar Association, of which he is a member, and will be considered in the extensive report which that committee is to make on procedure.

Bar Associations

Alabama. — The dates for the next annual meeting of the Alabama Bar Association have been fixed as May 17–18, at Montgomery.

Indiana. — The annual convention of the Indiana Bar Association is to be held in July in South Bend, Ind.

Nebraska. — The dates and place for the next annual meeting of the Nebraska State Bar Association have been fixed as the last Thursday and Friday in June, 1912, at Cedar Rapids.

North Carolina. — The annual meeting will be held June 25–7, at a place later to be announced.

Pennsylvania. — The Pennsylvania Bar Association will hold its eighteenth annual meeting at Cape May, June 24–7.

Procedure

The Supreme Court of Oregon, acting under a constitutional amendment passed by the people, has laid down a rule that it will not grant appeals on mere technical grounds, but only when it can be shown conclusively that errors have resulted in a miscarriage of justice. This action has been taken in a comparatively unimportant case, arising over a promissory note for $350.

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A committee of the Missouri Bar Association, consisting of Judge J. M. Johnson, P. Taylor Bryan, and Judge John D. Lawson, has submitted a report making numerous recommendations regarding procedure. One is that the trial judge should be given the authority to comment upon the evidence after the custom of federal judges. Another is that appellate courts shall not reverse cases unless it is found that an actual miscarriage of justice has resulted from error shown to have been committed during the trial.

The Supreme Court of Missouri, whose reactionary decisions invalidating indictments because the word "the" was omitted from the clause, "against the peace and dignity of the state," have excited widespread denunciation, has sought to justify itself by replying to such criticism in an opinion handed down by Judge A. M. Woodson in the recent gerrymander case. Judge Woodson says: "The same reasons which would support arguments in favor of omitting the word 'the' from the indictment would equally support an argument justifying the omission therefrom of the entire clause 'against the peace and dignity of the state,' the difference being one of degree and not of principle. Before leaving the question let me state to my law-loving neighbors that, after spending the best part of my life on the bench, and after having read and observed quite extensively regarding the forms and modes of administering justice, the courts have done far more harm and injustice by judicial legislation — that is, by interpolating into statutes and constitutions words and phrases which the lawmakers never placed therein, and by striking therefrom words and phrases that were placed there by the lawmakers — than they have by clinging to the so-called technicalities."

Criminal Law

An example of antiquated and barbarous methods of punishment was afforded in Wilmington, Del., on March 3, when Richard Wright, a white man, convicted of several burglaries a few days before, was whipped with forty lashes on the bare back at the New Castle county workhouse. The victim was brave until the 30th lash descended. Then he began to squirm. When the lash fell for the 40th time he was crying. The whipping took place in the open air, although the mercury stood at 26 degrees, and a biting wind was blowing. Fred W. Jackson, William B. Ennis, Charles Walters and Andrew Tillman, all negroes, convicted of robberies, were each given twenty lashes.

The bill introduced in the New York Assembly, aiming to eliminate as much as possible the transmission of criminal and mentally deficient tendencies from parent to child, has become a law through the signature of Governor Dix. In adopting such a law New York is following the example of New Jersey, Illinois and other states. The new law provides for the sterilization of certain classes of male criminals and defectives confined in state institutions and creates a Board of Examiners of Feeble-Minded, Criminals and Other Defectives. If this board, after an examination, finds that an inmate of the class affected by the law would transmit to his offspring a tendency to crime, insanity or feeble-mindedness, or that his own mental or physical condition would be improved thereby, it is to appoint one of its members to perform the necessary operation. The criminals who come within the operation of the law are those who have

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been convicted of rape or of such a succession of offenses as the board may decide to afford sufficient evidence of confirmed criminal tendencies.

Pleas of guilty by George Graham Rice and Bernard H. Scheftels, of the brokerage firm of B. H. Scheftels & Co., brought to a dramatic close on March 8 what is believed to be the longest trial on record in a United States court. They had been on trial in the United States District Court of New York City for nearly five months for alleged conspiracy and the misuse of the mails to promote and sell mining stocks. The outcome of the trial was significant. United States Attorney Wise commented on the case as follows: "The defendants, doing business as brokers, sought to create a market for certain stocks of which they held large blocks under option. These stocks they sought to sell to their customers at inflated market prices with a secret profit to themselves. In aid of their stock selling campaign they put out market 'literature' cleverly devised to induce the public to accept their advice to order the purchase of the particular stocks in which they expected to make this secret profit. These and other similar practices with which they were charged have been common in this city. Those engaged in such practices have not heretofore been prosecuted, and it has not hitherto been supposed to be practicable to prosecute them under the federal statutes. The case has been regarded by the Government as a test case and one of far-reaching importance in that aspect. Its successful termination has established the criminal responsibility of brokers for practices which it had been commonly supposed would expose them at the most to civil liabilities.

Miscellaneous

Reargument of the so-called "intermountain rate cases" was ordered by the Supreme Court of the United States on April 8. The reargument will permit Justice Pitney to participate in the decision of the cases. The cases involve the constitutionality of the "long and short haul" provisions of the interstate commerce law and the power of the Interstate Commerce Commission to make "blanket" rates over a large zone of territory.

The latest volume of Illinois Supreme Court Reports contains an interesting decision, in the case of *Trenchard* v. *Trenchard*. Mrs. Trenchard sued her husband for divorce, alleging cruelty and non-support. It was alleged that he shook her, pushed her against the door, threw her to the floor and held her there, kept her awake at night by quarreling with her, and finally turned her out of the house. Scant and ineffective testimony was offered in rebuttal. The court decided that though a wife "may be dutiful," a husband has the right to do any of these things, since they do not constitute "extreme and repeated cruelty" — that is to say, such cruelty that endangers life or limb.

The Governors of the states as a body today filed their solemn protest with the Supreme Court of the United States on April 1 against the proposition to strike down state railroad rates as interfering with interstate commerce. It was the first time in the history of the nation that such a protest had been made. The protest took the nature of a brief, filed as "friends of the court" by a committee of Governors, Judson Harmon of Ohio, Herbert S. Hadley of

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Missouri, and Charles H. Aldrich of Nebraska. This committee was selected at a conference of Governors last September. The brief was submitted in connection with the "state rate cases." Because the Federal Circuit Court in the Minnesota freight and passenger rate cases held the rates invalid not only as confiscatory but by reason of their effect on interstate commerce, that case was taken as the text for the Governors' protest. It was declared that what was said went directly to the right of every state to regulate state commerce.

The Carnegie Foundation for the Advancement of Teaching, in its sixth annual report, urges that the states further restrict entrance to the bar and work out a uniform system of rules for admission of lawyers to practise. It finds an increase in the number of law schools in the United States, from 96 ten years ago to 114 in 1910, without, however, any increase in the proportion of the schools giving exclusively day instruction in the law. This fact is considered unfortunate, as "a vast and profound subject such as the law is quite enough to engage all of the faculties of the average young man." The profession is also found to be greatly overcrowded. If the proportion of lawyers to the population should be as great as that of physicians, 1,700 graduates yearly, says the report, would maintain the present overcrowded state of the profession, but as a matter of fact there were 4,183 graduates in June, 1910. The report draws the conclusion that lawyers are being manufactured grossly, in excess of the demand, and men are admitted to practise upon "a law basis that enables a large number of unfit and ignorant men to enter the profession." To this cause, says the report, is to be attributed a large part of the delays in the administration of justice.

Obituary

Babson, Thomas M., corporation counsel of Boston, died Mar. 5. He was graduated from Harvard Law School in 1868, and practised law for two years in St. Louis, in the seventies.

Blodgett, John Taggard, Justice of the Supreme Court of Rhode Island since 1900, died at his home in Providence, Mar. 4, aged fifty-three. He served for three years in the legislature. He was a hard worker as a judge, and rendered many dissenting opinions.

Finch, William Albert, Professor of Law at Cornell University, died Mar. 31, in Brooklyn, N. Y. After practising law he joined the Cornell faculty in 1891. He was the author of "Finch's Cases on the Law of Property in Land."

Foster, David J., Congressman from Vermont, ranking Republican member of the House Committee on Foreign Affairs, died in Burlington, Mar. 21. He was graduated from Dartmouth College, and admitted to the bar in 1883. In 1886 he was elected prosecuting attorney of Chittenden county. He later served as state senator and commissioner of state taxes. In 1898 he was appointed chairman of the board of railroad commissioners. He entered Congress in 1901 and was a member of the Fifty-seventh, Fifty-eighth, Fifty-ninth, Sixtieth and Sixty-first Congresses, being re-elected to the Sixty-second Congress.

Harrity, William F., former postmaster of Philadelphia, and national chairman of the Democratic party in 1897, died April 17. He was one of the most successful corporation lawyers at the Philadelphia bar, and was a

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director in many corporations and financial institutions.

Hord, Francis T., Attorney-General of Indiana from 1882 to 1886, died Mar. 8, aged seventy-four. He was long a leader of the Democratic party in Indiana.

Jordan, Judge James H., of the Indiana Supreme Court, died April 5. He had served on the Supreme bench since 1894.

Lawson, Judge Thomas Goodwin, a member of the Georgia Constitutional Convention of 1877, died at his home in Eatonton, Ga., Apr. 16. He was a member of the Fifty-second, Fifty-third, and Fifty-fourth Congresses, and a trustee of Mercer University.

Livingstone, Col. Knox, president of the South Carolina Bar Association, died Mar. 22. He had served in the state legislature.

Malcolm, Sir Ormond Drimmie, for thirteen years Chief Justice of the Bahama Islands, died recently at his home in Nassau, the Bahamas. He retired from the bench in 1910.

Mouton, Charles Homer, former Lieutenant-Governor of Louisiana, died at Lafayette, La., Mar. 16, aged eighty-eight. He was admitted to the bar in 1844, was a leader in the opposition to the Know Nothing Party, and took an active part against the Louisiana lottery. He held many important political positions.

Noble, Gen. John Willcock, Secretary of the Interior in President Harrison's Cabinet, died in St. Louis, Mar. 22, aged eighty. He was made United States Attorney at St. Louis by President Johnson, and later had charge of much of the important litigation in St. Louis.

Norton, Judge N. W., former president of the Arkansas State Bar Association, died at Forrest City, Ark., Mar. 7, aged sixty-two. He had served at various times upon the Supreme and Circuit Court bench as special judge, and at various times had been mentioned as a probable candidate for Associate Justice of the Supreme Court and also for the gubernatorial office.

Page, Charles, of the San Francisco law firm of Page, McCutcheon, Knight & Olney, one of the country's greatest admiralty lawyers, a commanding figure in the progressive life of California, died on Feb. 26. He was graduated at Yale in 1869, and was president of the Mercantile Title, Trust and Insurance Company and a director of the Firemen's Fund Insurance Company.

Price, James L., Associate Justice of the Supreme Court of Ohio, died Mar. 11. He was admitted to the bar in 1862 and practised at Carrollton, O., for a few years, before going to Lima to reside and practise. In 1895 he was made judge of the Circuit Court of Ohio, and since 1901 had been Associate Justice of the Supreme Court.

Robertson, Judge James H., one of the best known lawyers of Texas, and a member of the legislature for several terms, died at Austin, Mar. 2. He had served as Mayor of Austin.

Stevens, John S., president of the Illinois Bar Association in 1905, died at Peoria, Ill., Mar. 4. He served as postmaster of Peoria under President McKinley, and was regarded as one of the ablest corporation attorneys in central Illinois.

Wilson, C. C., Chief Justice of the Supreme Court of Utah from 1866 to 1870, died at his home in Kewanee, Ill., Mar. 10, aged eighty-five.

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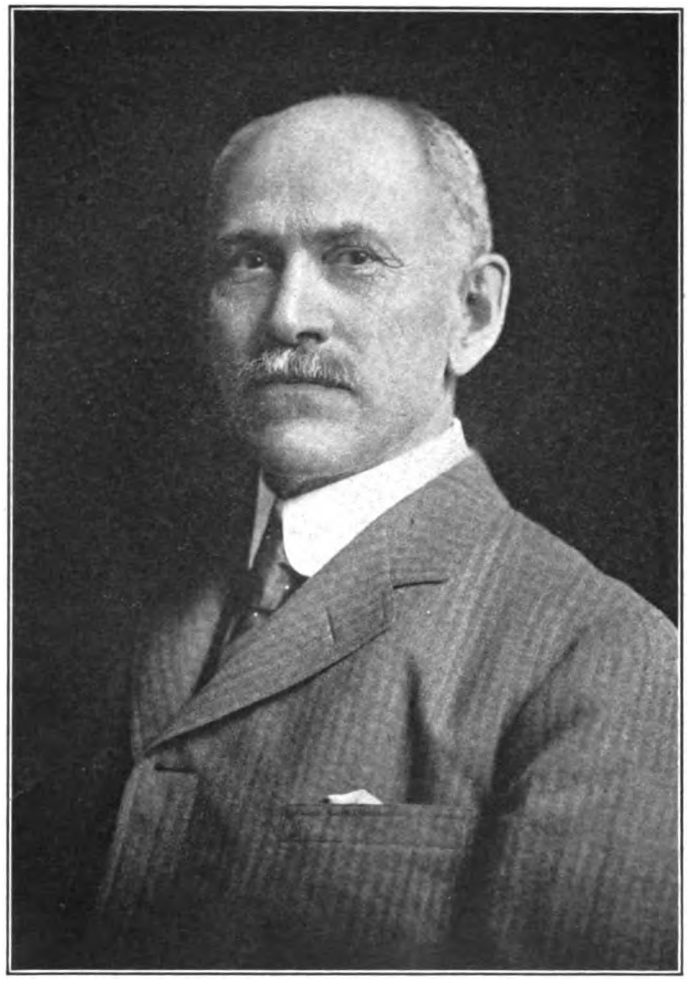

STEPHEN S. GREGORY

OF CHICAGO

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

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The Green Bag

Volume XXIV June, 1912 Number 6

The American Bar Association

IT is not an exaggeration to say that the chief instrumentality of constructive legal reform existing at the present time is the bar association. It is an oft repeated truism that reforms dealing with the law depend primarily upon the initiative of lawyers for their success, and the bar association of today, thanks to a happy circumstance, is something more than an organization designed primarily for mutual benefit and pleasant social intercourse among followers of a common calling. The existing bar association is a deliberative body, welcoming proposals of important projects for discussion, assigning subjects requiring careful study to properly qualified committees, and evolving the matters investigated in a form ripe for actual execution, whether by the association itself or by the legislative body to which it applies for legislation. One would not imply that this ideal is realized in the case of all our bar associations, but it certainly is in the more important instances. The somewhat vague popular notion that bar associations meet merely to hear desultory addresses that fail to command earnest thought, and that they are addicted to the futile habit of adopting resolutions that shift the duty of actual performance to the laity, does not correctly represent the methods pursued by our alert and active bar associations in countless lines of fruitful effort.

The more earnest and public-spirited members of the legal profession have probably had the keenest recognition of the great benefits that might come from organization, and have been most active in the existing bodies. To this fact, doubtless, are due the prevailing characteristics of the bar association of today, which has received the impression of these men's personality and acquired the stamp of a statesmanlike attitude toward problems involving the form of existing or proposed laws. It is not an overstatement to call the spirit of the progressive bar association statesmanlike, when we consider the serious deliberation given to such subjects as the recall of judges, laws affecting large corporate business, the reform of procedure, the uniformity of state laws, and workmen's compensation. These are all topics engaging the attention of the most thoughtful publicists everywhere, and requiring of the legislator the same skilled attention as that given by the trained lawyer who has made an expert study of them.

The stamp of a statesmanlike habit of mind which has been acquired by our bar associations will persist, and no lowering of standards can result from such a broadening of the membership of

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the associations as will include every reputable legal practitioner. We agree with the sentiment that it should be considered derogatory to a lawyer's standing in the profession for him to refuse, without exceptional reason, to contribute his influence to the common cause, and that every member of the bar in good standing should enroll himself in his state and national bar associations. Anyone who hesitates thus to enroll himself may well be invited to consider the immeasurable benefit certain to result from a compactly organized legal profession. Every lawyer is interested in some degree in the advancement of his profession on the higher side, and has thus a potential capacity for ameliorative effort which needs only to be organized in combination with the similar interest of others to become effective.

We are pleased with the effort being made by the American Bar Association to broaden its membership. The appointment of a Committee on Increase of Membership indicates that the Association has a lively appreciation of the important public function it has assumed, which is, as defined by its constitution, "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American bar." The activity of the Association in recent years has been one worthy of a dignified patriotic body meeting the responsibility of taking the initiative in matters of large public concern, and this decision to enlarge the membership comes as a happy manifestation of its increasing sphere of usefulness to the community, and of its determination to enlarge that usefulness in the future. The work already accomplished by the Association is known to most of our readers, and need not be catalogued here. That work, already an achievement of impressive magnitude, will bear even finer fruit in years to come.[1]

[1] Stephen S. Gregory, President of the American Bar Association, has inaugurated a nation-wide movement for an increase in the membership of the Association, for the purpose of increasing the efficiency of the organization in carrying out the purposes for which it was organized. Charles J. O'Connor, of Chicago, who was active and successful in building up the membership of the Illinois Bar Association, has been selected as chairman of the special Committee on Increase of Membership. The committee is selected from leading lawyers in every federal judicial circuit.

To be eligible to membership it is required that an applicant must have practised five years next preceding his election and must be a member in good standing of the bar of his state. The dues for membership are $5.00 per annum. There is no initiation expense.

The Lawyer's Patron Saint

By Charles B. Connolly, Ph.D.,
of the Philadelphia Bar

LONG years ago to Innocent
The Pope, a famous lawyer went;
'Twas Anthony, a man of skill,
Who came to draw the Pontiff's will.

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Now when the advocate was through
And was about to bid "Adieu,"
His holiness asked what might be
The size of his retaining fee.

"Nor gold nor silver will I take,"
Said Anthony, "but you can make
A present to rejoice my heart
Before to Naples I depart.

"To lawyers never has been given
A patron to revere in Heaven;
Select some doctor wise and great
For us henceforth to imitate."

The Holy Father said amused:
"Such piety can't be refused.
I've granted many worse requests
To others who have been my guests.

"But you must also have a hand
In picking out your saint so grand,
Blindfolded in the Vatican
Go find a patron, if you can."

With heavy bandage on his eyes,
'Mid marble saints, the lawyer tries,
While Pope and Cardinals stand near,
To watch him on his errand queer.

At last he stops and reaches out,
And grabs an image round about
The waist, exclaiming, "This shall be
A patron saint for all like me."

The bandages removed he saw
His model for the men of law:
'Twas no saint to guard from evil.
Anthony had grabbed the devil!

Said the Pope: "A wise selection!
Henceforth work 'neath his protection!"
Sadly the lawyer journeyed home,
And soon the news spread all through Rome.

No more worked Anthony for Pope;
Instead he seemed to lose all hope;

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Despair came o'er him and he died
Before his time by suicide.

So this is why tradition states
No lawyers pass through Heaven's gates.
The legal mind is early bent
To have regard for precedent.

The Legal Status of Workmen's Compensation

By Francis Dean Schnacke

THE question of the constitutionality of the workmen's compensation acts of the various states attracts much attention at the present time. Within the past year the courts of last resort of half a dozen jurisdictions have passed on the validity of such statutes of their respective states, and with one exception, that of New York, their constitutionality has been sustained.

As a rule the validity of such legislation is challenged on the grounds that: first, it violates the constitutional provisions for jury trials, it being contended that a person under the operation of such a law is deprived of his right to have a jury determine the question of his liability, and also to assess the amount of the damages; second, such legislation is challenged on the ground that it deprives a person of his property without due process of law, and is therefore repugnant to the Fourteenth Amendment of the federal Constitution and a similar provision which appears in almost every state's Constitution. There have been other objections advanced against the validity of such laws, as, for example, that they deny equal protection of the laws, but the courts have never considered such arguments as weighty, and have been unanimous in declaring that their constitutionality does not turn on that point. The Court of Appeals of New York, in declaring the workmen's compensation act of that state void, did so only on the ground that it was a taking of property without due process of law in violation of the New York State Constitution. To quote the Court: "All that is necessary to affirm in the case before us is that in view of the Constitution of our state the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void." (*Ives* v. *South Buffalo Ry. Co.*, 94 N. E. 431, 448.)

Passing to the discussion of the first objection, it has long been settled that the Seventh Amendment of the federal Constitution does not guarantee a trial by jury in a civil action in a state court. (*Walker* v. *Sauvinet*, 92 U. S. 90.) The objection to the validity of an automatic workmen's compensation act of New York on the ground that it was repugnant to a provision in the Constitution of that state that "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," was discussed by Mr. Justice Werner in the *Ives* case, but he ends by saying

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that there are conflicting views among the members of the court in regard to the matter, and that "since the disposition of the questions which it suggests is not necessary to the decision of the case, we do not decide it." (*Ives* v. *S. Buf. Ry. Co.*, 94 N. E. 431, 439.) *In re Opinion of Justices* (July 24, 1911), 96 N. E. 308, a Massachusetts workmen's compensation bill came before the Supreme Judicial Court of that state on application of the state senate for an opinion of its validity, but the question of jury trial was not brought up, and as the justices confined themselves strictly to the matter asked for, namely, whether such a law would be repugnant to the Fourteenth Amendment of the federal Constitution and a similar provision in the state Constitution, there is nothing to be obtained from that opinion. The question is not raised in the case of *Borgnis* v. *Falk Co.* (Wis., Nov. 1911), 133 N. W. 209, but in that case the contention was advanced that the statute in question was unconstitutional because it vests judicial power in the Industrial Commission not composed of men elected by the people, in violation of those clauses of the state Constitution, which give the judicial power to certain courts and provide for election of judges by the people. The court held that the Industrial Commission was not a court but an administrative body, which in the course of its administration of this law is empowered to ascertain some questions of fact and apply the existing law thereto. In so doing, although the Commission acts quasi-judicially, nevertheless, it is not thereby vested with judicial power in the constitutional sense. *Borgnis* v. *Falk Co.*, 133 N. W. 209, 219. Public utility commissions, railway rate commissions, boards of equalization, and the like, are similar administrative bodies which exercise quasi-judicial functions without being repugnant to such a constitutional provision.

The constitutional guarantee of trial by jury was passed over by the Supreme Court of Montana, in upholding the validity of the miners' compensation act of that state, as applying only "to trial of cases, actions, or suits at law." The Montana statute is similar in its operation to the Wisconsin law just referred to, in that the state is directly involved in its administration. It provides for the creation of an indemnity fund, collected from the mine operators, out of which the injured miners are compensated. The Court says: "The adjustment of claims under the act is an administrative function and not a judicial proceeding, and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution." (*Cunningham* v. *N. W. Improvement Co.*, 119 Pac. 554, 564.) The Supreme Court of Washington, in its recent decision sustaining the compulsory workmen's insurance act of that state (*State ex. rel.* v. *Clausen*, 117 Pac. 1101, 1119), after a careful discussion of the matter of trial by jury, disposes of it with the following words: "The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate." In his concurring opinion in this case, Mr. Justice Chadwick concludes by saying: "Our decision upon

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the fourth proposition — the right of trial by jury — is not settled by this decision and should not be so regarded." And then adds: "Upon the fourth proposition, therefore, I reserve my opinion until such time as its expression will have the force of law."

Just how far the legislature may go in depriving a person of a jury trial it is unnecessary to determine. All that need be said is that from an examination of these decisions it is evident that the validity of workmen's compensation acts does not turn on that point.

The more difficult question then arises: Does such legislation deprive a person of property without due process of law? It is here that a difference of opinion exists. A distinction must be drawn between those compensation acts which are compulsory and those which are optional. The non-compulsory statutes make it elective with employers and employees whether they will accept or not, but make it decidedly more advantageous for them to come under the compensation provisions than to rely on an action at law, for employers who do not accept are deprived of more or less of their common law defenses, and employees who do not accept are compelled to rely entirely upon their common law causes of action subject to the common law defenses of the employer.

It is contended that while such acts are nominally optional, nevertheless the provisions are such as to be practically coercive upon employers and employees to accept them, but the courts of last resort of all the various states which have so far passed on the validity of such acts have held them to be constitutional. [*In re Opinion of Justices*, 96 N. E. 308 (Mass.); *Borgnis* v. *Falk Co.* (Wis.), 133 N. W. 209; *Cunningham* v. *Northwestern Improvement Co.* (Mont.), 119 Pac. 554; *State ex rel.* v. *Creamer* (Ohio), 97 N. E. 602.] An optional statute of Maryland (Md. Acts of Assembly, 1902, Ch. 139) was declared unconstitutional on April 28, 1904, by the Court of Common Pleas of Baltimore City in the case of *Andrew J. Franklin* v. *The United Railways and Electric Co. of Baltimore.* This Maryland law, however, provided for the indemnification of only those injuries resulting in death, and a workman coming under the provisions of the act, who was seriously but not fatally injured, had no claim upon the insurance fund, and furthermore he was deprived of his right of action even if his injury was caused by his employer's negligence. This case, moreover, was never carried to the Court of Appeals, but the State Insurance Commissioner, who administered the law, acquiesced in the decision of the lower court and notified the Governor in a letter dated May 10, 1904, that he had closed the accounts of the fund.

Since this Maryland case was never before a superior court, and as has been pointed out, the statute in question was peculiarly faulty, it may safely be said that by the weight of authority optional workmen's compensation acts are constitutional. The remainder of this discussion will, therefore, be devoted to compulsory statutes.

There have been but two decisions as to the validity of compulsory laws. Under substantially the same statement of facts the Court of Appeals of New York has decided in the negative [*Ives* v. *S. Buf. Ry. Co.* (Mch. 24, 1911), 201 N. Y. 271, 94 N. E. 431], and the Supreme Court of Washington in the affirmative. *State ex rel.* v. *Clausen* (Sept. 27, 1911), 117 Pac. 1101. The courts which have passed on the non-compulsory statutes have studiously avoided expressing any *dictum* on the validity of the mandatory laws. Un-

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doubtedly the question of the constitutionality of the compulsory acts is a much more difficult one than that of the optional ones.

Such legislation as workmen's compensation laws, whether operating directly, or through the agency of the state by the creation of a state insurance fund, must necessarily, considering their scope and purpose and the participation of the state in their administration, maintain their validity, if at all, in the state's inherent police power.

An accurate determination of the scope of the police power of a state is impossible. It extends to all the great public needs (*Camfield* v. *United States*, 167 U. S. 518), and, says Mr. Justice Holmes in a recent case: "It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." (*Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. Rep. 186, 188.) It is well settled that a state may, within the scope of its police power, order the destruction of a house falling to decay or otherwise endangering passers by; it may order the demolition of such buildings as are in the path of a conflagration; require diseased cattle to be slaughtered; decayed or unwholesome food to be destroyed; prohibit wooden buildings in cities; regulate railways and other common carriers; regulate interments in burial grounds; restrict objectionable trades to certain localities; provide for the compulsory vaccination of children; confine the insane or those afflicted with contagious diseases; restrain vagrants, beggars and habitual drunkards; suppress obscene publications, and houses of ill fame; prohibit gambling houses and the sale of intoxicating liquors; and in short do anything whenever and wherever the public interests demand it (*Lawton* v. *Steele*, 152 U. S. 133), and "a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (*Holden* v. *Hardy*, 169 U. S. 366.) The police power is not fixed, but is subject to growth and change in its application with the changing industrial and social conditions. (*Holden* v. *Hardy*, *supra*; *Atkin* v. *Kansas*, 191 U. S. 207.)

It is contended, however, that workmen's compensation acts create an absolute liability without fault and that such legislation is not within the scope of the police power of the state. This is the stand that the New York Court of Appeals has taken in the *Ives* case. Mr. Justice Werner, in delivering the opinion of the Court, says: "The argument that the risk to an employee should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business." (94 N. E. 431, 440.) As a matter of fact sections 4585 and 4803 of the Revised Statutes of the United States provide for that very

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thing. Section 4585 reads as follows: "There shall be assessed and collected by the collectors of the customs at the ports of the United States, from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel employed in the coasting trade, and before such vessel shall be admitted to entry, the sum of forty cents per month for each and every seaman who shall have been employed on such vessel since she was last entered at any port of the United States; such sum such master or owner may collect and retain from the wages of such seamen." Section 4803 provides that sums so collected shall be placed to the credit of "the fund for the relief of the sick and disabled seamen." (U. S. Comp. St. 1901, p. 3322.) This statute had its inception in the act of Congress of July 16, 1798, c. 77, 1 Stat. 606, and was on the statute books for nearly a century during which time it was continuously enforced. It has been specifically mentioned and given force in several cases, though never attacked directly. [*Peterson* v. *The Chandos* (D. C.), 4 Fed. 645; *Holt* v. *Cummings*, 102 Pa. 212, 48 Am. Rep. 199; *State ex rel.* v. *Clausen* (Wash.), 117 Pac. 1101.]

The Supreme Court of the United States has recently upheld the Oklahoma Depositors' Guarantee law, which authorizes the assessment and collection of a certain percent on the daily average deposits of every bank incorporated under the state laws, as a fund to pay losses caused depositors by failing and insolvent banks. *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Statutes imposing liability upon fire insurance agents for the benefit of a fund to care for and cure sick and injured firemen have been upheld in New York and Illinois. [*Fire Dept.* v. *Noble*, 3 E. D. Smith (N. Y.) 440; *Fire Dept.* v. *Wright*, 3 E. D. Smith (N. Y.) 453; *Firemen's Benevolent Assn.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115.] Statutes making railways absolutely liable without fault have been upheld by the Supreme Court of the United States. (*St. L. & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *A. T. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 96.) A statute of Nebraska making a railway liable for injuries to passengers irrespective of negligence, except when the injury was caused by the criminal negligence of the passenger or the violation of some express rule brought directly to his attention, has also been sustained by the Supreme Court of the United States. (*C. R. I. & P. Ry. Co.* v. *Zernecke*, 183 U. S. 582.) New York has held that a landlord who knowingly leases his premises for the purpose of running a saloon may be held absolutely liable for losses resulting from intoxication caused by such sale. (*Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.) Many other cases might be cited where the validity of statutes imposing liability without fault have been sustained. (See *Menden* v. *N. Y. N. H. & H. Ry. Co.*, 32 Sup. Ct. 169.)

In the recent case of *Caspar* v. *Lewin* (June 11, 1910), 109 Pac. 657, Mr. Justice Burch, delivering the unanimous opinion of the Supreme Court of Kansas, says: "The liberty of the wage earner to contract for extra pay for extra hazard and to seek some other employment is a myth or, as has been said, 'a heartless mockery.' (*Kilpatrick* v. *Grand Trunk R. R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887.) The man and the machine at which he works should be recognized as substantially one piece of mechanism and mishaps to either ought to be repaired, and charged to the cost of maintenance. The courts cannot abolish the old rules and

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adopt others which shall suit existing facts and remedy existing evils. That must be done by the legislature. But when tardy statutes are promulgated, the courts should interpret them as favorably as their terms will allow, and not proceed to shackle them with the discredited common law manacles." Freund, in his treatise on "The Police Power," says: "The principle that inevitable loss should be borne, not by the person who profits by the dangerous business to which the loss is incident, embodies a very intelligent idea of justice and which seems to be in accord with modern social sentiment. . . . It also underlies the rule of *respondeat superior* since the employer cannot relieve himself from liability for the act done by the servant within the scope of his employment by proof of the greatest possible care in the selection of the servant. Logic and consistency therefore demand that liability, irrespective of negligence, should not be denounced as unconstitutional. The required element of causation may readily be found in the voluntary employment of dangerous instruments or agencies." (Freund, The Police Power, Sec. 634.)

The Supreme Court of Washington, in its recent decision sustaining the compulsory workmen's insurance and compensation law of that state, says: "The test of the validity of such a law is not found in the inquiry: Does it do the objectionable things? But it is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby?" (*State ex rel.* v. *Clausen*, 117 Pac. 1101, 1106.) The Court later goes on to say that the test of a police regulation, when measured by the "due process of law" clause of the Constitution, is "reasonableness, as contradistinguished from arbitrary or capricious action." The intention of that clause of the Constitution was "to prevent the arbitrary exercise of power, or undue, unjust and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society." In the recent case before the Supreme Court of the United States involving the constitutionality of the Oklahoma Bank Depositors' Guarantee law, which authorizes the collection of sums from each bank in the state to form an indemnity fund out of which are paid losses caused depositors by failing and insolvent banks, Mr. Justice Holmes, delivering the opinion of the Court, says: "In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." (Citing *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy-Mining Co.*, 200 U. S. 527, 531; *Offield* v. *N. Y. N. H. & H. Ry. Co.*, 203 U. S. 372; *Bacon* v. *Walker*, 204 U. S. 311, 315.) In considering the constitutionality of workmen's compensation acts which operate through the creation of a state insurance fund, as the Washington law does, it may be well to note the following from the opinion of Mr. Justice Holmes in the *Noble State Bank* case just referred to: "And . . . it would seem that there may be other cases besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." (See *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190.)

It is a well settled rule of law that courts in passing on the constitutionality of police regulations should consider

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the presumption that the legislation is the proper exercise of the police power, and that, in the words of the Supreme Court of the United States, "a large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." (*Holden* v. *Hardy*, 169 U. S. 366.) *People* v. *Smith*, 108 Mich. 527, 66 N. W. 382, 62 Am. St. Rep. 715, is a leading case on this matter. In that case the Court says that "all presumptions should be in favor of the validity of legislative action," and that it is the province of the legislature and not the courts to pass on the reasonableness and necessity of a police regulation, for the legislature may make thorough investigations through committees and commissions which the courts cannot do. Mr. Justice Holmes, in the *Oklahoma Bank Guarantee* case, tersely states the gist of the matter in the following words: "If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it." He further states that a state's police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." (*Noble State Bank* v. *Haskell*, 31 Sup. Ct. Rep. 186, 188.) Mr. Justice Werner, delivering the opinion of the Court of Appeals of New York in the *Ives* case, and Chief Justice Cullen and Justice Bartlett in their concurring opinion, strongly intimate the possibility that the doctrine as laid down by the Supreme Court of the United States in the *Noble State Bank* case, just referred to, might justify the validity of the New York compensation law in question. But they dispose of the matter by declining to be bound by that decision in the construction of their own state constitution.

There can be scarcely any doubt that workmen's compensation laws are economically, socially and morally sound. The New York court in the *Ives* case (94 N. E. 431, 436) admits that. It is so conceded by all modern statesmen, jurists, economists and sociologists. Almost all the enlightened countries of Europe, the principal provinces of the Dominion of Canada, Australia, New Zealand, the Transvaal, and many other countries, have had such laws in operation for some time. The result of such legislation in Germany was the reduction of the number of accidents almost sixty-two per cent during the first five years of its operation.

"If, therefore," in the words of the Supreme Court of Washington, in its recent decision (*State ex rel.* v. *Clausen*, 117 Pac. 1101, 1113), "the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purposes as to capriciously interfere with and destroy private rights."

University of Kansas.

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The Serenader

By Dan C. Rule, Jr.

IT was an ardent lover and a member of the bar
Who stripped the green baize cover from his grandpa's old guitar,
And to serenade his lady with a ballad and a tune
To her darkened window strayed he underneath the midnight moon.
Since the maiden made a bee line to her windowpane to see
If it were the family feline or a stray calliope
That was making all the racket, when he touched the quivering string,
We have evidence to back it when we say she heard him sing:

"Maiden with the glossy tresses
And the eyes of azure hue,
Your petitioner confesses
His adoring love for you.
If you, as a favor regal,
Would on him your love bestow,
It would be entirely legal
And a priceless quid pro quo."

Then the maiden's father testy, muttering phrases we deplore,
Most emphatically professed he never heard such strains before,
And, convinced the youth had caroled long enough and longer still,
Seized his shotgun double-barreled, sighted it with care until
He was sure its loads terrific would just miss his daughter's swain,
Then with chuckles beatific pressed upon the triggers' twain.
But the vocalist courageous undismayed by ball and powder,
In his baritone outrageous bravely howled a trifle louder:

"Since you hold my heart as bailee,
It's presumed you understand
That at any time it may be
Taken back upon demand.
If my love is no attraction,
And tonight my heart you spurn,
I will bring a civil action
To compel its prompt return."

Now this thoughtful lady knew that those who can superbly sing
Are quite prone to say they'll do that or they won't do anything.
Though unable to endure the song he sang and tune he played her,
That was why she was so sure she loved her skilless serenader,
Not in vain his words besought her, for she coyly murmured, "Pop,
Tell him he can have your daughter if he will consent to stop!"

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Whereupon, her joyous suitor, though his voice was slightly hoarse,
Did his very best to suit her with this last romantic verse:

"Oh, my bubbling joy and pride I
Cannot suitably portray!
Since you are to be my bride I
Now in triumph go away,
And this farewell strain or two from
My melodious guitar
Is a musical adieu from
Your fond member of the bar."

Clyde, O.

The South African Court System

By Marion John Atwood

BY the Act of Union of 1909 a unitary form of government was established in South Africa and therewith a rather unusual court system among English colonies. It is one in which the local or provincial governments play little or no real part and the Union government takes all precedence. It is, however, in entire harmony with the character of the existing government.

The entire court system is known as the Supreme Court of South Africa and is made up of three divisions,—appellate, provincial, and local. The appellate divisions is in reality a supreme court of appeal for the four colonies of the Union. The provincial courts, four in number, are the former supreme courts of Natal, Transvaal, Orange Free State, and Cape Colony, while the local courts comprise the former inferior courts of the provinces.

The appellate court sits in Bloemfontein, but accomplishes the rather unusual feat, for a supreme court of appeal, of changing its place of sitting to accommodate suitors if it so wills. This is to be explained on the ground that it was held out as a means of getting Orange Free State to enter the Union. Thus likewise Pretoria is the seat of Government and Cape Town is the seat of the Union legislature. This division has no original jurisdiction and hears merely the appeals from the provincial courts, which heretofore would have gone directly to the King in Council. However, appeals cannot of their own right come directly from the provincial courts to the appellate divisions. The upper court must grant permission to the appellant to bring his case in the superior court, but no appeal is to be refused on the ground of the limited amount involved.

The provincial courts are located at the seats of provincial government, Cape Town, Pietermaritzburg, Pretoria, and Bloemfontein. They have been given all of the original jurisdiction exercised by the former supreme courts of the provinces and in addition in all matters "in which the Government of the Union or a person suing or being sued on behalf of such a government is a party," and "in which the validity of any provincial ordinance shall come into question." They also, apparently, have jurisdiction over questions of election to the lower house of the Union legis-

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lature. In the retention of their former jurisdiction the courts of this division hear appeals from the courts of the local division. There is no obstacle placed in the way of such appeal and practically all cases of importance are appealed to the superior court.

The number of the courts of the local division is determined by the Governor General in Council in accordance with the needs of the population. They are numerous and constitute the common courts of original jurisdiction. By the Act of Union they were granted jurisdiction in all matters formerly belonging to the inferior provincial courts. Thus it is seen that they are of a more varied character than the courts of the other divisions. They, too, are to have original jurisdiction in cases in which the Union is a party or in which a provincial ordinance is challenged. This jurisdiction is apparently concurrent with that of the superior court.

The courts of this division are found in every town, and are presided over by a magistrate, an official inferior in importance to a regularly-appointed judge. There may or may not be separate civil and criminal courts. Thus, Johannesburg has nine courts, part of which have criminal jurisdiction, and the remainder civil, while smaller places having but one court combine in it both jurisdictions.

Prior to the Act of Union any party to a suit might carry his case to the King in Council subsequent to the action of the provincial supreme court. At present no appeal lies from the supreme court of a province. The matter must be considered by the appellate court and action of this court is final, save at the pleasure of the king. The working of the system is at once apparent in the shutting off of appeals. The appellate division through its power to cut off an appeal to it may stop any further action in a case. Thus few cases are appealed to the Crown and the Union courts profit in increased strength by the finality of their decisions. This is the great point of contrast with other English colonial court systems. Appeals lie directly from state courts to the King and from the Commonwealth supreme court at the pleasure of the King in Australia, and apparently appeals may lie directly to the Crown from at least the province of Quebec in Canada.

Judges in South Africa are appointed by the Governor General in Council. Their appointment is for life, save in cases where both houses of the Union legislature petition the Governor for their removal on the grounds of incapacity or misbehavior. Thus the judiciary secures the necessary independence for the prosecution of its work and at the same time provision is made for recall in aggravated cases of misconduct or misbehavior. The grounds of incapacity make this system more flexible than that of the United States.

The complete concentration of judicial matters in the hands of the Union is apparent from the foregoing. Under the existing system the provinces take no part in constituting the judiciary, their only part being in the enforcement of decrees. The system is one which appears to be giving complete satisfaction and is supported by all classes of the population.

Madison, Wis.

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A Celebrated Legal Corporation

By Roy Temple House

Professor in the State University of Oklahoma

LAST December the *Barreau*, the Paris Bar Association, celebrated the one hundredth anniversary of its re-establishment; but this later epoch of its existence has been of short duration compared to the period before the Revolution so rudely interrupted its career. As early as the latter part of the thirteenth century we have a record of the existence of a "College of Advocates," which, it is true, included in its earlier stages not only the pleaders but the notaries, and which was very closely connected with the *Parlament*, or College of Magistrates. The organization was essentially like the other trades guilds of the period, with St. Nicholas for its patron and the ninth of May for its sacred day. The *Parlament* regulated the subsidiary Association by means of a carefully-graduated system of punishments, fixed fines, discretionary fines, expulsion from the session, suspension of the privilege of pleading, permanent withdrawal of that privilege, imprisonment. It seems that these penalties were very rarely inflicted, since the conduct of the legal profession in those days was, if not exemplary, very easily regulated by a hint from the bench.

Even the cut of the pleaders' beards was kept under surveillance. The magistrates followed the royal fashion, which changed from time to time. First it was the clean-shaven face, then the full beard *à la* Henri IV, then the little Louis XIV moustache; and the *Barreau* was expected to follow the *Parlament*, as the *Parlament* followed His Majesty. A document of early date warns certain young advocates from appearing in court with defiant moustaches, "trained in the Turkish fashion." Lawyers and magistrates wore a long scarlet robe trimmed with ermine (which was generally of feline origin, whence Rabelais' qualification, "furred cats," which is synonymous with "pettifoggers"). On the rare occasions when a lawyer suffered degradation, his furred bonnet was publicly taken away from him, as a degraded officer loses his epaulets and sword today.

The relations between the two corporations seem to have been very cordial and intimate. We read of instances where the older counsellors were invited to sit on the bench with the regularly-constituted magistrates and aid them in the conduct of their cases. The magistracy was recruited from the sister body, and the two organizations were thus practically one.

But in the sixteenth century was instituted the practice of selling at auction the *Parlament* positions. Magistrates were no longer, as it were, graduated from the *Barreau*, and the bonds were loosened. Unauthorized solicitors found it easier to gain a hearing and to take the bread from the mouths of the regular members of the corporation; so that suspicion and dissatisfaction became much more frequent. But a surprising degree of sympathy existed through the years, as is shown by the fact that when the *Parlament* was exiled to the little city of Pontoise, in 1720, the *Barreau* refused to follow their magistrates, declaring that their duty held

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them at Paris, and that there they would remain. No amount of threatening or cajoling was able to move them, and the Court at last, in despair, brought the *Parlament* back to Paris. In 1771 again, the *Parlament* was not simply exiled but displaced, and the notorious improvised "*Parlament Maupeau*" put in their places. The lawyers at first refused to plead before this illegal court. Forced to present themselves at the bar, they contrived one excuse after another to impede the progress of affairs, and did their work in so unwilling a manner that with time the recall of the old magistrates was seen to be a political as well as a judicial necessity.

In 1579 an edict had been issued regulating the amount of fees which a lawyer could charge. This touched the profession in a very sensitive spot, as the *Barreau* had always maintained that such limitations were inconsistent with their dignity. No attempt was made to enforce the edict until the Duke of Luxemburg, in 1602, brought complaint against a lawyer for excessive charges. His plea was granted, but the *Barreau* rose in united protest. Threatened with forfeiture of their privileges if they opposed a royal edict, the entire corporation, to the number of 407, marched to the *Palais*, and surrendered their furred bonnets. The next day the courts were deserted for lack of pleaders, and the *Parlament* was in great perplexity. But ready-witted King Henry IV found a solution which spared the feelings of both sides. To save the dignity of the *Parlament*, he decreed that the edict should stand; to win the *Barreau* back to their places, he promised that it should never be enforced; and his promise has been faithfully kept.

The legal profession was very much in evidence when the change of *régime* arrived. There were more than two hundred lawyers in the Constituent Assembly. One of the chief grievances against the old government derived from the secrecy of criminal trials. In 1789 all such hearings were made public; and this change was a very significant one for the lawyers, as well as for their clients. A pleader's audience, with the help of the newspapers, now became the whole country; and it suddenly became possible, as it has ever since remained, for a brilliant pleader to become a national celebrity in an hour. But almost contemporaneously with this great advantage came a heavy blow. On the 7th of September, 1790, the Assembly abolished the *Parlaments*, and with them disappeared the *Barreau* as a corporation. Henceforth for twenty years there are only individual lawyers, following the guidance of their individual judgments. In 1790 the Order had 600 members; but on its abolition the legal profession fell into disrepute. A large number turned to other lines of activity; and though there are brilliant and noble names through the interregnum, notably the heroes who defended the King and Queen at the peril of their lives and property, the usefulness of the Order was shown conclusively by the disorders that followed its abolition.

In 1804 the law schools were reopened, and on the 14th of December, 1810, the *Barreau* was re-established, though with greatly decreased privileges. Napoleon, himself a legal mind, saw clearly enough the usefulness of a systematically organized bar, but not of an independent bar. The Restoration brought them increased liberty, and the Revolution of 1830, which was the work of lawyers, of course redounded still further to their advantage. Article 5 of the ordinance of August 27th, 1830, relating to the privileges and prerogatives of the *Barreau*, makes provision for a thorough re-

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vision of the laws and regulations touching the legal profession. Such revision has never yet been made.

The most significant contribution of the nineteenth century to French legal methods has been in criminal court procedure. Based largely on the English model, it entrusts the judicial function to a jury of twelve men, chosen by lot and charged by the president in the following impressive language:

"You swear and promise, before God and men, to examine with the most scrupulous attention the charges which shall be brought against . . .; to betray neither the interests of the accused, nor the interests of society, the accuser; to communicate with no one until after your decision is declared; to listen neither to hate nor to malice, neither to fear nor to affection; to decide according to the charges and the defense in obedience to your conscience and your intimate conviction, with the impartiality and the firmness of men who are honest and free."

The twelve jurors hear the charge standing; they raise their hands, and each one answers: "I swear it!" The president wears the traditional red robe; the jury sit in absolute silence, forbidden all questioning and all remarks, their faces in the shadow, and the prisoner sits out before them with the light falling full upon him. The authors of the modern Code were not only good jurists, but keen psychologists.

The *Barreau* as it exists today enjoys no privileges that could be termed monopoly. It is not necessary to be a member of the corporation to enjoy the privilege of pleading in a particular case. Instances are numerous where a relative of the prisoner has plead the prisoner's cause, and the *Palais* has often echoed to the voice of a layman; but such instances are isolated. The *Barreau* is a responsible corporation, a corporation which enjoys the public confidence, and is useful as no heterogeneous aggregation of individuals could be. There are still propositions to abolish the order. Such a measure would be less dangerous today than it was in 1790, since the existing laws would allow the immediate formation of an association which would serve practically the same purpose as the existing arrangement; but such an organization has proved its utility and necessity, and will continue to exist independently of legislation concerning it.[1]

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[1] Jules Le Berquier, "Le Barreau moderne," *Revue des deux Mondes*, 1er juillet, 1861.

Jules Le Berquier, "Le Barreau moderne," *Revue des deux Mondes*, 15 mars, 1886.

Louis Delzons, "Le Barreau et son Histoire," *Revue des deux Mondes*, 15 janvier, 1911.

Norman, Oklahoma.

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The Case of Archibald Fisher

By J. H. Rockwell

THE following case, in which circumstantial evidence appears in an unusually complete form, was tried in a local court of Sangamon County something more than eighty years ago, and has never, so far as the writer can learn, been given to the general public. The case presents, it will be seen, a number of extremely interesting phases.

William, Henry and Archibald Trayler came to Illinois from Green County, Kentucky, in 1829. William settled near Greenbush, Warren County, about one hundred miles northwest from Springfield; Henry settled at Clary's Grove, Menard County — at that time a part of Sangamon — and Archibald settled in Springfield, engaging in the business of a building contractor. He purchased a lot and erected a house on it, and being a bachelor, he rented it to his partner — a Mr. Myers — and boarded with him.

The three brothers were, all of them, sober, industrious men, and had been well respected in the Kentucky town from where they came, as they were then respected by their new acquaintances in Illinois.

Archibald Fisher was a man about fifty years old, unmarried, and a schoolteacher by profession; his home was in Warren County and he boarded with William Trayler. Being a man of an economical turn of mind, and seldom, if ever, idle, he had accumulated several hundred. Wishing to enter some land, he started in company with William Trayler, for Springfield, stopping at Henry Trayler's near Greenbush, on the way, reaching there early Sunday evening. The next morning all three came to Springfield, going at once to Archibald Trayler's boarding place. This was about noon, Monday, June 1, 1841.

After dinner Fisher and the three brothers left the house for the purpose of looking about the town. At supper time the three brothers returned but Fisher was not with them. He had turned aside, they said, as they were passing along a footpath in the northwest part of town. Supper was eaten, and as Fisher did not put in an appearance, the three brothers went in search of him, but when they returned at night they reported that nothing had been seen of him. Search was resumed early the next morning and continued throughout the day, but with no success, and William and Henry Trayler, who had expected to leave that morning for home, expressed their intention of giving up the search, but this was objected to by Archibald and others, on the ground that Fisher, if found, would have no means of conveyance back to Warren County.

However, William was determined to return home and that night, unknown to Archibald, he hitched his horse to his buggy and left. Missing him, and finding that the horse and buggy were gone, Archibald followed him on foot, overtaking him just as he was crossing Spring Creek, some two or three miles west of town.

Remonstrating with him for leaving before the mystery of Fisher's disap-

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pearance was cleared up, he finally persuaded William to return with him to Springfield. But the next morning both William and Henry insisted on starting for home in spite of every effort on the part of Archibald to detain them.

Up to this time Fisher's disappearance had attracted no special attention outside the few immediately concerned. Three of four days later Henry came back to Springfield to resume the search with his brother Archibald, but nothing came of it. On Friday, June 12, however, James W. Keyes, the postmaster at Springfield, received a letter from the postmaster at Greenbush, stating that William Trayler had returned home and was circulating a report that Fisher was dead and had willed him his money, and that the amount was about $1,500 — a much larger sum than Fisher was supposed to have had, and Mr. Keyes was asked to give him all the information he could touching the matter.

The contents of this letter was soon made public and created intense excitement. Springfield had at this time a population of two thousand people, and in the year previous, adopted a city charter. The mayor was one William L. May, and he, in company with Josiah Lamborn, Attorney-General of the state, headed a movement to ferret out the mystery. A large company was raised and formed into squads, each squad following a different direction, in order that no spot might be left unsearched. Every well, and every place where a body might be concealed, for miles around, was carefully examined. The search was continued for several days, and then it was determined to arrest William and Henry Trayler, and officers were sent for them at once. Henry was brought in the next day, Monday, June 15. He was closely questioned by the Mayor and the Attorney-General, but he steadily protested that he knew nothing more about the matter than was already known. It was pointed out to him that the circumstantial evidence in the case was so strong that he and his two brothers would certainly be hung, and that the sole chance he had of saving his own life was to become a witness for the state and give the particulars of the murder — for that Fisher had been murdered there could no longer be any doubt.

He withstood all the pressure brought to bear upon him until Wednesday, the 17th, when, solemnly protesting his own innocence, he told how his two brothers, William and Archibald, without his knowledge at the time, had murdered Fisher by hanging him to a tree; how they had temporarily hid the body; how that just before the departure of William and himself from Springfield on the third of June, his brothers had told him of the murder, and had asked his assistance in making a final concealment of the body; how that at the time William and he had left ostensibly for home, they took another way and entered the woods northwest of town, where they were joined by Archibald.

Entering into a minute description of the crime, he related how his brothers had gone into a thicket where the body was concealed; how they had placed it in the buggy, driven off with it towards the Hickox mill-pond, on Spring Creek, and returning soon after, had told him they had put the body in a safe place. Following this Archibald had returned to town, and William and himself had set out for their homes.

Up to this time Archibald Trayler had been held in the highest esteem, and no faintest suspicion of serious wrongdoing had ever attached to him, but after this confession on the part

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of his brother Henry, he was immediately arrested and lodged in jail, which was probably the best thing that could have been done for him, as he was undoubtedly in grave danger of mob violence — the feeling of the people against him having become greatly aroused.

Search was now recommenced for Fisher's body, and near the thicket where the body was supposed to have been concealed, a small tree was found bent over as though the hanging might have been done on it, and underneath it were unmistakable signs that a struggle had taken place there. A trail, as though made by dragging a heavy body, was also found, and it lead directly to the tracks of a buggy going in the direction of the mill-pond already alluded to. The tracks were lost sight of for a little in an open place in the woods, but were recovered near the margin of the mill-pond where the buggy had been driven into the water and out again on the same side of the pond.

Hundreds of men were soon engaged in dragging and fishing for the body; failing to find it, and becoming impatient of delay, they cut the dam and drew off the water, but the body was not in the pond. About noon of that day — Thursday, June 18 — the officers who had gone to arrest William Trayler returned with him in custody, accompanied by a man calling himself Gilmore — Dr. Gilmore. These officers, with William Trayler in charge, had stopped for the night at Lewiston, a town about half way between Greenbush — William Trayler's home — and Springfield. Late in the night they were awakened by Gilmore, who had just arrived, and told them that Fisher was alive and at his — Gilmore's — house in Warren County; that he had followed them to give this information, so that the prisoner might be released without further trouble. But the officers declined to release Trayler on the word of a stranger, and next morning continued on their way to Springfield, Dr. Gilmore accompanying them.

Gilmore told the officers that when he heard of William Trayler's arrest he was several miles from home; that when he returned home he found Fisher there, and that he would have brought him along, in pursuit of the officers, but that Fisher's physical condition rendered it impossible for him to come. The doctor further stated that he had known Fisher for years and that he was subject to fits of temporary derangement, in consequence to an injury to his head received in early life. The doctor also stated that Fisher had said the first he knew of what he was doing, after leaving the Traylers, he was not far from Peoria, and being nearer home than Springfield, he had started at once for home, without the remotest thought that his sudden disappearance was leading to the injury of anyone.

On reaching Springfield Gilmore's statements were made public. At first the people were dumb with astonishment, but when the news was conveyed to Henry Trayler, at the jail, and he reaffirmed his own story of the murder, people began to suspect that Gilmore was acting in collusion with the murderers, and that the story he had told was simply a ruse by which to secure their release, and although he was not placed under arrest, he was kept under close surveillance. About three o'clock that afternoon, Mr. Myers — Archibald Trayler's partner — left for Warren County to ascertain the truth of Dr. Gilmore's story.

Without waiting for the return of Myers, however, the Traylers were brought before a justice of the peace for preliminary examination, on the

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charge of having murdered Archibald Fisher. Henry Trayler was introduced as a witness on the part of the state, and under oath, repeated all his former statements, and at the close bore a rigid cross-examination without faltering for a single moment. In addition to this evidence, a woman who said she was well acquainted with Archibald Trayler, testified that on the Monday afternoon of Fisher's disappearance she saw Archibald and another man, whom she identified as William Trayler — then present — in company with a third man answering the description of Fisher, enter the woods immediately northwest of town, and an hour or two later she saw the two brothers return alone.

It was also shown by a number of witnesses that Archibald Trayler had, since the disappearance of Fisher, paid out an unusual amount of gold, and that the money Fisher had brought with him to Springfield was in gold coin — amounting to several hundred dollars. Other witnesses were examined and testified to occurrences corroborating the testimony already given, thus completing a chain of circumstantial evidence substantially without a flaw. There was the coming of Fisher to Springfield with a large sum in gold coin on his person, accompanied by William and Henry Trayler, who knew that he carried the money; then his sudden disappearance and the fact that he was last seen in the company of the Traylers; the long and unsuccessful search; the evident anxiety of William and Henry Trayler to get away, and their hurried leave-taking; Henry's confession; the confirmation of the confession by the finding of the bent tree and the evidences of a struggle underneath it; the finding of the buggy tracks leading to the old mill-pond; the paying out of an unusual amount of gold coin by Archibald, and the reiterated confession by Henry when the Gilmore story of the finding of Fisher is told him — not a single link in the chain was lacking.

When the state had closed and rested its case, Hon. Stephen T. Logan, who represented the defense, arose and said that he would introduce one witness only, and opening a door leading into an adjoining room, Archibald Fisher, alive and in his own proper person, was slowly conducted into the presence of the court. Myers had found Fisher at the home of Dr. Gilmore, and returned with him late the evening before, — June 21, — had kept him in seclusion until he was needed to clear the suspected men.

The three brothers never recovered from the effect of the terrible experiences through which they had passed. William died within a year after, Archibald dying a year later. Henry lived several years after his brother Archibald's death, but was never known to allude to the dreadful ordeal of his trial for murder in any way — living a silent, unresponsive life during the remainder of his days.

Had Fisher died while wandering out on the open prairie in his demented state — a thing that might easily have happened, for at that time the country was wild and unsettled — the three Trayler brothers would, undoubtedly, have gone to the gallows, and their very memory have been blighted by the shadow of a crime of which they were wholly innocent.

Springfield, Ill.

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A Firm Judge

By Edwin Tarrisse

"I NEVER sat in the trial of a case in which I cared two cents which side gained it," once said a judge, boasting of his impartiality.

"Old Ben Wade" was not that sort of a judge, while administering justice in five Ohio counties. He saw at once the right of a case, and made the jury discern the real issue.

Once when trying a case his rulings made the prosecuting attorney snarl out: "I have always understood that it was the province of the jury to decide the facts; the court has nothing to do with them."

"Gentlemen," replied the unmoved judge, "the attorney for the state is correct; it is your province to decide the facts. The Court has nothing directly to do with them — if it had it would not take long."

The retort prompted the jury to return a verdict of acquittal after a few minutes' consideration.

Few of Wade's rulings were reversed by the Supreme Court, but there was one notable exception. A difficult case which he had decided after much consideration was reversed by the higher court and sent back to be tried again. At the second trial Judge Wade adhered to his former decision.

"But, your Honor, the Supreme Court reversed your former judgment," exclaimed the surprised counsel.

"Yes, so I have heard; I will give them a chance to get right," he quietly replied.

The case was again taken to the Supreme Court, which reversed its own judgment and affirmed Wade's decision.

The Evolution of an Effective Law

By M. A. Carringer

District Attorney, Forest County, Pennsylvania

THE thinkers of the nineteenth century did not entirely succeed in their attempt to bring the study of social phenomena within the domain of strict science, yet they did establish beyond cavil the fact that the principles of universal evolution are applicable to this field as well as to the inorganic world and to lower organic forms. Society is undergoing a process of development from the condition now existing to a condition somewhat different and somewhat more advanced, and this development is a resultant of the action and reaction of certain social forces, working in accordance with certain principles of cause and effect the nature and character of which are not yet very clearly determined. It is upon this basis that the facts dealt with by all the social sciences are being classified and studied.

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Students of legal history and the development of political institutions are generally agreed that law is subject to the same developmental processes and that a particular system of law is a product of such processes. It is also recognized by this class of students that a system of law, or even a particular piece of legislation, can be produced by no other means. This fact, however, has not been recognized by the general public, and a large class of political and social reformers has failed to grasp its full significance. The impatience of the enthusiastic advocate of social reform with the slow working of governmental agencies in their efforts to remedy social evils grows out of the assumption that it is possible to devise legislation from *a priori* reasoning which will be effective for the accomplishment of the desired reforms, if the men in power were only willing to make the attempt and could bring sufficient ability to the task. This assumption is radically wrong and leaves out of the account the fundamental nature of the development of law.

A law is a rule of human action or conduct promulgated and sanctioned by the state, and it may be enacted in the form of a constitution adopted directly by the people, a statute adopted by a legislative assembly, a treaty with a foreign nation made by the executive authority, a judicial decision ratifying a custom or extending an ancient rule by interpretation to a new set of facts, or an administrative regulation made under a delegated power. By whichever of these forms the law has been promulgated in the last instance, it is nevertheless a product of the same set of forces so that, for the present purpose, the form of enactment is a matter of indifference.

An analysis of the origin of these rules reveals two sets of factors, the one conscious and the other unconscious. The conscious factors consist of the activities of men in studying social conditions and attempting to regulate them through governmental agencies. This group of factors is the more obvious and is the only group which the unthinking take into account. The second group is made up of the great body of natural laws and natural forces which govern man as an individual and men in societies and those laws and forces which regulate and control inorganic and lower organic nature. A slight examination of the processes involved will make it clear that the latter group of forces is of immensely greater power than the former group. Man's conscious efforts to regulate and control social conditions can only be effective when they harmonize with the irresistible movements of the forces in the second group. The unconscious social forces constantly nullify and render inefficient all laws based on purely *a priori* speculations.

From these facts it becomes apparent that, in addition to purely jural limitations, the legislative power of a state is subject to definite natural limitations. These limitations can be defined with certainty only when we have succeeded in classifying the natural forces at work in society and in determining the full extent and nature of their operation.

An examination of any set of remedial statutes will give us the general outline of the development of a law. A social condition or a group of social conditions arises which, in the course of time, comes to be recognized as detrimental to society; the recognition of the evil gradually creates a pressure, through public opinion, upon the law making powers for the remedy of the evil in question through governmental agencies; this results in a rule or a set of

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rules designed to meet the public demand for the elimination of the evil. If the condition which the law is designed to remedy be simple and the forces involved well understood, it is possible that this first attempt at regulation may prove effective; but in a developing society the conditions are so infinitely complex and the intricately correlated forces involved, as well as the limits of the efficiency of legislation, are so little understood that it is extremely improbable that this first effort will meet the requirement of the situation. This tentative enactment will sooner or later be put to the test of administrative enforcement and its inefficiency will become apparent; then will follow amendment or modified enactment in an effort to remedy the deficiencies of the former law. This modified law is again subjected to the test of actual enforcement and is again amended to remedy new deficiencies. In this manner the process of progressive experimentation and analysis continues until a law has been devised which is adapted to the existing social conditions, which is in harmony with the unconscious social forces involved and which will furnish an efficient remedy for the condition complained of, provided, of course, that such legislative regulation is a possibility. These processes of growth vary infinitely in their details and may extend over considerable periods of time, but they involve the same set of principles of development and manifest the same general outline. The process of progressive experimentation applies to the construction of the constitution of a state as well as to the development of an efficient statute of a legislative assembly. The process may require many centuries of time and may include experiments in many nations. A treaty between two sovereign states and a regulation of an administrative bureau are produced by the same process.

This process of progressive experimentation is well illustrated in the history of federal regulation of interstate railroad transportation. Here we see the social demand for the regulation of a set of phenomena entirely new in the history of society, the tentative enactments of Congress which were entirely ignored by the railroads, the successive experimentation and progressive amendment which finally culminated in the organization of the Commerce Court and the development of a system of regulation which is beneficent in its operation both as to society in general and the railroads themselves. The history of this legislation in detail is too well known to bear repetition here. Today we can see the same process in its initial stages in the efforts of the federal Government to regulate trusts.

A further examination of these processes brings to light some of the salient characteristics of the evolution of law. These are of special interest because of their direct bearing upon the many legislative reforms now being agitated.

In the first place, it is evident that the development of law is always some distance behind the advance movements of society in general. The evolution of the social consciousness which recognizes the need of remedial legislation necessarily precedes the first conscious steps towards regulation. The process itself, after it has been put in operation, requires a considerable period of time. In a developing society conditions are constantly arising which never have been the subject of legislative regulation in the past history of civilization; legal history, therefore, furnishes no precedent and the process begins *de novo*.

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Again it is manifest that effective legislation can only be produced by a succession of experimental tests. *A priori* speculation is of assistance, to be sure, in framing working hypotheses, but actual experiment is always the court of last resort. When legislators become all wise and the laws of social evolution are thoroughly understood, it may become possible to devise a system of regulation for a new set of social phenomena which will be effective in the first instance, but that day is yet far distant. When a particular scheme of legislation, devised for the purpose of ameliorating some vicious social condition of which society has recently become conscious, is proposed, it is impossible to determine what would be its effect if it were put into actual operation. It is impossible to foretell, on theoretical grounds, to what extent its provisions will be nullified by irresistible unconscious forces. It is impossible to foresee what other groups of social forces it will set in motion, and it is just as impossible to determine in advance whether or not these forces newly aroused will be beneficent or otherwise. The only practical method of disposing of these difficulties is the method of progressive experimentation here outlined. It is the method which a study of the history of legislation would indicate to be the only one possible to finite man. He may construct beautiful imaginative utopias and devise statutes ideally perfect, but in order to devise really efficient legislation for the control and regulation of any set of complex social phenomena, he is ultimately forced to adopt the method of experiment and analysis. Theoretical sociology and theoretical economics can never be more than adjuncts and subordinate assistants to actual experiment.

The evolution of law is an extremely complex process. Three sets of factors come into operation: first, the unconscious forces of the inorganic and lower organic worlds; second, the forces, physical and psychical, conscious and unconscious, manifested in man as an individual; and third, the complex group of forces controlling men in the mass, which are called social forces. All of these forces are eternally dynamic; they are at work in an unceasing and infinitely complex interplay. A particular social phenomenon can never be traced to any specific individual cause, but is always the resultant of a multitude of causes acting and reacting upon each other. It is with this complex system of causation that man's conscious efforts to regulate social phenomena by law must be in harmony before the law can be efficient. The apparent complexity is multiplied when we take into consideration the further fact that the society which we are trying to regulate is also undergoing a process of development and is changing to some different condition even while we are trying to adapt our system of regulation to the conditions existing. In other words, while we have been experimenting to make a law effective, the condition which we are endeavoring to regulate has itself changed.

These observations lead to the conclusion that the law ultimately resulting from this process is determined, upon final analysis, by the unconscious social forces, and not by any conscious foresight of men. Man's conscious share in the process consists in adapting his means to the working of the unconscious social forces. What is here meant is simply that the final form of the law is determined by the underlying social forces.

This process is necessarily slow. It takes considerable periods of time to

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determine whether a particular enactment will be effective or not, and to determine just in what particulars it is defective. Tests by actual enforcement and judicial interpretation also consume time. The process of amendment or modified enactment and the repetition of experimental tests cannot be hastened. In many modern laws now highly effective we can trace the history of the principles involved to early England or perhaps to ancient Rome, and their present efficiency is due to centuries of such experiment as we are here considering. It is the slowness of this process which is so irksome to the enthusiastic advocate of reform. It is useless, however, to grow impatient with the working of natural forces. Nature, whether in the formation of a solar system or the evolution of a bi-valve or the development of a social institution, goes about it in her own way and will not be hurried. So long as the state is a living, growing organism and the development is progressive, there is no cause for despondency.

The principles here emphasized are pertinent to the discussion of any of the reforms by means of legislation now being so generally advocated in this country. Intelligent human activity is an important factor in the development of governmental institutions, but to make it effective, reformers must take into account first, social conditions as they actually exist and the underlying social forces and their modes of operation; second, the fundamental nature of law and the method by which an efficient law is evolved. Any reform movement which fails to take cognizance of these fundamental facts must of necessity prove futile.

Tionesta, Pa.

Reviews of Books

GERMAN LEGAL LITERATURE

Guide to the Law and Legal Literature of Germany. By Edwin M. Borchard, Law Librarian of Congress. Library of Congress, Washington, D. C. Pp. 188 + 23 (glossary) + 14 (index). (For sale by Superintendent of Documents, Government Printing Office, 65 cts.)

Jurisprudence in Germany. By Edwin M. Borchard, Law Librarian of Congress. 12 *Columbia Law Review* 301 (Apr.).

MR. BORCHARD'S Guide to the Law and Legal Literature of Germany is the first of a series designed to make accessible to the American lawyer, and to the American legislator as well, the most important legal literature of the civilized states of the world. The work has not been carried out in the perfunctory spirit of the time-serving bibliographer, but exhibits qualities that call for admiration, and is to be treated as a scholarly, critical monograph on German legal literature, written by one whose acquaintance with it is not superficial, but embraces the tendencies which have been at work in German legal thought, and the divergent theories and methods of the important writers. Sheldon Amos's remark, made forty years ago, holds true today: "Modern jurisprudence is emphatically a German creation." Not only do we owe a great debt of gratitude to Professor Pound, for luminously expounding the theories of recent German jurists, but Mr. Borchard has

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placed those interested in recent progress in Germany under a similar obligation.

Mr. Borchard properly emphasizes the need of a scientific jurisprudence, which shall draw the law into more intimate relation with life than it has had in this country under a system wherein outworn rules of the common law have ceased to respond to the needs of modern society. In this he is only repeating what Professor Pound has often told us. Thus duly emphasizing the need of an acquaintance with German legal science, which is the effective handmaid of political and social investigation rather than something apart, he surveys the field of legal encyclopedia by way of introduction, later taking up the philosophy of law. In the metaphysical group Kant, Fichte, Schelling, Hegel and Krause are noticed, and in the historical school of the early nineteenth century Hugo and Savigny. The metaphysical method fell into disrepute, but was revived by the neo-Hegelians, Lasson and Kohler, and the neo-Kantian, Stammler. This brings us to the modern sociological-philosophical school of which Ihering, Kohler and Stammler are the leaders. Of the group forming the subdivision of social utilitarians, Ihering, Berolzheimer and Sternberg are prominent representatives. Some attention is also given to Bierling and Bekker. There are complete notes not only on the chief works of these writers, but upon writings in which they are discussed and upon such translations as have appeared, or are about to appear, in the English language. The importance of the Modern Legal Philosophy Series now in course of publication is recognized.

The foregoing review of the literature of theoretical jurisprudence, which fills the valuable article written for the *Columbia Law Review*, forms only a lesser portion of Mr. Borchard's comprehensive guide, which deals with a great variety of other subjects, such as legislation, court reports, legal education, legal history, the Civil Code, commercial law, social insurance and labor laws, civil procedure, criminal law, criminal procedure, reform of criminal law and procedure, and public law. The value of all this wealth of information, presented as it is in admirable perspective, need not be dwelt upon to be recognized.

There is a useful glossary of German legal terms, based on the terminology of Schuster, and a good index.

MACGILLIVRAY ON INSURANCE

Insurance Law relating to all risks other than Marine. By E. J. Macgillivray, LL.B. Sweet & Maxwell, Ltd., London. (1912.) Pp. 1050 + 8 (index).

MACGILLIVRAY on Insurance covers all branches of the subject except marine insurance. The book is not an encyclopædic digest, as so many of our recent law books seem to be. But it is a well-reasoned treatise with sufficient cases cited to support the text, and American cases are cited freely as well as English cases, and a number from the English provinces. This book has already received exceptionally high praise in the English reviews, and the praise is surely well deserved.

The American reader will be constantly impressed with the fact that the English decisions are far more favorable to the Insurance companies than similar decisions in this country. That atmosphere is found throughout the work. For instance, the fire insurance cases arising out of the Jamaica earthquake were decided in favor of the companies, whereas under similar facts our courts held the companies liable for the losses arising out of the San Francisco

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earthquake and conflagration. Moreover we will hardly hope to get the American courts to agree with the author where he says, "Thus, where loss consequent upon explosion is excepted from a fire policy, the exception will equally exclude (1) damage caused by fire consequent upon explosion; (2) damage caused by explosion consequent upon fire."

Another thing that will strike the American reader is the absence of a certain confusion that surrounds the law of insurance in this country by reason of our many co-ordinate jurisdictions that give differing decisions upon similar sets of facts. Our American textbooks on insurance are necessarily so taken up with citations of authorities from these many state and federal courts upon a limitless number of varying forms and statutes, that they are bound to become more digests than logical and thoughtful treatises. It therefore is especially pleasing and instructive to read a work on insurance based upon practically a single jurisdiction and a single legislative power. It is possible to develop fundamental principles with greater accuracy and clearness than where an author is confronted with varying and irreconcilable decisions of several state and federal courts of equal standing.

The very fact that the author gives well-supported views differing from those current in the United States makes the book the more valuable in one way to the reader in this country. Our varying standard form policies, and state statutes covering innumerable details, have tended to make us narrower in insurance law than in most any other direction. We are more than usually apt to neglect the principles and reason in insurance propositions, and merely search for decisions — hoping that there may be more for us than against us. We would have better decisions and statutes if our lawyers, judges and legislators would give a little more time to an examination of the efforts and principles seen in the other countries where they have been worked out on a more comprehensive and logical basis than in our states. Even the parts of the book that deal with the English statutes are of considerable interest on this ground, though of course they cannot be of immediate value to the busy practitioner who wants nothing but a few decisions in point.

Upon the many questions that are constantly coming before the insurance lawyer, such as double insurance, subrogation, insurable interest and so forth, the book will be found very helpful. It is thorough and convincing from beginning to end. The author has given us an excellent treatise, with adequate citation of authorities to support his reasoning, instead of merely announcing what the various judges have held from time to time. As already stated, the book has received very favorable comment in England and it should have an equally favorable reception in this country.

F. T. C.

YOUNG'S FOREIGN COMPANIES

Foreign Companies and Other Corporations. By E. Hilton Young, M.A., of the Inner Temple and Oxford Circuit, Barrister-at-Law, City Editor of *The Morning Post*. University Press, Cambridge, Eng.; G. P. Putnam's Sons, New York. Pp. 309 + 9 (appendix) + 14 (index). ($4 *net*.)

THIS is a very luminous and sensible discussion of the principles of private international law applicable to foreign companies doing business in England and English companies engaged in business abroad. The treatment is analytical rather than merely expository, and the book is a scholarly

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essay on an important subject in the conflict of laws. The first part deals for the most part with foreign theories of the juristic person, and the second half with English law. The writer disclaims any intention of dealing with the metaphysical nature of the juristic person, but his work illustrates the sound contemporary tendency not to carry the fiction theory too far. His position is thus in harmony with that of our ripest contemporary thought. Professor Pollock lately showed that the fiction theory, as a dogmatic doctrine, had never been actually received into the English common law (27 *Law Quarterly Review* 219), and Mr. Arthur W. Machen, Jr., in two brilliant articles, has pleaded eloquently for a sane theory of the corporation as a real entity rather than a fiction (24 *Harvard Law Review* 253, 347). Mr. Young is sufficiently in accord with this position to perceive the inconsistency in an American judicial decision where it was said, on one hand, that the existence of a corporation "is as real, as vital, and efficient elsewhere as within the jurisdiction that created it," and on the other, that it "anywhere and everywhere is but ideal; it has no actual personal identity and existence as a natural person has" (*Moulin* v. *Insurance Co.*, 1 Dutcher 57).

In opposition to the formal theories which he discusses, among which is the theory of comity that he considers American courts to have overstrained, he advocates a so-called "system," which refuses to make a fundamental distinction between the juristic and the natural person, and which places the foreign juristic person upon the same footing as the foreign natural person. He concedes that historically this theory has been influenced by the reality or *genossenschaft* theory as propounded by Dr. Gierke and other Continental writers, but it is declared not to rest upon it.

The writer tells us that this treatise is the outcome of some consideration which it fell to his lot to give some years ago to the case of *Risdon Iron Works* v. *Furness*. In that case a British limited company engaged in mining in California became insolvent, and the defendant, an English shareholder, was sued for his proportion of the price of some machinery for which the company had contracted. By Californian law such a shareholder of a foreign company would be personally liable, but the action failed on the ground that such enlargement by a company of the liability of a shareholder must be held in an English court to be *ultra vires*. Mr. Young has no fault to find with this decision. The accepted principle of private international law, he says, that a contract must be governed by the *lex loci contractus*, applies only to the rights of members of the juristic person *inter se*, and "cannot affect third parties with which the juristic person enters into legal relations, still less can it affect foreign states with whose laws the juristic person comes into contact."

HOPKINS ON PERSONAL INJURIES

The Law of Personal Injuries, and incidentally Damage to Property by Railway Trains; based on the statutes and decisions of the Supreme Court and of the Court of Appeals of Georgia. By John L. Hopkins. Revised and enlarged edition, 2 v. Harrison Co., Atlanta, Ga. V. 1, pp. xvi, 772; v. 2, pp. xv, 644 + 68 (table of cases) + 58 (index). ($12 *net*.)

DOUBLED in size, with the addition of nine hundred new cases cited, all of Georgia, Hopkins on Personal Injuries, a work which ten years ago had a most favorable reception from the bench and bar of Georgia, now appears in an up-to-date revision. The

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bulk of the book has expanded so considerably that the only serious fault with which the work can be charged would perhaps be its failure to get a tighter grip on such voluminous material, so as to squeeze it into the mold of a purely analytical treatise. Instead of searching dissection of judicial opinions we have voluminous quotations, which are, however, well arranged and built into a well-constructed exposition. As a compendium of the case law of Georgia, in the field of personal injuries, we believe that the value of this work will be acknowledged by the lawyers of other states.

KING'S CRIMINAL LIBEL

The Law of Criminal Libel; a treatise on libel as a Criminal Offense, embracing the substantive law and the procedure and practice in prosecutions by criminal information and indictment at common law and under the Canadian Criminal Code. By John King, M.A., K.C., of Osgoode Hall, Toronto, lecturer to the Law Society of Upper Canada, author of "The Law of Defamation in Canada," and "The Law of Contempt." Carswell Co., Ltd., Toronto. Pp. xxiii, 381 + 18 (index). ($5.)

THIS treatise on criminal libel is written to supplement the author's work on "The Law of Defamation," published four years ago. It states the law, both substantive and procedural, of Canada, with particular attention to the provisions of the Canadian Criminal Code. English and Canadian decisions are included, and American cases are also used for purposes of illustration. The subject is broken up into sharp sub-divisions, and the treatment of the various topics is exceedingly lucid. The various chapters, instead of being encumbered with elaborate discussion, set out with clear definitions of leading principles, followed by attractively presented supplementary matter of an illustrative sort. The writer has produced a textbook of more than ordinary merit.

OPINIONS OF THE JUDGE ADVOCATES GENERAL

A Digest of Opinions of the Judge Advocates General of the Army, 1912. Prepared under the direction of the Judge Advocate General, U. S. A., by Capt. Charles Roscoe Howland, Assistant to the Judge Advocate General. Government Printing Office, Washington, D. C. Pp. 1103.

THIS digest includes the opinions of the Judge Advocates General since 1862, and has been prepared under the direction of the present incumbent of that office, Brigadier-General Enoch H. Crowder, U. S. A. The subjects covered are mainly those of military law, but other topics besides the organization and discipline of the army are comprehended. The portions that will particularly concern the legal profession are perhaps those dealing with claims, public property, navigable waters, bonds and contracts. Published for the information of the Army and Organized Militia, the book however brings within a convenient compass the content of all opinions of general interest, excepting only those the principles of which have been incorporated into the army regulations or into statute law.

ROBINSON'S CRIMINAL STATISTICS.

History and Organization of Criminal Statistics in the United States. By Louis Newton Robinson, Assistant Professor of Economics in Swarthmore College. Hart, Schaffner & Marx Prize Essays. Houghton Mifflin Co., Boston. Pp. 104. ($1 *net*.)

THE purpose of this helpful little monograph is to point out the need, often emphasized by writers on criminology, of a standard system of criminal statistics, which will serve two practical ends: (1) that one may judge of the nature and extent of criminality in a given geographical area, and (2) that one may determine the transformation, if any, which is occurring in these

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two phases. Federal criminal statistics, in the form they have possessed up to the present time, "tell little or nothing of criminality in the United States," and state criminal statistics are "almost without exception bad." A reorganization is needed.

The writer's plan for reorganization, which is "not radical nor even new," contemplates co-operation between the federal census office and the states in putting a standard uniform system into operation. The same reform that has been carried out in the field of mortality statistics is advocated. Eighteen states have come into the area of co-operation with the census office in mortality statistics, and this registration area will gradually be extended from year to year by the admittance of those states which come to maintain the required standard of excellence. It will be conceded that the same plan in connection with criminal statistics will surely prove practicable and efficient.

CANADIAN MARRIAGE AND SUNDAY LAWS

The Marriage Law of Canada: its Defects, and Suggestions for its Improvement. By George S. Holmested, one of His Majesty's Counsel for Ontario. Arthur Poole & Co., Toronto. Pp. iii, 46 + 5 (index). ($2.)

The Sunday Law in Canada. By George S. Holmested, one of His Majesty's Counsel for Ontario. Arthur Poole & Co., Toronto. Pp. ix, 111 + 17 (index). ($3.)

IT WILL surprise most American lawyers to learn that doubts regarding the validity of a divorce often arise in Canada, owing to conflicting decisions by courts of different jurisdictions, in the same manner as in the United States. To remedy this evil, the author of these suggestions urges that all Provincial matrimonial courts be superseded by one court established for the whole Dominion, to hold sessions in each Province and bring about a uniform administration of the law of divorce. He also urges that the law as to impediments to matrimony be changed, to remove the objections to which the doctrine of pre-contract in the Province of Quebec gives rise.

In his work on Sunday laws, the same author gives a historical review of English legislation regarding *dies non juridici*, by way of introduction to the present state of the law. Legal proceedings, sittings of Parliament, and consultation of judges on Sunday are considered, and information regarding Canadian laws as to Sunday observance, sports, and games, and prosecutions for violations, is included.

NOTES

The proceedings of the twenty-third annual meeting of the Washington State Bar Association, held at Spokane last July, contains the president's address delivered by Hon. C. W. Howard of Bellingham and the following papers: "Delays of Courts," by Judge S. J. Chadwick of the state Supreme Court; "The Courts of Germany," by Fred H. Peterson of Seattle; "The Facts of the Case," by Federal District Judge Frank S. Dietrick of Boise, Idaho; "The Recall of Judges, by T. J. Walsh of Helena, Mont., and "The Ownership of Property in the United States by the Federal Government, Whether as Proprietor or Sovereign," by Russell L. Dunn of San Francisco.

The Transactions of the seventh annual meeting of the Arizona Bar Association, held March 18–19, 1912, contain the President's address, "Compensation of Employees Injured in Industrial Accidents," by Frederick S. Nave of Globe; "Reversals for Technical Reasons," by Walter Bennett of Phoenix; "The Lawyers' Relation to Legislation," by Frank O. Smith of Prescott; "The Commission Form of Municipal Government as Applied to the Citizens of Arizona;" "The Conservation and Utilization of State Lands," by R. L. Alderman of Globe;and "Some Attainable Reforms to Expedite the Disposal of Civil Business," by John Mason Ross of Bisbee.

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BOOKS RECEIVED

A Treatise on the Constitution of Georgia, giving the origin, history and development of the fundamental law of the state, with all constitutional documents containing such law, and with the present constitution, as amended to date, with annotations. By Walter McElreath, of the Atlanta bar. Harrison Co., Atlanta, Ga. Pp. viii, 676+24 (index). ($6.)

Comparative Legal Philosophy, Applied to Legal Institutions. By Luigi Miraglia, Professor of the Philosophy of Law in the University of Naples. Translated from the Italian by John Lisle of the Philadelphia bar, with introduction by Albert Kocourek, Lecturer on Jurisprudence in Northwestern University. Modern Legal Philosophy Series, III. Boston Book Co., Boston. Pp. xl, 773+20 (index). ($4.75.)

Handbook on the Law of Judicial Precedents, or the Science of Case Law. By Henry Campbell Black, M.A., author of Black's Law Dictionary, and of Treatises on Judgments, Constitutional Law, Statutory Construction, etc. Hornbook Series. West Publishing Co., St. Paul, Minn. Pp. xv, 701+36 (cases cited)+31 (index). ($3.75 delivered.)

Text-Book of Medical Jurisprudence and Toxicology. By John J. Reese, M.D., late Professor of Medical Jurisprudence and Toxicology in the University of Pennsylvania; late President of the Medical Jurisprudence Society of Philadelphia. 8th ed., revised by D. J. McCarthy, A.B., M.D., Professor of Medical Jurisprudence (Geo. B. Wood Foundation) in the University of Pennsylvania, Neurologist to the Philadelphia General and St. Agnes Hospitals. P. Blakiston's Son & Co., Philadelphia. Pp. viii, 654+6 (index). ($3 *net*.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Admiralty. "The Laws of Salvage." By James D. Dewell, Jr. 21 *Yale Law Journal* 493 (Apr.).

Dealing with the law applicable to the following state of facts: "Suppose a steamer is charterer under a charter party constituting the charterers the owners *pro hac vice*, and that the charterers manned and supplied her, and this steamer should rescue a vessel and bring her into port and be admittedly entitled to a salvage award. To whom would the award belong, that is, so far as between the owner of the steamer and the charterer?"

Biography. "James Buchanan as a Lawyer." By W. U. Hensel. 60 *Univ. of Pa. Law Review* 546 (May).

"I assert with absolute confidence as to their attitude toward slavery that Mr. Buchanan was never more insistent that it should be let alone in the States where it existed and that the fugitive slave law was constitutional and should be enforced than Mr. Lincoln. Their differences were wholly as to the conditions which should govern it in federal territory. Down to and long after his inauguration Mr. Lincoln reiterated his intention to not disturb slavery where it existed and to enforce the Fugitive Slave Law."

Court of Claims. "The United States Court of Claims." By George W. Atkinson. 46 *American Law Review* 227 (Mar.-Apr.).

A general account of the court and its methods of work.

Criminal Procedure. "The Police Courts of New York: A Record of Progress in the Minor Criminal Courts." By Frederick Trevor Hill. *Century*, v. 84, p. 87 (May).

The article contrasts the present inferior courts of New York City with those of twenty-five years ago, and gives a clear account of the many improvements which have been made in the administration of justice. The improvement in the character of the judges and the methods of conducting the work of the courts has been striking. "The whole spirit of the legislation," says Mr. Hill, "reflects high credit upon its framers, and thus far its results have exceeded expectations. It has not only promoted justice, curbed oppression, and safeguarded the needy and friendless, but it has supplied invaluable material for increasing the usefulness of minor criminal courts throughout the country, which, though termed inferior by the law, are centers of popular education and civic influence without a peer in the judicial system of America."

See Procedure.

Criminology. "Scientific Administration of the Criminal Law." By Chief Justice John B. Winslow, Supreme Court of Wisconsin. *Case and Comment*, v. 18, p. 707 (May).

"The writer of this article was upon the trial bench for seven years, and had occasion to pass sentence upon a considerable number of convicted persons, and he frequently felt the utter impossibility of satisfying himself as to the wisdom or justice of the sentences which he imposed. It seemed always to be merely a guess, and a very unsatisfactory guess at best. He always recognized the difficulty of the task, but he did not then comprehend, as he now comprehends, the true reasons for that difficulty;

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namely, the fact that he could make no study of the convicted person's previous life or environment, or the causes of his act, nor avail himself of the study of any expert on the subject; and the further fact that, even if he could accomplish these things, he could take little or no advantage of them, but must still impose a predetermined prison sentence, regardless of its fitness to the crime or its probable deterrent or reforming effect on the criminal. . . .

"Were it possible for the court to delay sentence, to cause the investigation which I have suggested to be made, to ascertain where the real difficulty has been, and then to treat the case as an individual problem, prescribing such measures, either therapeutic, disciplinary or segregative, as its history indicates to be best, society might easily acquire a sober, industrious citizen, instead of an enemy."

"Criminal Law for Men." By Robert Ferrari. *Case and Comment*, v. 18, p. 731 (May).

What are the practical reforms the state should institute? . . .

"(1) Do not sentence your prisoners to a fixed period of servitude, debasement, and brutalization, but to an indeterminate time of education, trial, and experiment.

"(2) Have your civil and criminal judges separate in office. Criminal law, if it is to be properly administered, is a long and difficult study and requires unremitting time and patience on the part of judges to understand the criminal and to sentence him in the proper way.

"(3) Teach criminology in law schools, to pave the way for experts on the criminal bench.

"(4) Give your judges more power over the destinies of criminals than they have now.

"(5) Put the children of convicts in industrial schools, and in houses of correction. Catch the future criminal in the bud and give him ample time to flower as a useful member of society.

"(6) Adapt your treatment to different kinds of criminals. Some need the lunatic asylum, some need work in the open, some need work in the shop, some may be sent to the mines; it is better that criminals be sacrificed to fire damp than that honest workmen should be.

"(7) Abolish the cellular system in prisons and establish agricultural colonies.

"(8) Attach experts to your criminal courts to examine and classify criminals.

"(9) Give the state the right of appeal. If the individual has the right to say that he shall not be condemned through the mistake or ignorance of his judges, society also has the right to demand that those whose acquittal is equally the result of mistake or ignorance shall not be allowed to go free.

"(10) Give the appellate court the right to increase the punishment already meted out by the lower court. Society has rights which the individual must respect. Even in the classic land of the *habeas corpus* and of intense personal freedom, the appellate court may increase the punishment.

"(11) Let the state compensate the individual for judicial errors. If it has prosecuted unjustly, let it stand the expense and offer at least partial balm.

"(12) Let the perpetrator of a wrong indemnify the victim of it.

"(13) Employ, for occasional criminals, the suspended sentence.

"(14) Treat habitual criminals as pests of society.

"(15) Compel reparation of damage in the case of the criminal through the impulse of that passion which is not anti-social, but excusable, such as the passion of love and that of honor."

"Humanizing Criminal Law." By Arthur MacDonald. *Case and Comment*, v. 18, p. 711 (May).

"It is as true of a prison as of a university, that buildings do not make it, but men. The public, however, are unwilling to pay for trained men. Even the wardenship of a prison is not regarded as a very high political office, nor are intellectual qualifications a conspicuous requisition. The regular duties of a warden (not to mention his political ones) leave him little time and less energy to make an individual study of his prisoners, and too many of the under officers are incapable from lack of education or intelligence, or both. Many of the criminals are more intelligent than their keepers, whom they are admonished to respect. . . .

"It is not unjust or unreasonable to make the reformatory a humanitarian laboratory for purposes of study, provided no injury be done the inmates."

"Is There a Criminal Class: William Allan Pinkerton says No." By Frank Parker Stockbridge. *Hampton's*, v. 28, p. 267 (May).

"No one," says Mr. Pinkerton, "can study criminals at close range and believe in the existence of a criminal class, regardless of what Lombroso and his disciples may claim. . . . Humanity is not thus divided into criminals and non-criminals. There is but one classification that can be made — the class of those who have committed crimes and the class of those who have not yet committed crimes. Within certain limits, varying with the individual, every human being is a potential criminal. I have seen this illustrated so often that I am never surprised to learn that any man or woman, however highly placed and however greatly esteemed, has done something which the law forbids and for which society demands a penalty. On the other hand, however — and this is the bright side of the shield — every criminal is potentially an honest man, and with the right kind of encouragement from society will remain honest by preference. It is my observation of hundreds of criminals whose reform has been complete and permanent that makes this conclusion a definite one."

Cy Pres. "The Application of the *Cy Pres* Doctrine to Trusts for Charitable Purposes." By T. Bourchier-Chilcott. 28 *Law Quarterly Review* 169 (Apr.).

"An erroneous, but apparently well-established opinion formerly existed, and it must be said still exists, that the court, whenever its jurisdiction is invoked to direct a scheme for the administration of a charitable trust, has power

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to deal with the charity property as it pleases, and, in point of fact, to do anything which within certain limits it thinks expedient to be done with the property (*Philpott* v. *St. George's Hospital*, 27 Beav. 107, 122 R. R. 337). This is quite a mistaken view of the jurisdiction of the court."

Direct Government. "The Initiative and Referendum." By Henry M. Campbell. 10 *Michigan Law Review* 427 (Apr.).

"If the great mass of intelligent people, who are now so indifferent to public affairs and so engrossed in their own, would give but a small part of their time and attention to public questions and the selection of proper representatives, then there would be no difficulty under our present system in adequately protecting the interests and securing the welfare of all of the people and in giving effect to their will."

Due Process of Law. "Federal Intervention under the Fourteenth Amendment." By Charles Wallace Collins. 21 *Yale Law Journal* 470 (Apr.).

"We cannot answer the question as to how far federal intervention can go under the Fourteenth Amendment. We can see how far it has gone, but a study of all of these cases fails to enable one to set limitations for the amendment in the future, under the present federal procedure. For practical purposes this principle of intervention may be stated in the following words: No state can make or enforce any law which shall, upon proper proceedings, be deemed unreasonable by a majority of the Supreme Court of the United States. This involves the interpretation in each case of the terms 'due process of law' and 'equal protection of the laws.' The rule of reason alone governs. What are fair profits, what are excessive taxes, what are proper health laws, what is confiscation and what discrimination — these are questions which cannot be answered in the abstract nor can they be adequately defined by precedents. If it becomes incumbent on the Supreme Court of the United States to pass judgment on them, it must consider the reasonableness of each concrete case."

Federal and State Powers. See Due Process of Law, Railway Rates.

General Jurisprudence. "The Scope and Purpose of Sociological Jurisprudence. III, Conclusion." By Professor Roscoe Pound. 25 *Harvard Law Review* 489 (Apr.).

Continued from 24 *Harv. L. Rev.* 591 (23 *G. B.* 425), 25 *Harv. L. Rev.* 140 (24 *G. B.* 88).

Having in the two earlier papers considered the three schools of juristic philosophy, Analytic, Historical, and Philosophical, which were the forerunners of the present Sociological school, and having shown how in their later developments these three schools approached common ground, Professor Pound now, in the concluding portion of his invaluable essay upon a timely and fruitful subject, traces the progress of this resulting sociological school, which is still in a formative stage.

The Comtist Positivism, to which some attention has already been given, was really the starting point of this sociological jurisprudence. While there are those who still "appear to insist that sociological jurisprudence must be identified with a philosophical jurisprudence of the positivist type," we have really got far beyond this position. Sociological jurisprudence has gone through the same process of development as sociology, in that the old mechanical-biological conceptions have gradually been displaced. Accordingly, Professor Pound divides the biological stage into four successive types of theory: (1) the mechanical, (2) the ethnological, (3) the philosophical, and (4) the organismic. Space does not permit reproduction of the acute observations on these various phases of juridical theory, but the discussion will be found quite as valuable from the standpoint of the student of sociology as from that of the student of jurisprudence.

Next the importance of Ward's service to sociology is recognized, and with it comes the beginning of a new epoch, the method of which is not biological so much as psychological. Gierke and Tarde are recognized as important factors in giving the sociological jurisprudence a new turn.

At the present time, jurisprudence is in the stage of unification:

"Presently it was seen also that not only was it needful to combine the several methods that had been employed in sociology and to unify the science, but that it was equally needful to put the science into relation with the other social sciences; to unify the social sciences by recognizing that they are 'merely methodological divisions of societary science in general.' . . .

"The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied. . . .

"Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress. Comparing sociological jurists with jurists of the other schools, we may say: —

"1. They look more to the working of the law than to its abstract content.

"2. They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.

"3. They lay stress upon the social purposes which law subserves rather than upon sanction.

"4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds.

"5. Their philosophical views are very diverse. Beginning as positivists, recently they have adhered to some one of the groups of the social

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philosophical school, from which, indeed, the sociological school, on many essential points, is not easily distinguishable. While Professor Moore tells us that the time has come 'in the development of the pragmatic movement for systematic and detailed applications of pragmatic conceptions and methods to specific problems, rather than further discussion of general principles,' unhappily discussion of general principles goes on and a pragmatist philosophy of law is yet to come. When it is promulgated it may expect many adherents from the sociological jurists."

"Jurisprudence in Germany." By Edwin M. Borchard, Law Librarian of Congress. 12 *Columbia Law Review* 301 (Apr.).

See p. 305 *supra*.

Government. "The State Governor." By John A. Fairlie. 10 *Michigan Law Review* 458 (Apr.).

"From this discussion of the powers of the state Governor it should be clear that while his influence in matters of legislation is important and increasing, his authority and control over the state administration is far from complete. His power of appointment and removal are much more restricted than in the case of the President of the United States; and he has little effective power of direction over the administrative officials. . . . At the same time the growing importance of the Governor's position should not be underestimated. Through his political powers he exercises a large influence over the welfare of the state, not only by his constitutional negative on legislatures but also by his positive influence as an exponent of public opinion. And in the field of administration both his express authority and his active influence are increasing, and it may be said should be further increased."

International Arbitration. "Anglo-American Arbitration." By Herbert W. Horwill. *Contemporary Review*, v. 101, p. 475 (Apr.).

"In weighing the objections formally offered by the Senate against the proposed treaties with England and France it is important to take count of a more formidable reason that lies behind. The Senate always shows itself keenly jealous of any threatened or suspected infringement of its share in the control of foreign affairs. In this reluctance to surrender the least part of its prerogative there is more than meets the eye. The Senate knows well enough that any curtailment of its opportunities of exercising its treaty-making power would weaken its influence in home politics also."

Legal History. "The Reception of Roman Law in the Sixteenth Century, III." By Prof. W. S. Holdsworth, D. C. L. 28 *Law Quarterly Review* 131 (Apr.).

"Even in the sixteenth century there were signs that 'the double jurisprudence of Rome would be overwhelmed by the enormous profession of the common lawyers.' In fact, the same cause which abroad led to the extension of the influence of the civil law led in England to the extension of the common law."

See Pleading, Roman Law.

Legislation. "Law and the Function of Legislation." By Edwin W. Smith. 46 *American Law Review* 161 (Mar.-Apr.).

"I appreciate that it is easy to talk about custom, the common thought, public opinion, but it is not always easy to know what they are. How does judge or legislator know? If a legislator does not know, his duty is clear — he need make no law. The doctrine of *laisses faire* is a good one yet. There are, however, questions which judges have to decide, upon which there is no public opinion. If so, judges must rely upon arguments of counsel, precedents, their own knowledge of current thought. . . . I am strongly in favor of the right to discuss intelligently the decisions of the courts."

Married Women. "The Law of Married Women in Texas." By Claude Pollard. 46 *American Law Review* 241 (Mar.-Apr.).

"With some changes and modifications, we preserve the Spanish rule, and regard marriage as a state of co-equality between husband and wife in so far as property rights are involved, thus recognizing the separate existence and identity of the wife. . . . We recognize the right of the wife to own property, to convey it, to make contracts, to sue and be sued; and while these rights may be limited in a sense under our law, the recognition thereof indicates that her civil rights are equal to those of her husband."

Mining. "Mining Law." By Cummins Ratcliffe. 46 *American Law Review* 215 (Mar.-Apr.).

Touching upon some of the leading features of the law of mining, in a general survey of the subject.

Monopolies. "The Character and Powers of Governmental Regulation Machinery." By Charles C. Batchelder. *Journal of Political Economy*, v. 20, p. 373 (Apr.).

The important point is brought out that legislation should not only prevent monopoly based on unfair competition, but that it should tolerate competition only when the latter is fair; as the author expresses it: —

"We should prohibit not all combination, but all *unfair* combination, and encourage not all competition, but all *square* competitions. Cut-throat competition is not for the public weal.

"The business interests of this country must realize the seriousness of the situation, and join hands immediately to bring public pressure to bear upon our legislators to remedy by wise statutes the threatening danger to our national prosperity. As our population increases, we must inevitably cease to export raw materials and foodstuffs in payment of the trade balances against us for the large number of commodities which we must always import, and must substitute our manufactured goods. Taking into

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account our high standards of living and expensive labor, we can only hope to compete in the markets of the world by developing to their full extent our natural advantages in the inventiveness of our people, the wide employment of labor-saving machinery and scientific management, and the perfection of our financial and business organization, which is only a form of labor-saving machinery in the fields of distribution and administration.

"Germany has a long start of us, as she has been applying the methods of science to her industries, while we have been trying political nostrums. Over forty per cent of the success of German commerce is estimated to be due to the wise national policy of encouraging the co-operation of capital, instead of persecuting it as we are doing. Her old rival, England, is showing many signs of economic distress, and there is a widespread feeling that war between them is inevitable from economic, not political causes. . . . If Germany is not checked by war, England, already worsted in the fields of commerce, will be in danger of sharing the fate of Venice, Spain, Portugal, France, and Holland, all of which once ruled the world. If England is defeated, we shall in our turn find it very difficult to retain sufficient hold upon the markets of the world to pay for our imports by selling our manufactures. . . .

"The motto of business in the past has been 'Every man for himself, and the devil take the hindmost.' Henceforth it must be, 'All for one, one for all!' "

"Industrial Combinations — Existing Law and Suggested Legislation." By Robert L. Raymond. *Journal of Political Economy*, v. 20, p 309 (Apr.).

A penetrating and helpful discussion.

"The legislation to be adopted must appeal favorably to the average man's sense of fairness. Right and wrong as the terms are commonly understood exist here as elsewhere. That which is permitted must appeal to the average man as right, and that which is forbidden must appeal to the average man as wrong. The law must not discriminate against the wise, the farseeing, the successful, on behalf of the unskilful and the indifferent. Competition and trade must probably always remain to some extent a species of warfare. Men of ability, brains, ambition, and imagination will win, in this fight as in any other, over less capable opponents. The accredited and proper weapons to be used are satisfactory service and products, and cheapness to the consumer. Blows struck from behind with the bludgeon of unfair methods must be declared to be against the rules. What does this mean when applied to the combination idea? It means this — the law need not insist arbitrarily on competition: neither should the law accept it as a settled fact that competition is played out, and permit the combination idea to be artificially forced. Competition must have a fair chance."

The legislation proposed and outlined by the author will repay study. Designed to supplement rather than supplant the Sherman act, defines unfair business practices with clearness and seeks to prevent any form of restraint on competition inherently inequitable, without overstating the rights of the competitor against the monopolistic aggressor.

"Trust Regulation and the Courts." by Harrison S. Smalley. *Journal of Political Economy*, v. 20, p. 326 (Apr.).

"The philosophical essence of our jurisprudence is still the theory of extreme individualism. The courts still cling to eighteenth-century ideas of the beneficence of untrammeled private rights. Their attitude toward government regulation of industry is therefore inevitably hostile. They tend to look upon such regulation not only as contrary to the economic interests of the country but as subversive, of the very purposes for which our government was established. Being empowered, therefore, by the Constitution, as interpreted by themselves, to annul any act of regulation which to their minds is unreasonable, their tendency is to declare void many acts pronounced useful and necessary by the enlightened sense of the age. . . .

"After all, when you clear away the dust and cobwebs of legal fictions and precedents and technicalities, is not the very idea of judicial review of economic questions an utter absurdity? Why should such questions be taken out of the hands of industrial experts and assigned to legally trained men for settlement? Would we for a moment tolerate a similar procedure in relation to any other class of subjects? . . .

"So from every point of view it seems to me clear that when trust regulation comes it should be purely legislative and administrative in character. This does not mean, of course, that when questions arise incidentally which are plainly judicial, the courts should be denied the prerogative of determining them. Thus, such criminal prosecutions as might prove necessary in the work of regulation would be brought in the courts, and suits for damages would probably also be maintained in judicial tribunals. But there should be no judicial review of the reasonableness of administrative acts."

"The Economies of Combination." By Edward Sherwood Meade. *Journal of Political Economy*, v. 20, p. 358 (Apr.).

"During a decade of unparalleled industrial development, the trusts, starting with every advantage of large capital, well-equipped plants, financial connections, and skilled superintendence, have not succeeded. It is impossible on the basis of these figures to indorse the trusts on the side of increased business efficiency. If we go no further than their record of performance, they have not justified the claims made for them. . . .

"It is a reasonable presumption that the plan of dissolution followed in the case of the American Tobacco Company will not result in the sacrifice of any degree of productive efficiency, and that the separate boards of directors and separate staffs of officials may display greater energy and greater diligence in developing the business than has been possible under the centralized control."

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"Its Competition Compassed by Immorality that Sort of Unrestricted Trade which is Favored of the Law?" By Archibald H. Taylor. 46 *American Law Review* 184 (Mar.-Apr.).

"I am certain that the remedy adopted by the doctrine of the *Dr. Miles Medical Company* v. *John D. Parks & Sons Company* is a step towards socialism, *i. e.*, assuming that the permanent remedy for immediate anarchy, is socialism, just as I have described. And while repeating my profound admiration for the wonderful ability with which the views of the Court are presented by Mr. Justice Hughes, and by Judge Lurton, below, I am constrained to conclude my appreciation in the words used by Owen Meredith in completing an appreciation of women. He had written many lines, all commencing with the simple words "I know," and ascribing to the fair sex many rare and wonderful qualities. But he ended with the line, "I know that their morals, thank Heaven, are not mine," I cheerfully and loyally will obey the decree in this case, but to subscribe to the moral philosophy or political economy of it, is not within the terms of my oath taken as a member of the profession."

"Economic Aspect of the Recent Decisions of the United States Supreme Court on Trusts." By Prof. Jeremiah W. Jenks. *Journal of Political Economy*, v. 20, p. 346 (Apr.).

The Supreme Court in these two decisions [in the *Standard Oil* and *Tobacco* cases] has failed to take sufficiently into account the economic benefits that come from the saving of industrial energy and the promotion of industrial efficiency by industrial combination. Even though it may have justly estimated the evils coming from some of their business practices, in its remedies it is directly attempting acts that must result in loss of industrial energy and lessening of industrial efficiency. This is clearly an economic injury to the public, directly contrary to the public interest."

"An Interstate Trade Commission." By William Dudley Foulke. *Journal of Political conomy*, v. 20, p. 406 (Apr.).

"Every power exercised by the Interstate Commerce Commission over common carriers should be applied, wherever it can be made applicable to industrial and commerical monopolies which have acted in unreasonable restraint of trade."

See Patents.

Patents. "The Sherman Anti-Trust Act and the Patent Law." By Gilbert H. Montague. 21 *Yale Law Journal* 433 (Apr.).

"Between the constitutional guaranty, on the one hand, and the Act of Congress of July 2, 1890, known as the Sherman Act, on the other hand, there can be no question of precedence. It cannot be assumed that the Sherman Act intended to interfere with rights established by the Constitution and granted by the patent law. The constitutional guaranty must prevail. The owner of a patent may, in any measure whatsoever, exclude others from using his patent, and from manufacturing or selling the patented article. The owner of a patent may do all the acts comprehended in the three propositions of law above set forth; and even though such acts be monopolizing, and such as, without the immunity of a patent, would clearly constitute a violation of the Sherman Act, the Constitution and the patent laws shall be his protection."

See Monopolies.

Penology. See Criminology.

Pleading. "The Common Law System of Pleading." By Hon. U. M. Rose. *Case and Comment*, v. 18, p. 643 (Apr.).

"As the motives that led to this system of special pleading were indefensible, so its general effect was bad; it elevated form above substance, not infrequently perverting the administration of justice into a mere trial of wits; it involved useless expense, labor, and mischievous delay; it cannot be doubted that the technical spirit which it embodied overflowed into other branches of the law with bad results; it diverted the attention of attorneys, lawyers, and judges from a study of the real problems of jurisprudence, to merely fanciful problems of artificial creation, having originally their sole origin in personal greed; it blinded men to the real purposes for which laws exist, and tended to lead the common people to believe, or at least suspect, that law was a mere matter of chicanery and trickery."

See Procedure.

Practice. "The Disappearing Argument." By John I. Williamson. 21 *Yale Law Journal* 489 (Apr.).

"It has been, I think, the experience of most lawyers, that the higher the appellate tribunal is in point of dignity, power and learning, the more apt it is, in the language of an eminent jurist now upon the bench of a court of last resort, 'to lean, as upon a staff, upon the argument of counsel,' to complain of the absence of briefs and to advise and encourage oral argument. Indeed the bench has ever willingly availed itself of this assistance."

Procedure. "Conservatism in Legal Procedure." By Hon. Frederick W. Lehmann. *Case and Comment*, v. 18, p. 649 (Apr.).

"The law which a man is held to know should be within the reach of his understanding. . . . There should be in it nothing savoring of the mystery of a craft. . . . An alien tongue persisted in the English courts for nearly seven hundred years, and alien forms persisted for more than a century longer. What we know as the common-law system of pleading exhibits the genius of the Norman, rather than of the Saxon, element in the English nation; but it held its place with astonishing tenacity. . . . The niceties and subtleties of the law of pleading were all settled at the expense of some suitor who cared nothing, and should be held to care nothing, for the forms employed, but who had a grievance and was entitled to a remedy, and as at the trial he could tell his case

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from the witness stand in plain English, so it should have been formulated by his counsel for trial in plain English in the pleading. . . .

"The purpose in pleading should not be to display expertness in the art, but to advise the court and the opposing party of the contention made. The controversy in the interest of justice should be narrowed as much as may be, but not necessarily to a single issue, for there may be more than one matter really at issue between the parties. Falsehood should be eliminated as well as formalism."

"The Reform of Procedure in the Courts as a Means of Preserving the Respect and Confidence of the People in the Government." By Hon. A. J. Rodenbeck. *Case and Comment*, v. 18, p. 635 (Apr.).

"The Bench and Bar have it within their power to create a public sentiment which will compel a change in procedure, and if this power is not exercised, they must bear the responsibility of public condemnation.

"The objections are not confined to any particular jurisdiction. The procedure may be better in some states than in others; but in all there is an opportunity for improvement.

"A constant effort should be made toward simplification and expedition. Every useless requirement should be eliminated, every technicality should be wiped out, and every unnecessary formality should be avoided.

"The substance of the right should be paramount and every detail of practice which stands in the way of doing exact justice, under the circumstances of the case, as expeditiously as possible, should be eliminated."

"The Relation of Judicial Procedure to Government." By Thomas W. Shelton. *Case and Comment*, v. 18, p. 654 (Apr.).

Now, what shall be the form that pleading and procedure shall take? Let it be that which the Supreme Court shall provide. We have not trusted it in vain in matters of equal importance. . . .

"It is immaterial what form the system takes so that, at the trial, a statement of the facts of the cause of action from which the alleged legal liability can be drawn is presented upon a permanent record. It is neither honest nor prudent that that which is not presented in the pleadings originally or by just amendments should be judicially decided. A man has the constitutional right to be confronted by his accusers, and to be placed but once in jeopardy upon a clearly defined charge; so, he has the inalienable right to be explicitly notified of the *intention, specific reason, and alleged legal right to take his property.*"

"Procedural Reform." By Everett P. Wheeler. *Case and Comment*, v. 18, p. 661 (Apr.).

"Doubtless we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. . . . It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system so that these means of procrastination shall no longer be available."

Questioned Documents. "Questioned Ink Marks — Determining the Age of Ink Marks." By Webster A. Melcher. 74 *Central Law Journal* 299 (Apr. 26).

"As inks are the means by which the business of the world is conducted, and through which its records are preserved, it is, of course, important that the inks used should be of as lasting a quality as possible; but it surely is not of less importance to be able to determine whether or not these ink records are really authentic, and are really what they purport to be. Nevertheless, there has not been published anything of definite value bearing on the solution of the question of the age of a given ink writing; and presumably the subject has not even been carefully investigated, with such solution in view."

This neglected problem of the age of writings is dealt with in this scientifically prepared article.

Railway Rates. "The Commerce Clause and Intra-state Rates." By William C. Coleman. 12 *Columbia Law Review* 321 (Apr.).

"If the Minnesota decision is right, are not previous decisions overthrown and is not a 'different kind' of commerce added to 'new modes' of commerce? But 'The Constitution has not changed. The power is the same,' until the people, not the courts, through the exercise of their power of amendment see fit to enlarge it, by changing the Constitution."

Recall of Judges. "The Judicial Recall." By Bruce B. McCay, *Century*, v. 84, p. 15 (May).

"What is the difference between the verdict of a mob rendered without a trial and the verdict of a majority arrived at by mere rumor and report?"

Real Property. "Estate Which a Trustee Takes." By Prof. Albert M. Kales. 6 *Illinois Law Review* 549 (Apr.).

Treating of what estate vests in the trustee, under a variety of possible circumstances varying with the terms of the conveyance and the implied objects of the trust. Lucid analysis of a highly technical subject.

"Capital and Income (Lifeowner and Remainderman)." By Walter Strachan. 28 *Law Quarterly Review* 175 (Apr.).

"I. Income as between lifeowner and remainderman includes such property or proprietary rights belonging to the trust estate as the lifeowner is entitled to by the express or implied terms of the trust instrument, by legal intendment, by the action of third parties, by statute, custom, usage, or otherwise.

"II. Capital as between lifeowner and remainderman is any proprietary right belonging to the trust estate to which the lifeowner is not entitled."

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Religious Freedom. "Religious Liberty in the United States." By Justice Andrew Alexander Bruce. 74 *Central Law Journal* 279 (Apr. 19).

"Freedom of religious thought and candid discussion and argument must, we believe, always be protected and guaranteed. In spite of the dicta of the so-called Girard Will Case, we believe that a bequest which should seek to create an institution in which a non-Christian religion should be taught would now be sustained, but it is questionable whether one would be sustained which should provide for the teaching of theories or practices which should be antagonistic to the basic morals of Christianity. With Mormonism, for instance, as a religion, the law can constitutionally find no fault, even though its priests may deny the authority of the Christian Scriptures, or the divinity of Christ. If, however, the Mormon under the color of religion, endeavors to teach the principles of polygamy, which is opposed to our moral senses and to what is the same thing, the morals taught by the New Testament, the courts can, perhaps, interfere, or at any rate, refuse their sanction and aid when called upon to enforce contracts or to validate testamentary bequests."

Roman Law. "The Gaian Fragment." By Joseph I. Kelly. 6 *Illinois Law Review* 561 (Apr.).

"The writer contends that his translation — 'every right that we exercise pertains either to persons, to things or to actions' — is supported by grammatical and logical interpretation. Every word is given its obvious meaning without ellipsis, addition or paraphrase. The translation concedes to Gaius a conception of rights which only the vanity of the moderns would deny him."

Shelley's Case. "Application of the Rule in *Shelley's* Case Where 'Heirs' in the Remainder to Heirs is Used as a Word of Purchase and Not as a Word of Limitation." By Albert M. Kales. 28 *Law Quarterly Review* 148 (Apr.).

Two conflicting theories are pointed out, one found in the English decisions, the other held by the Illinois Supreme Court. Neither theory, says Mr. Kales, should triumph over the other; "there should always be, in every jurisdiction, the possibility of getting results according to each theory until all possible variations which may occur have been passed upon."

See Real Property.

Torts. "Actions Arising Out of Injury to Both Person and Property." By William H. Loyd. 60 *Univ. of Pa. Law Review* 531 (May).

"Where a person is injured physically and his property is also injured by the same wrong act, does there arise but one cause of action for damages, or are there separate and independent causes of action, one for the injury to the person and another for the injury to the property?"

Trusts. See Cy Pres.

Workmen's Compensation. "A Problem in the Drafting of Workmen's Compensation Acts. III." By Francis H. Bohlen. 25 *Harvard Law Review* 517 (Apr.).

"It seems evident that the adoption of the phrase 'arising out of and in the course of the employment' is not calculated to secure certainty in the application of such acts, and so to prevent litigation or to eliminate fault on the part of the parties as a factor decisive of liability. . . . It would be altogether better, in view of the very unfortunate results attained in Great Britain, . . . to select some other words appropriate to accomplish the object in view, using the language of the English act as indicating what to avoid rather than what to copy. . . .

"The present article is meant solely to direct the attention of future legislators to the dangers that lurk in the blind assumption that since the English act has been in force for some years unamended, therefore it has worked satisfactorily and can be safely copied, and in the hope that with this plainly in view a more satisfactory phraseology can be found. There has been no lack of legal ability on the part of those who have drawn the acts already in force, and no doubt the problem would now be satisfactorily solved had not the question of the constitutionality of the whole scheme absorbed practically their entire attention to the exclusion of mere matters of draftsmanship."

"The Economic and Legal Basis of Compulsory Industrial Insurance for Workmen, II." By James Harrington Boyd. 10 *Michigan Law Review* 437 (Apr.).

Containing a full discussion, especially from the consitutional side, of the effect and legal validity of the Ohio Industrial Insurance Act of 1911, which is founded upon the German Industrial Insurance Law of 1884, which has been adopted in a more or less modified form in most European countries.

"The Dangers of State Insurance." By Hugh Hastings. *North American Review*, v. 195, p. 630 (May).

"For the state of New York or any other state in the United States the only law that seems applicable for the moment is one of simple compensation as a substitute for all other remedies except the common-law right to recover, through the civil courts, just damages for the consequences of wilful and unpardonable negligence. To make this law a compulsory one is as repugnant to the idea of the free-born American citizen as federal ownership of the railroads; therefore, while this law should be compulsory in effect, it should be elective in fact, and each employer, while required to insure, should be given the choice of doing it in the way most adaptable to his surroundings."

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Latest Important Cases

Criminal Law. *Double Jeopardy — Confrontation with Witnesses — Waiver — Philippine Bill of Rights.* U. S.

Where defendant had been convicted before a justice of the peace, in the Philippine Islands, of assault and battery, and the person assaulted subsequently died and defendant was convicted of homicide on evidence derived from the record of former proceedings, it was held, in *Dias* v. *U. S.*, 222 U. S. 574, that the prosecution of the accused, under such circumstances, for homicide, does not put him twice in jeopardy, in violation of the Bill of Rights of the Philippine Islands enacted by Congress in 1902.

It was also held that the right "to meet the witnesses face to face," under the Philippine Bill of Rights, is not infringed by a judgment of conviction of homicide resting in part upon testimony produced at the previous trial for assault and battery.

Under the Philippine Bill of Rights, moreover, one accused of an offense not capital, who is not in custody, and who was present when the trial was begun, may waive his right to be present at every stage of the proceedings, and the court is then free to proceed as if he were present.

The Court, Van Devanter, J., writing the opinion, professed to construe the foregoing rights under the Philippine fundamental law exactly as the same rights have been construed under the Constitution of the United States.

Lamar, J., dissented.

Dangerous Weapons. *Construction of Statutes — Sullivan Anti-Pistol Law — Bill of Rights.* N. Y.

The Sullivan anti-pistol law, in New York State, has been practically deprived of the effect sought by the Legislature or by judicial construction. Mr. Justice Gerard, in the Supreme Court of New York County, rendered a decision April 4, reading into the act the qualification that the weapon must be concealed in order to justify prosecution for a misdemeanor.

In the *Vigorito* case, it was charged that the defendant had entered a Turkish bath establishment and placed a revolver with his other valuables in a box provided by the management for that purpose. "The witness," said Justice Gerard, "did not see the petitioner take the revolver from his person and place it in his safe. The conjecture that the revolver was concealed, because the witness did not see it until he found it in the box, is not sufficient to convict of a criminal act."

The Court reviewed the construction placed upon the act by the courts since its passage. Supreme Court Justice Pendleton in *People ex rel. Darling* v. *Warden* held "that no police regulation could be enforced which encroached upon the rights of citizens which the Constitution intended to secure against abridgement." It was ruled that the possession of a firearm in one's home was an inalienable right.

In *People ex rel. Prince* v. *Fallon*, where a pawnbroker was prosecuted for exhibiting a revolver in his windows

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without a license, the judgment of the Supreme Court (Gavegan, J.) was that no offense had been committed.

Finally, the Court quoted the decision of the Court of Appeals in *People* v. *Pierce*. Here, in exonerating the owner of a pistol, the court ruled that "the act in question regards weapons used for criminal purposes, such as slingshots and sandbags, and not ordinary weapons employed for legitimate reasons and contemplated by the Constitution and the Bill of Rights." This reading, patently not in the mind of the framer of the Sullivan act, hedged in the law to application only in regard to such weapons as are associated with criminals.

Master and Servant. *Contract of Hiring at Will — Termination without Notice.* N. Y.

An agreement was entered into by the plaintiff, holding about one-third of the stock of a manufacturing corporation, and the defendant, owning two-thirds, whereby the defendant undertook to devote his whole time and attention to the business of the corporation, no period of employment being specified. After a short period the defendant left the employ of the plaintiff and started a competing business.

In *Watson* v. *Grigino*, decided by the New York Court of Appeals, March 8 (N. Y. Law Jour., Mar. 23), it was held that no time being specified, the contract was one of hiring at will, and the master had the right to discharge or the servant to leave at any time, without affording the other party any claim for damages. Consequently plaintiff could not recover.

The Court (Vann, J.) said: —

"The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England it is presumed to be a hiring for a year regardless of the nature of the service, unless there is a custom relating to the subject and it appears that the contract was made with reference to the custom (*Fawcett* v. *Cash*, 3 Nev. & Man., 177; *Littey* v. *Elwin*, 2 Ad. & El., 742; *Davis* v. *Marshall*, 4 L. T., N. S. 216). In some states a stipulation as to the method of payment, such as weekly, monthly or yearly, is held to denote the period of service contracted for (*Tatterson* v. *Suffolk Mfg. Co.*, 106 Mass., 56; *Franklin Mining Co.* v. *Harris*, 24 Mich., 116; *Beach* v. *Mullin*, 34 N. J. Law., 343). In this state the rule is settled that unless a definite period of service is specified in the contract the hiring is at will and the master has the right to discharge and the servant to leave at any time."

Procedure. *Technicalities of Pleading — Frivolous Objections to Indictment as Wanting Definiteness.* U. S.

Following its own precedents, and exhibiting a tendency that some of our state courts have been reluctant to follow, thereby subjecting themselves to the charge that they allow technicalities to obstruct justice, the United States in *Hendricks* v. *U.S.*, decided Feb. 19, refused to sustain what it called a frivolous contention that an indictment be set aside for technical uncertainty. The indictment charged subordination of perjury before a federal grand jury, and the Court refused to treat it as wanting definiteness merely because if did not set forth the matter under investigation by the grand jury or the name of a specified defendant under investigation. Mr. Chief Justice White wrote the opinion.

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The Editor's Bag

A NICE DISTINCTION

OUTSIDE the legal profession the only man who will not smile when he reads the Illinois Supreme Court decision, in the case against George Clark, charged with operating a confidence game, is John Dembinski, the victim of the game.

The decision in question reverses a verdict which provided a term in the penitentiary for Clark, and furnished, substantially, the only satisfaction Dembinski got out of the matter. As it was among a large number of opinions handed down when the court adjourned, it escaped the attention of the press, or, if seen, presented so small an element of news value that the mere title of the cause was given publication without comment.

The original indictment charged that Clark "did unlawfully and feloniously obtain from John Dembinski his money by means and by use of the confidence game." He was tried, and after a petit jury had declared him guilty, a sentence of ten years' imprisonment in the penitentiary was imposed upon him.

The case was appealed to the Supreme Court, Clark's counsel setting up the usual charges of irregularity in the process by which he was brought to justice, insisting that the indictment was faulty, that the trial was improperly held and that the finding was not justified. Particular emphasis was placed upon the form of the indictment, and it is upon this phase of the proceedings that the decision of the higher court rests.

The opinion declares that the presentment was indefinite inasmuch as it failed to point out whose money Clark secured from Dembinski! As indicated, the indictment says that Clark obtained "from Dembinski his money," and the court is possessed of the idea that this statement may have misled someone, being subject to misconstruction. The pronoun "his," it maintains, might as correctly refer to the defendant as to Dembinski. "It would be as easy," it continues, "to say that the defendant obtained his own money from Dembinski, as that he obtained the money of Dembinski."

That the opinion rendered in the case might be made still clearer, the court adds: "A conclusion that the pronoun referred to Dembinski rather than the defendant could only be sustained on the ground that the grand jury intended to charge the defendant with a crime."

Since, in the opinion of the court, so violent an assumption would be contrary to all rules of criminal pleading, it is wholly out of the question to figure that the grand jury was endeavoring to accuse Clark of doing something criminal when it indicted him. And since it has no other means of determining, from the indictment, whether the grand jury was trying to bring Clark to trial for getting Dembinski's money in an unlawful manner, or was simply

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recording the unusual circumstance of a man "unlawfully and feloniously" obtaining his own money, the trial is irregular and the case must be reversed.

Solely on account of that little pronoun "his," the arrest of the prisoner, the investigation of the grand jury, the trial and the judgment of a court of justice, must come to naught. Occurrences of this character, of course, are to be regretted.

We should add that Chief Justice Carter filed a dissenting opinion in this case, holding that it "seems clear to me that the pronoun 'his' referred to Dembinski and not to Clark."

GETTING AT THE FACTS

A LAWYER in a Southern court was examining a witness as matter-of-fact as himself. A fence was in some way connected with the case. The lawyer wished to impress upon the court and jury that the witness was perfectly familiar with that particular fence, and was, therefore, competent to speak of its condition. To that end he asked:

"Do you, or do you not, know the fence between the farms of Anthony Barker and Henry Morgan?"

"I do, sir."

"And have you at any time crawled under that fence?"

"Never, sir."

"Never?"

"Never, sir."

"Well, then, can you or can you not recall ever having crawled through that fence?"

"I cannot, sir."

"Perhaps you may be able to state positively whether you have or have not climbed over that fence."

"I have, sir."

"Now, remembering that you are under oath, you will state definitely to the court and jury precisely what part of that fence you climbed over."

"The top, sir."

TOO MUCH FOR HIS HONOR

SOME years ago the Supreme Court had to pass upon the case of *David Kawananakoa, Jonah Kalanianole, Abigale W. Kawananakoa and Elizabeth K. Kalanianole* v. *Ellen Albertina Polybland et al.*

Mr. Justice Holmes, who was to announce the decision of the court, hesitated at these names. Although announcing a decision of the supreme tribunal of the land he was obliged to acknowledge that he would have to forego the form of pronouncing the names. Accordingly he spoke as follows:—

"This is case no. 273, but I will not undertake to pronounce the names of the appellants, which are a matter of record."

No member of the court smiled in sympathy except Mr. Justice McKenna, but the assembled attorneys enjoyed the situation immensely.

IRRELEVANT TESTIMONY

AT A TERM of the circuit court in Iowa not long ago a "horse case" was on trial, and a well-known horseman was called as a witness.

"You saw this horse?" asked counsel for the defendant.

"Yes, sir, I —"

"What did you do?"

"I opened his mouth to ascertain his age, and I said to him, 'Old sport, there's a lot of life in you yet.' "

Whereupon counsel for the other side entered a vigorous protest. "Stop!" he cried. "Your honor, I object to any conversation carried on between the witness and the horse when the plaintiff was not present!"

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THE GENERAL'S DREAM

GENERAL "Joe" Geiger's fame, says an Ohio correspondent, was not confined to Ohio. It extended, in a way, from the Atlantic to the Pacific and from the Lakes to the Gulf. He was an inveterate wag, a small man physically, and made no pretense to any sort of personal beauty. While a member of the Ohio Senate, quite a number of years before the Civil War, a contest for the Major-Generalship of Militia was being protracted in that body by two or more aspirants, and at the psychological moment some member moved the election of Hon. Joseph H. Geiger to the position, and the joke became dead earnest — the "contest" ended as soon as a vote could be taken. Many years afterward, in an ex-soldier meeting in the Ohio capitol, his address followed the addresses of two ex-officers of the Civil War. In its course, he explained: "Now these gentlemen have seen actual war and lots of it; I never was in battle. They had to fight for their titles; mine was the result of skill and dexterity."

Again, presently, he said, "It must not be concluded, however, that I have not suffered for my country, because I have done so. When Kirby Smith was threatening Cincinnati in September, 1862, I was one of the Squirrel Hunters who went to the defense of that city, and all the saloons were closed all the time we were there. Just think how I must have suffered!"

These will introduce the General anew and bring us to one of his unnumbered stories still floating about twenty years after he passed on.

In certain branches of the law he was formidable, but the less he was required to tumble over the books, the better he liked the practice.

Across the street from his residence was that of E., one of his very warmest friends, who never entered a trial unprepared, a splendid, all-round lawyer, resident of the silent city for years now.

Coming down city one morning, the General said he had dreamed the night before that he had died and gone to Heaven; that when he reached the gate and expected an easy entrance, St. Peter stopped him.

"What is your name?"

"Gen. Joseph H. Geiger."

"Where are you from?"

"Columbus, Ohio."

"What is your occupation?"

"I'm a lawyer."

"Well, you can't come in here."

Thereupon he stepped one side and sat down a good deal disconcerted and undecided what was best to do.

While he was waiting and trying to think, up came his neighbor E., who went through the same sort of catechism, with the same answers, but to his amazement, the gate swung open and E. entered.

Resenting the apparent injustice in his exclusion, he proceeded to call the doorkeeper to account and demanded to know the ground of the discrimination, saying, "I come from the same city, about the same time and have the same occupation, and here you turn me down because I am a lawyer, and let him in; why is it?"

"Oh," said St. Peter, "he's no lawyer; he only *thinks* he's a lawyer."

ONE AT A TIME

A JUSTICE of the peace was holding court in a little Missouri town. One of the attending counsel held against him an old grudge. While the Justice was delivering an opinion he was interrupted by the braying of a jackass without.

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"What noise is that?" shouted the Justice, full of suspicion that the unfriendly attorney was putting up a job on him.

"It is only the echo of the Court, your Honor," said the attorney, smiling.

Not in the least disconcerted, the Justice resumed his delivery. Soon, however, the attorney interposed with technical objections, just as the jack brayed again.

"Hold on!" retorted the retaliating Justice; "one at a time, if you please."

"LACKED THE ESSENTIAL ELEMENT OF TRUTH"

IN THE thirties of the last century there were among the lawyers of the eastern Ohio border two of the strongest, both of whom had made enduring records at the bar and on the bench and between whom a sort of Damon and Pythias relation long subsisted.

T. was fiery, quick tempered and tenacious in his likes and dislikes, once taken, though always eminently just at the bar or on the bench; the other, W., was mild, amiable and slow to anger — a just man and true. Along toward middle life, on the motion of T., they agreed that when either was of opinion that he noticed any weakening or breaking down of the mental power of the other, he should privately advise him of it and the act should not be resented or taken amiss.

Years ran along; the three-score and ten had come and gone with each and they were still active in the profession and in prominent offices. One day they met in Steubenville, their former common home city, and in the course of a conversation W. said, "You remember, T., the agreement we made some twenty years or more ago?"

"Yes."

"Well, I've been watching you lately and I've come to the conclusion that it is my duty, under that agreement, to tell you that I have observed some evidences of failing mental power, on your part; you don't seem to —"

T.: "You're a d —— d liar!"

And so the cordiality of a life-long friendship came to an end.

HAPPENINGS IN COURT

I

THE old attorney had apparently exhausted every method of discrediting the witness, and with no apparent success. Then hesitating as if in deep thought for a few moments, he continued in a low satirical tone as follows: —

"Mr. Garibaldi, I just want to ask you a few more questions, which I want you to answer plainly and specifically: Is there a woman living with you who is known in your neighborhood by the name of Mrs. Garibaldi?"

"Yes, sir," replied the witness.

"Who takes care of her?"

"I do."

"And you support her, too, don't you?"

"Yes, sir."

"Mr. Garibaldi, you have never been married to her, have you?"

"No, no," smiled the witness somewhat embarassed, "she —"

"That is all," concluded the old attorney.

There was a young attorney opposing him, and it was evident that he had been taken by surprise. Confounded and confused he stepped forward, and in a low, somewhat reproachful tone, asked: "Mr. Garibaldi, who is that woman? You never told me anything about her."

"That — oh, that is my mother, you know," answered the witness innocently.

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II

Recently before a General Court Martial at Fort Sheridan, Ill., a Jew was called to testify and establish his title to some stolen property. When he took the witness stand the President of the Court, an old Colonel, addressed him as follows:—

"Will you please rise and be sworn."

The witness, smiling an assent, rose from his seat, put on his low-brimmed hat, raised his right hand, and adjusted his face in pleasurable expectation.

"Take off your hat," ordered the Colonel.

"Very vell," responded the Hebrew, slowly obeying.

"Now be sworn," directed the Colonel.

Casting furtive glances at the Colonel, the witness cautiously put on his hat again and raised his hand.

"Take off your hat and be sworn," roared the Colonel in anger.

The witness trembled, and in a sorrowful voice said:

"Vell, I can svear vithout my hat on, but it is no good. I vants a good svear, because I vants my property."

"Put on your hat then!" thundered the Colonel.

III

RUDOLPH, the office boy, was sent over to court to have the case continued when called.

"On what ground do you want a continuance, "asked the judge.

"Well, I don't know — I just want a continuance, that is all — I don't know on what ground," replied he rather embarassed.

"But you must have some ground or you can't get a continuance here. Haven't you any defense, or —"

"No — no, that is the ground —no defense. My brother said he didn't have any, but if he could get a continuance for a month he probably could find some way to beat a judgment on it."

IV

THE office boy was sent over by the attorney for the defendant to watch the call of the case for trial, with the positive instructions not to let the plaintiff get a judgment, but to defeat him in any possible way and to have the case continued and set as far ahead as possible.

The boy did not return to the office until next morning, when the attorney said to him: "I see by the Law Bulletin that you got a continuance in that case until the last day of next month. I want to compliment you on your good work. I was afraid I would have to let them take a judgment against me."

The lad's chest swelled with pride, as he proudly said, "Yes, I tell you I had a hard time to do it though. You see the plaintiff did not show up, and the judge kept insisting continually that he would dismiss the suit on him. I resisted it successfully every time, and not until I had waited all day for the plaintiff to show up would he give me the continuance I asked for."

"What!" roared the attorney. "The judge wanted to dismiss, and you wouldn't let him?"

"Yes, sir — no, sir —" stammered the boy. "He insisted upon dismissing it, yes, sir, but you told me to get a continuance, and I got it — twice as long as you asked for, too. Wasn't it right?"

HIS AUTHORITY

AT THE trial of a cause before a justice of the peace in a Southern state, a decidedly novel legal authority

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was cited by one of the learned counsel, a citation which wrought some slight confusion in the court-room.

"The Court will please observe," remarked this acute counsel, with much deliberation and in a most pompous manner, "that in the case of *Shylock* v. *Antonio*, although judgment was rendered in favor of the plaintiff, yet circumstances prevented the execution which had issued from being carried into effect, in spite of that fact."

"To what cause," inquired the justice, with a face overspread with perplexity, "did the Court understand the gentleman to refer?"

"*Shylock* v. *Antonio*, 2d Shakspere, page 235, Johnson's edition," returned the counsel, solemnly. "The Court will there find the case reported in full."

The Court unfortunately did not, upon reflection, consider the authority quoted as quite sufficient.

SHE WAS THE CHAMPION

ABOUT the best witness that figured in a case tried not long ago in a Toledo court was a big colored woman, of truly Amazonian proportions. This woman proved such a good witness for the plaintiff that the attorney for the defense planned to vitiate her testimony by "showing her up."

"You yourself have been arrested, have you not?" he began in cross-examination.

"Look a-heah!" exclaimed the dusky stalwart, "does yo' think Ise gwine to tell yo' mah private business. I guess not!"

"I have the right to know, and you must tell me," the lawyer persisted, and the Judge instructed the witness that she would have to answer.

"Ise been arrested fo' lickin' mah husband," the woman finally said, her eyes flashing.

"Is that so?" queried the attorney, with satisfaction. "What is your husband's name?"

She told him.

"What is his business?"

"He's a prize fightah," she added, and amid the general merriment that ensued the cross-examination suddenly ended.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

Louis S. Thierry, a Boston lawyer, is always telling his friends that "the jury system needs toning up." When they ask why, he retails the following story and vouches for it. Two pleaders met on Pemberton square, one of them raging: —

"Why," said "I" — "the jury meets at 4, and it meets at 10, and I haven't got my witnesses ready. What in —— shall I do? Six hours earlier than I expected."

"Don't mind," consoled "C." "My jury meets at 10, and it meets at 4 — six hours later than I expected. Let's swap witnesses. You take mine, and I'll take yours." — *Boston Herald.*

The Chicago woman was on the witness stand. "Are you married or unmarried?" thundered the counsel for the defense. "Unmarried, four times," replied the witness, unblushingly.

— *Philadelphia Record.*

Judge Parry's book, "Judgment in Vacation," is full of good stories. He explains that before leaving the bench he always makes a point of inquiring whether anyone has any special application to make. It seems that in his early days, a man applied the first thing in the morning, and complained that he sat the whole of

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the previous day in court. Judge Parry inquired, "Why did you not apply to me at the end of the day?"

"I was just getting up to speak," said the man, "but you was off your chair and bolted through your door like a blooming rabbit."

—*London Law Notes.*

Magistrate. — "What is the charge against this old man?"

Officer. — "Stealing some brimstone, your Honor. He was caught in the act."

Magistrate (to prisoner). — "My aged friend, couldn't you have waited a few years longer?"

— *Chicago Tribune.*

Correspondence

CORRECTION FROM A WIG MAKER IN DUBLIN

To the Editor of the Green Bag: —

In your article, "A Wig Shop in the Temple," in the *Green Bag* of April, 1912, you state that there are only two or three wig makers in the world, all in London, a remark which I would wish to contradict, as the business which I carry on has been in my family since 1760 and I still supply all the wigs for the Irish Bar, either long or short, as well as every description of legal gown and brief bag.

I remain,

Yours truly,

S. A. BLACK

Dublin, May 9, 1912.

[We of course had no intention to ignore a business which has had an ancient and remarkable history. Our correspondent, the "Bar Wig and Robe Maker to the Hon. Society of Benchers and the Bar of Ireland," will perhaps excuse our ignorance of matters lying somewhat outside the province of an American law journal. —*Ed.*]

A NATIONAL CODE OF PROCEDURE

To the Editor of the Green Bag: —

While so much is being said about reform of code procedure, I take it that the profession will be glad to hear from anybody who can, or thinks he can, advance an idea toward the betterment of jurisprudence along these lines.

It seems to me that what we need is not so much reform as uniformity in procedure. It is true that the old technical rules of procedure, especially of pleadings, should be abolished, so far as is practicable and consistent with the sensible and at the same time *certain* administration of justice. The idea of requiring a party to reply to an answer containing neither a set-off, counter-claim nor a cross petition, simply because an opposing counsel chooses to plead facts or matters which he could prove under the general denial, instead of having these matters denied by operation of law, is ridiculous — but this practice prevails in many states.

The idea, too, of requiring counsel to move to strike arguments and expatiations of an opposing counsel from a pleading, or run the risk of having them admitted on him, if he does not fully deny them, is both unreasonable, dilatory and unjust. If parties sufficiently plead so that each know what the other claims, it should be sufficient. Many other things in pleading at present are very faulty.

Writs, also, need reforming and some of them abolishing. Why should a party be required to test the illegal acts, or the acts done *without jurisdiction* of a court, officer, or municipal body, by *certiorari* under the codes of some states? If the act so done is final, it is

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void *ab initio* and confers no rights; and all parties are presumed to act with reference to and knowledge of the legal right of a court, officer or municipal body, and of its or his jurisdiction. If the matter done is interlocutory or intermediate, redress should be obtained by appeal. Many other things in writs are defective, and some of the writs need abolishing.

But all this is foreign to my subject. What I was going to say is that we need a code of procedure applicable to every state, and to any court in any state in the Union. A national code of procedure if you please. I hear you say that this is impossible. It is nothing of the sort. Mind, I do not mean that this national code be made to apply to special proceedings such as election contests, etc., as this would involve a national *jurisprudence*, a thing I concede to be visionary. But it is not impossible for us to have a systematic and uniform code of procedure dealing with general procedure. Why should the grounds for a general attachment be different in the various states; and why the proceedings to obtain that attachment and matters thereunder? It could just as well be regulated by a code adopted to the use of each state as to one. So with all provisional and extraordinary remedies. So with parties to actions, manner of commencing actions, process, venue of actions, trial, verdict, judgment, new trial, appeal, proceedings upon appeal both from inferior and to higher courts. So with pleadings, and writs, and all other matters relating to General Procedure in courts, not affecting or relating to special proceedings given under a special chapter relating to a particular subject, such as elections, stock running at large, and others similar.

But I hear you say, how about the judicial constructions of this fanciful code? Will they not be as various as the judicial minds of the various courts? Perhaps, sir, you are slightly right — at least you have found an *apparent* objection, which can, however, be answered. It is true that such a code would necessarily be construed by the various courts of the Union in the various actions, and perhaps, or even probably, the construction of the states might differ somewhat and in some instances.

However, this could easily be remedied by a law book gotten up by some of the large companies, or perhaps all of them would have one, giving each section of the code, and its construction as given by the various courts of the states; and this book could even separate the states, and give each under its name, and identify the section construed of course.

It can readily be seen that the advantage of such a code would be far-reaching. It would enable any lawyer in any state to practise law in any other state, without being forced to employ a lawyer in the foreign state to attend to the case; or in other words it would make a general code for a lawyer to understand, after which he would be *equal* to all other lawyers anywhere, at least as to the matter of procedure. It would enable a lawyer to go to any state at any time and commence practising where he left off in the other state, if he wanted to change his home. It would prevent a lawyer at forty-five from feeling himself a prisoner in the state wherein he had been practising for twenty years, and enable him to go elsewhere if he so desired. It would, also, be beneficial to the client; for who does not know how often a client loses his rights by mistreatment of a foreign lawyer chosen from a book, or by refraining to sue rather than to be forced to employ some

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lawyer at a distance whom he does not trust?

How can this code be obtained, is perhaps the most difficult question. I answer by concerted action of the lawyers in every state. Let the bar associations of each state take the matter in hand, and arrange for a convention to consider the matter in all its forms; and if that convention deems it advisable let the legislature of each state authorize the Governor of each state to appoint a certain number of eminent lawyers, and let the entire number so chosen by the various Governors constitute a commission to meet where agreed on, and formulate a *simplified and national code*, the expense of each member and his compensation to be fixed and paid by the legislature of his state. Let them take time, and do the thing right, if it takes a year or so — it will be worth the money; and then let each legislature adopt the code returned by the commission as "the code of procedure of the state," the result of the brains of some of the best and most eminent lawyers in the Nation; and the thing is done.

All this will take time. But the thing is worth it, and now is the time to start.

LEV RUSSELL.

St. Louis, May 8, 1912

The Legal World

Monthly Analysis of Leading Events

The month has seen a great deal of hard fighting for possession of the state delegations in the coming Presidential conventions, and political controversy has taken up so large a share of the thoughts of the public that even other matters, commonly treated as non-political, seem to be tinged with more or less of a political interest. The month has had few notable developments. The chief happenings of the month indicate the prevalence of a widespread political unrest.

The passage of the anti-injunction bill by the lower House of Congress has significance chiefly from the labor standpoint, and political motives have no doubt played an important part in the investigation of Judge Archbald of the Commerce Court. It is impossible to determine just what foundation there is for the serious charges against him, and there is ground for the suspicion that the object of the proceedings is quite as much to discredit the Commerce Court, and to bring about its abolition, as to prove Judge Archbald guilty of improper conduct.

The Industrial Workers of the World still occupy a prominent place in the public eye, and the issue of "free speech" in Los Angeles is not the only one which has been seized upon by demagogic agitators. United States District Judge Hanford of Tacoma has been bitterly denounced for denying naturalization to one Olsson, on the ground that Olsson's socialistic opinions rendered it impossible for him to fulfill his oath of allegiance to the Constitution. The real point of the controversy seems to have been overlooked. Olsson declared himself a member of the Industrial Workers of the World, an organization suspected of a purpose to achieve its ends through unlawful violence than by peaceable means, and the real ques-

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tion is therefore that of Olsson's inclination to obey the laws of this country, rather than whether he considers those laws just or unjust.

Apart from these political or social developments, there has perhaps been some slight progresss toward more efficient administration of the law. The new legislation bringing about certain reforms in the Boston Municipal Court, though not so far-reaching as to place that court on a par with the Chicago court in efficiency, will bring about some highly beneficial results. The agitation led by Police Commissioner Waldo in New York City must also tend to exact a higher standard of efficiency from the judges of the Court of General Sessions in that city.

The passage by the Senate of the federal Employers' Liability bill is a triumph for the Taft administration, and marks a step in wholesomely progressive legislation.

Personal

At the May meeting of the Yale Corporation John W. Edgerton, Secretary of the Yale Law School since 1903, was appointed Professor of Mercantile Law.

George Grafton Wilson, Professor of International Law at Harvard University, has been appointed by the Harvard Corporation exchange professor to France for the year 1912–13.

Mr. Justice Mahlon Pitney was tendered a complimentary dinner April 27 at Newark, N. J., by four hundred members of the bench and bar of New Jersey. The speakers were Mr. Justice Hughes, Chancellor Edwin Robert Walker, Chief Justice William S. Gummere, Attorney-General Edmund Wilson, Robert H. McCarter, former Attorney-General, acted as toast-master.

A portrait of Judge Peter Grosscup was hung in the United States Circuit Court of Appeals at Chicago, beside other paintings of judges on April 23, under the auspices of the American Bar Association, addresses being made by Stephen S. Gregory, president of the Association, John S. Miller, and Judge Francis E. Baker. The portrait was painted by Lawton S. Barker.

Dean John H. Wigmore, speaking recently before young men at the Chicago Y. M. C. A., gave the following estimate: about sixteen-twentieths of the lawyers in Chicago make from $1,000 to $3,000 a year. One-twentieth make $4,000, one-twentieth $5,000, one-twentieth $6,000 or more. There are not over forty lawyers in the city who make more than $10,000 a year.

Charles H. Burr, of the Philadelphia law firm of Burr, Brown & Loyd, was awarded the H. W. Phillip's prize of $2,000 on April 20, by the American Philosophical Society, for the best essay on "The Treaty-making Power of the United States." Nine essays were submitted. At the banquet at which the award was announced, toasts were responded to by Professor Charles P. Chandler, Professor John Bassett Moore, Charlemagne Tower, Professor James Brown Scott and Mr. Burr.

Judge Elbert H. Gary, chairman of the United States Steel Corporation, speaking as president of the American Iron and Steel Institute at its annual meeting in New York May 17, prophesied the early repeal of the Sherman anti-trust law and announced himself a progressive in politics as well as in business. "Competition is necessary," he said, "but I do not believe in de-

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structive competition, and neither am I in favor of secrecy in the steel business. The name progressive is not dangerous. Because a man is called a progressive it does not mean that he is a demagogue or a socialist or an anarchist."

Bar Associations

New York County. — The New York County Lawyers' Association, at its annual meeting May 9 at the Hotel Astor, adopted an amendment to its by-laws creating a Committee of Twenty-one on Patents and Trade marks.

Abram I. Elkus offered through the Committee on Calendar Practice the suggestion, which was heartily applauded that the Court of Appeals be asked to make a proposed reform in the equity calendar practice, whereby each equity case as it arises be appointed to one of the twenty-one Supreme Court Justices in the county. This Justice would then pass on each motion, demurrer, etc., in the case as it was brought up and would try it when it reached that stage. This reform, he said, was founded on the English system. The association also adopted a resolution for the creation of a special committee to pass on constitutional amendments dealing with employers' liability. Action was also taken urging a new federal Court House in New York City. Joseph H. Choate was elected president of the association Charles F. Brown, Thomas H. Hubbard and Benjamin N. Cardozo, vice-presidents, Charles Strauss was re-elected secretary, and Edward M. Grout was elected treasurer.

Illinois. — The Illinois State Bar Association took a vote by mail recently on the "recall" propositions debated at the session on the evening of April 26. Only a little over one-third of the members of the association voted, but the result is of interest: For the recall of judges in Illinois, 110; against the recall of judges in Illinois, 549; for the recall of judicial decisions involving constitutional questions in Illinois, 145; against the recall of judicial decisions involving constitutional questions in Illinois, 517.

Nebraska. — The dates and place for the next annual meeting of the Nebraska State Bar Association have been fixed as June 27–28, 1912, at Cedar Rapids.

North Carolina. — The annual meeting will be held June 25–7, at a place later to be announced.

Pennsylvania. — The eighteenth annual meeting of the Pennsylvania Bar Association will be held at Cape May, N. J., on Tuesday, June 25–27. George R. Bedford, of Wilkes-Barre, will deliver the President's address, and the annual address will be delivered by William D. Guthrie, of the New York bar, on "Constitutional Morality." Papers will be read by Cyrus G. Derr of Reading, on "The Best of Our Knowledge, Information and Belief," and by Henry Budd, of Philadelphia, on "Decisions, Reports and Some Reporters."

Procedure

Two bills making changes in the Boston Municipal Court have become law. It is provided that there shall be but one trial on the facts in a civil case. A defendant who desires a jury trial must file his claim within four days. An appellate division is created, and while an appeal is allowed to the Supreme Judicial Court, it is not believed that the privilege will be often exercised. The new system tends greatly to expedite and simplify procedure in the municipal court.

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The present system of procedure in the Circuit and Superior courts of Cook County, Illinois,— the plan of rotating judges, shifting them from one department to another — was attacked by Professor Albert M. Kales, of Northwestern University, in an address before the Illinois branch of the American Institute of Criminal Law and Criminology on May 10. Not only did he attack the methods of the courts, but also the state law which created the two higher courts for Chicago, stating that the system outlined in that law was wrong from start to finish.

Supreme Court Justice Giegerich, who has repeatedly expressed himself, during the current year, about the evil of the "Lawyer's Delays" in the courts of New York County availed himself on May 21 of an unprecedented method of hurrying the procrastinating lawyers. In the regular records of the court he made public the reasons why business in six cases had remained unfinished, as a result of the widespread custom of lawyers to put off for months perfunctory details which are necessary before a case can be disposed of. The Court singled out six cases which had been tried before him last February. In two of them the Court had ordered that copies of the decision should be signed by the attorneys of both sides and submitted to him for his signature. These orders had not been complied with, though weeks had elapsed. In another case a settlement was arranged out of court and no notice sent to Justice Giegerich, so that this case also remained to clog the court which was awaiting the submission of the evidence. In two cases orders were sent to the attorneys last February to submit findngs and briefs immediately, and the awyers had not been heard from. Such a publication of the reasons for delay, fixing the blame where it belongs, cannot fail to have a salutary effect.

Criminal Law

A laboratory for the study of criminals, on the general plan advocated by Arthur MacDonald of Washington, has recently been established in Russia, with a somewhat similar relation to the Russian government as that of the Smithsonian Institution to the United States government. It is understood that about $750,000 has been set aside by Russia for the purpose. Other countries have promised consideration. The scheme includes investigation by use of instruments of precision and the obtaining of all important facts regarding the individual and his surroundings. Referring to the prominence which he has given to physical investigations, Dr. MacDonald explains, in a recent article, that "The preference in criminal anthropology for the study of the physical side of the criminal is mainly chronological. For in any new line of work, one must begin in some place, and since already anthropology has produced a large number of physical data, and since such data are usually more definite in nature, they were naturally first considered. It is therefore more a matter of convenience than importance of investigations that the physical side receives more attention. Another reason for this preference is that psychology has not as yet, like anthropology, established a sufficient number of facts to be called a science in the rigid sense."

Police Commissioner Waldo and Commissioner of Accounts Fosdick of New York lately combined in an attack on what they called the abuse of power by the judges of the Court of General Ses-

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sions, in which most of New York's criminals are sentenced. Judge Mulqueen was made to bear the brunt of the charges. He holds the record of 125 sentences suspended during 1911, 48 being of convicts guilty of grand larceny, and 36 of burglars. The charges, however, have related chiefly to cases in which evidence was disregarded by the court, and the jury was directed to acquit the prisoner. Not only Judge Mulqueen, but also other judges of General Sessions, have been under investigation by the Grievance Committee of the Bar Association. The charges raise the question not of the soundness of the systems of suspended and indeterminate sentences, so much as of the manner in which it has been administered. It is impossible to draw any conclusions from the facts already made public which are certain to be fair to the judges whose intelligence and integrity are questioned. The main point to be settled in the present controversy is whether the action of the judges under investigation supplies any definite basis for the report, long current in the New York Police Department, that there are certain "political" judges who deal leniently with cases of prisoners and can bring the influence of politicians and district leaders to bear to get off criminals.

The Lake Mohonk Conference

The eighteenth annual session of the Lake Mohonk Conference on International Arbitration was held at Mohonk Lake, N. Y., May 15–17. The opening address was delivered by Dr. Nicholas Murray Butler, president of Columbia University, and head of the Association for International Conciliation, on "The International Mind." He said in part:

"The consideration by the Senate of the United States of the projected treaties of general arbitration with Great Britain and with France came to a rather lame and impotent conclusion. The debate, fortunately conducted in open session, revealed that few members of the Senate have any real grasp of our international relations or any genuine appreciation of our international responsibilities. . . .

"We must learn to bring to the consideration of public business in its international aspects what I may call the international mind, and the international mind is still rarely to be found in high places. That the international mind is not inconsistent with sincere and devoted patriotism is clearly shown by the history of the great Liberal statesmen of the nineteenth century who had to deal with the making of Europe as we know it. If Lord Palmerston had the international mind at all, surely Mr. Gladstone had it in high degree. The late Marquis of Salisbury, whom no one ever accused of lacking devotion to national policies and purposes, had it also, although a Tory of the Tories. Cavour certainly had it, as did Thiers. Lord Morley has it, and so has his colleague Lord Haldane. The late Senator Hoar had it when on a somewhat important occasion he expressed the hope that he should never so act as to place his country's interests above his country's honor. It was the possession of this international mind that gave to the brilliant administrations of Secretary Hay and Secretary Root their distinction and their success. The lack of it has marked other administrations of foreign affairs, both in the United States and in European countries, either with failure or with continuing and strident friction."

Other addresses were delivered by Samuel T. Dutton of New York, Dr. Benjamin F. Trueblood of Washing-

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ton, Dr. Albert Gobat of Berne, Switzerland; and H. A. Powell of St. Johns, N. B.

The principal speaker at the second day's session was Mr. Justice William Renwick Riddell of the King's Bench of Ontario. His subject was "Treaties Affecting the United States and Canada." He reviewed the treaties of arbitration affecting the United States and Canada since 1794, and pointed out that of nineteen treaties thirteen had been markedly successful.

John Ball Osborne, Chief of the Bureau of Trade Relations of the Department of Trade, addressed the conference on "The Settlement of Commercial Disputes Between Nations by an International Court."

William Cullen Dennis of the District of Columbia bar, formerly agent of the United States in the Orinoco Steamship and Chamizal arbitrations, spoke on the recent arbitration treaties with Great Britain and France.

Dr. Otfried Nippold, Professor of International Law in Berne University Switzerland, spoke on "Winning Germany for Peace." He said: "The endeavors to secure world peace can only be fully successful if all nations take part in them. The chief work must be done in Germany. For if we have taken Germany, we have taken the world.

The third and last day's session furnished the occasion for addresses by Samuel B. Capen of Boston; William C. Deming, editor of the Wyoming *Tribune*, Cheyenne; President Henry C. White of the University of Georgia; Dr. John H. Gray of the University of Minnesota; Selden P. Spencer of St. Louis, former judge of the United States Circuit Court; United States Commissioner of Labor Charles P. Neill; Hamilton Holt of New York; Dr. Dunbar Rowland of Jackson, Miss.; and the Rev. Frederick Lynch of New York. The conference prize for the best essay on international arbitration was presented to the winner, John K. Starkweather of Denver, Col., a student at Brown University. Miss Eunice Peters of Chicago was presented with the prize for the best woman's essay on peace.

International Law and Arbitration

In an unostentatious way the American and British governments have put into operation a scheme for the settlement by arbitration of a large number of pecuniary claims preferred by individual citizens and corporations against both governments. Already the two governments have agreed to arbitrate over two hundred claims of American citizens against Great Bristain and about one hundred claims of British subjects against the United States.

The general arbitration treaties between the United States, Great Britain and France were the basis of some of the most important papers read before the American Society of International Law at its sixth meeting, held in Washington, D. C., April 25–27. "Notwithstanding past failures," said Richard Olney of Massachusetts, "it is not believed that the United States should be deemed to be irrevocably committed to the position that it will make no general arbitration treaty which does not exclude from its operation what are claimed to be non-arbitrable questions." He took the position that there is no controlling reason why representatives of the United States at the next Hague conference may not propose a draft of treaty between nations which might be so framed as to minimize if not remove the objections to making all controversies at least prima facie arbitrable.

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Workmen's Compensation

The Illinois Workmen's Compensation Act went into force May 1, when all employers who did not file their rejection of the act with the State Bureau of Labor Statistics came under the act. Colin C. H. Fyffe, general counsel of the Illinois Manufacturers' Association has been requested to raise the question before the Supreme Court of Illinois of the constitutionality of the statute.

After many years of agitation the Senate passed the employers' liability and workmen's compensation bill, on May 7, by a vote of 64 to 15. The measure is regarded as the most important legislation of the session. The bill is the product of a special commission authorized under the administration of President Roosevelt. Senator George Sutherland of Utah is the chairman and Senator Chamberlin of Oregon, W. C. Brown, Congresssman Moon, and Congressman Brantley were other members. The bill is intended, according to its title, "to provide an exclusive remedy and compensation for accidental injuries resulting in disability or death to employees of common carriers by railroads engaged in interstate or foreign commerce or in the District of Columbia." The third section of the bill makes the remedy exclusive by providing that "except as provided herein no such employer shall be civilly liable for any personal injury to or death of any such employee resulting from any such accident."

Miscellaneous

The movement for the amendment of the Constitution so as to provide for the popular election of United States Senators reached an important stage of development May 13, when the national House accepted the Bristow amendment to its own resolution, putting the control of Senatorial elections into the hands of Congress, just as now the Constitution places the election of representatives. This put the two branches of Congress in harmony upon this matter and disposed of a point of controversy that had kept them apart for some time.

The long delayed trial of the Government's suit in equity for the dissolution of the American Sugar Refining Company and its subsidiaries, known as the Sugar Trust, began May 14 in New York before Wilson B. Brice as special examiner. In appointing Mr. Brice the judges of the United States Circuit Court of Appeals, who under the expedition act will pass directly upon the case on the testimony gathered before Mr. Brice, allowed sixty days to the Government for the introduction of its evidence, one hundred and five days to the defense for answering testimony, and thirty days each for rebuttal.

Following a meeting of the Executive Council of the Department of Regulation of Interstate and Municipal Utilities of the National Civic Federation, it was announced that R. H. Whitten, librarian-statistician of the New York Public Service Commission for the first distirct, had been secured for approximately four months' special investigating work into the matter of public service corporations in England. Mr. Whitten has gone to London, and in his investigation particular emphasis will be given to the questitions of profit-sharing, the sliding scale and control of capitalization. Mr. Whitten is the author of a number of volumes on public utilities questions, his latest work being "Valuation of Public Service Corporations."

President Taft sent a special message to Congress May 11 asking for legisla-

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tion to authorize him to appoint a commission to investigate the patent laws and report what changes were necessary to make them fit modern conditions. The President gave several reasons to show the need for a change. He referred to the recent "patent monopoly" decision by the Supreme Court, and enumerated five other reasons which he said demanded the revision of the patent law. The first was that large corporations bought patents for improvements and suppressed their manufacture. The President urged that procedure under the patent laws be simplified and that the burden of proving the invalidity of a patent be placed upon him who would infringe upon it.

Obituary

Eaton, Daniel Cady, who died at New Haven May 11, was for many years Professor of the History and Criticism of Art at Yale University, being made Professor Emeritus in 1907. He was a graduate of the Albany Law School.

Griswold, Stephen B. for thirty-seven years librarian of the New York State Law Library, died May 4, aged seventy-six. When he took charge, in 1875, the library was composed of 20,000 volumes, and when he retired, in 1905, it had grown to 81,000 volumes.

Mabee, J. P., chairman of the Dominion Board of Railway Commissioners, died at Toronto May 6, following an operation for appendicitis. Before becoming Chief Railway Commissioner he was a Judge of the High Court of Justice, Ontario.

McClure, David, a prominent member of the New York bar, who had declined appointments to the highest courts of the state, died April 30, aged sixty-three. He had served many large corporations as counsel, and had held important receiverships and other judicial commissions.

Morgan, D. E., former Chief Justice of the Supreme Court of North Dakota, died in California May 11. He was a native of Ohio, and first practised law at Grand Forks, N. D. Later he went into partnership with A. H. Noyes of Minneapolis, and later returned to North Dakota, where he established an office at Devils Lake. In 1883 he entered into partnership with Judge McGee, now district judge. In 1908 he was elected to the Supreme Court and served in that capacity until last year.

Poor, C. L., president of the *Burlington* (Ia.) *Hawk-Eye*, and City Solicitor of Burlington, died May 12, at the age of sixty-six. He was one of the best known members of the legal profession in Iowa.

Reavis, James Bradley, former Justice of the Supreme Court for the state of Washington, died April 29 at Tacoma, in his seventy-fourth year. He was a native of Missouri, and went to the Pacific Coast in 1874. In 1880 he entered law practice in Tacoma in partnership with R. O. Dunbar, now Chief Justice of the Supreme Court of Washington. He was a Regent of the University of Washington shortly after the state was admitted to the Union.

Walton, Major Clifford S. who died at Washington, D. C., May 15, had served on a number of international law commissions, including controversies between the United States and Peru, Chile and Salvador, and was the author of the "The Civil Law in Spain and Spanish America." He was often called into various courts as an expert on civil and international law matters.

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VISCOUNT HALDANE

THE NEW LORD CHANCELLOR

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London Stereoscopic Co.

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The Green Bag

Volume XXIV July, 1912 Number 7

The Proposed Patent Law Amendments

By Gilbert H. Montague
of the New York Bar

I

FOR several months, proposals to amend the patent laws have been engaging the attention of Congress.

Several bills propose to enable anybody, during the life of a patent, to apply to the Commissioner of Patents for a license to make, construct, use and sell the patented article, and to compel the patent owner to grant a license to any applicant, upon such terms and for such royalty as the Commissioner "deems just." Even though one or more licenses have previously been granted, the patent owner would nevertheless be obliged to grant a license to anybody who thereafter applied for one.

Several bills provide that unless the patent is worked within four years after it is issued, or "unless the owner shall show sufficient cause for such inaction," the patent owner must grant to any applicant a license to use the patent invention; and in the event of the refusal of the patent owner so to do, the District Court shall hear the applicant, and if satisfied that "the reasonable requirements of the public in reference to the invention have not been satisfied," the court shall compel the patent owner to grant a license to the applicant upon such terms and for such royalty as the court "deems just." These bills also provide that at any time during the life of a patent, whenever "a material and substantial improvement shall be patented, the manufacture of which would be an infringement on the original patent," the owner of an improvement may, upon application to the court, compel, in like fashion, the owner of the original patent to grant a license to enable such improvement to be manufactured.

These bills, in one form or another, all provide for so-called "compulsory licenses."

Several bills provide that anybody that purchases or obtains a license to use an article embodying a patented invention shall have an absolutely "unrestricted right" — regardless of any qualifying agreement made by such purchaser or licensor with the patent owner — to use, sell or lease the article so purchased, without any liability whatsoever for any infringement of the patent or the license.

Several bills, affecting articles patented and unpatented, forbid any agreement between seller and purchaser,

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licensor and licensee, lessor and lessee, or bailer and bailee (1) restricting such purchaser, licensee, lessee and bailee from obtaining any article from any other person; or (2) imposing any restriction upon the use of the article so sold, licensed, leased or bailed; or (3) making any discrimination in the price, rental or license based upon whether the purchaser, licensee, lessee or bailee uses such articles furnished by some other person, or any discrimination based upon whether the purchaser, licensee, lessee or bailee takes articles of a particular quantity or aggregate price; or (4) restraining such seller, licensor, lessor or bailee from disposing of an article to any specified persons, or to persons doing business within specified districts or territories.

These bills, in one form or another, all prohibit every kind of so-called "license restrictions."

In the hearings that have been held during the past few weeks by the House Committee on Patents, — primarily regarding an omnibus measure called the Oldfield bill, which embodies most of these proposals, — discussion has been confined, by request of the Committee, to the subjects of "compulsory licenses" and "license restrictions"; with the result that the fundamental principles of the American patent system have been more thoroughly examined and expounded than at any time during the past generation.

II

While the entire legal and political fabric of the nation is being measured and tested to determine its adaptability and efficiency under present conditions, no one could have been surprised that the American patent system — for which the founders of the Republic had provided by specific mention in the federal Constitution — should have received the strictest scrutiny. Few could have anticipated, however, the unanimity with which inventors, manufacturers, dealers and consumers justified the American patent system in all the respects in which these proposals aimed to alter it. Fewer still could have expected what the hearings finally demonstrated, that those features of the American patent system that were threatened by these proposals were in reality potent means for realizing the most "progressive" ideals of industrial freedom.

Mr. Louis D. Brandeis, of Boston, voiced this view when he analyzed the questions raised by these proposals to amend the patent laws. As he explained to the House Committee on Patents, he had "given considerable thought and investigation to the three questions: First, as to whether there should be placed a limitation upon the right now enjoyed under a patent to fix resale prices. Second, whether there should be some amendment or law which would abrogate the rule established by the court in the mimeograph case. And third, whether there should be legislation with respect to the working clause and compulsory licenses."

Approaching these questions from an advanced "progressive" point of view, the conclusions that Mr. Brandeis reached were substantially in agreement with those of most of the inventors, manufacturers, dealers and consumers who appeared before the Committee:

> It seems to me that the evils which exist are not evils resulting in any large measure from the existence of those rules to which I have referred and which are now the rules of law in this country; that the evils which exist consequently would not be removed by a change in these rules and that on the other hand, a change such as has been contemplated might result, and I believe would result, in a very serious disturbance of business enterprises which are on the whole beneficial to the community.

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Under Article I, section 8, sub-division 8, of the federal Constitution, Congrees has power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

Accordingly, section 4884 of the Revised Statutes has been enacted, providing that a patent owner shall have "the exclusive right to make, use and vend the invention or discovery." This "exclusive right" is in effect three "exclusive rights," *i.e.*, the "exclusive right" to make, the "exclusive right" to use, and the "exclusive right" to sell the patented article. The monopoly created by the federal Constitution and the Revised Statutes is expressly limited to a duration of seventeen years, at the expiration of which the patent owner's rights cease and the public is entitled to the free enjoyment of the invention.

The proposal for "compulsory licenses" rests upon the assumption that a patent owner, unlike owners of other forms of property, is a kind of trustee for the public, under a sort of moral obligation to see that the public acquires the use of the invention as soon as possible. But this assumption has been declared by no less an authority than the United States Supreme Court to be without foundation in logic or in the intention of the American patent system. As the court explained:

> The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.

The public is already better secured as regards patents, than in respect to any other form of property. While property owners may in general lawfully suppress the use of their property so long as they desire, and no one for a moment would suggest that such right be curtailed, the patent owner, at most, can suppress his invention only during the life of his patent; and when the statutory period of seventeen years is expired, the disclosure which he made, in order to obtain his patent, enables the public to enjoy the invention absolutely, without restriction and without price.

Until Congress is prepared to compel owners of unimproved real estate, unoccupied houses, idle horses, or unworn clothing, either themselves to improve their real estate, occupy their houses, use their horses, or wear their clothing, or to surrender possession of them to the first applicant, upon such terms and for such rental as some court "deems just," no reason exists why such drastic treatment should be accorded to owners of property in the form of patents.

III

Occasionally the argument for "compulsory licenses" is advanced in more specious fashion. Witnesses appearing before the House Committee on Patents were asked whether they approved of corporations acquiring a number of similar patents and then manufacturing only under one or two patents and "locking up" or "pigeon-holing" in disuse all the rest.

Mr. Thomas A. Edison responded to this question with a challenge that neither the Committee nor anyone appearing before it attempted to take up:

> I have heard and read numerous statements that many corporations buy valuable inventions to suppress them, but no one cites specific cases. I myself do not know of a single case. There may be cases where a firm or corporation has bought up an invention, introduced it, and afterwards bought up an improvement and ceased using the first patents — suppressed

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it, in fact. Why should that not be done? It is for the benefit of the public that it should get the latest improvement. I can not see why the public should be asked to change the patent law to enable a competitor to get hold of the disused patent so he could have a basis on which to enter into competition with a pioneer of the invention who has introduced an improved machine.

Before any changes in the law are made, let the objectors cite instances where injustice has been worked on the public by the alleged suppression of patents for other reasons than those which were due to improvements.

Far from eliciting instances of "injustice . . . on the public by alleged suppression of patents," the Committee was told of many instances where inability to suppress a patent covering an inferior alternative line of invention would have interfered with the proper development of a superior line of invention.

Mr. H. Ward Leonard, an independent inventor, and an officer of the Inventors' Guild, explained this point by an illustration from his own line of invention:

I have invented a certain form and I am manufacturing it, and in order to make sure that I shall have that field protected I have, in this particular instance which I have in mind, invented what would be a pretty good alternative form, and more than one. . . . I have created this line of invention and it has various ramifications which are alternative. It would be quite unfair to me, after developing the line that is commercial, and having selected the particular one of the several alternative forms that I think is the best suited — because I do not manufacture several other alternative forms, which manufacture would be quite commercial — that then my work should all go for naught, when a competitor comes along and at small royalty, and perhaps with very much greater capital and better selling facilities and better organization, takes the business all away from me; because it is quite conceivable to my mind, in this particular instance which I have in mind, that if I were forced to grant some concern in the electrical business that has $70,000,000 capital and an agent in every town in the country, if they were permitted to manufacture that invention of mine in the shape of an alternative form at a trivial royalty to me, I would be wiped out in a very short time.

How "compulsory licenses" would work in a concrete instance, where the United States Navy Department had enlisted the inventive staff of the Lidgerwood Manufacturing Company in the solution of the problem of trans-shipping coal in mid-ocean from a collier to a war-ship, was explained by the chief engineer of that company:

The managers of the Lidgerwood Co. were opposed to this undertaking on the ground that I would spend a large amount of money for a limited market, and also with the probability that some other inventor would reap the rewards by inventing something a little simpler, a little cheaper, or a little better than my device. My answer to that was that I proposed to apply the same method that I had succeeded in before, namely, by studying out every possible new method by which this could be achieved and methods to obtain patents upon them, so that, as the art developed, I might be able to turn the inventions which proved the best solution. . . .

The advantage to the United States Government in being able to trans-ship coal in mid-ocean cannot be reckoned in dollars and cents. It may mean the difference between winning or losing a naval engagement. . . .

The proposed compulsory-license law would utterly destroy the remaining hope of making a profit. Among patents enumerated many are alternates and not used. None are as good as those employed, but any one of them will work. If we should get to a point where the Government were demanding a great many of these machines, and this bill became a law, the commercial pirate would act under this law and demand a license under some of my unused devices, hence it would work a hardship to the manufacturer. . . .

How illusory is the proposal that the court will determine the royalty that the patent owner shall receive for a "compulsory license" that he is compelled to grant appears from the testimony of a leading printing press manufacturer:

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> Two men build similar machines to do the same work. One devises an ingenious little attachment which makes his machine much the more attractive to the buying public and gradually gets for him a large share of the business. The other applies for a compulsory license. Now, what is the measure of the fee he should pay? The device itself costs only a few dollars, but its sole possession is what gives its inventor an advantage in his business. To share it at any price knocks the greatest prop from under the business his ingenuity and energy has built up. To compel him to share his business advantage by compulsory license would kill initiative.

While a patent owner is using his utmost endeavors to establish the utility of his invention, it is unjust to have him crippled, at the outset, by a system of compulsory licenses, that can be taken advantage of by the very people whom the proposed legislation is professedly intended to reach. After he has established the utility of his invention, it is unjust to have it destroyed by compelling him to grant a license to parties who have contributed no expenditure or effort to the invention. As an officer of the Inventors' Guild said:

> Everybody realizes, that is familiar with the past history of the invention, for example of the wireless telegraph or of the incandescent lamp, or any other important invention — the telephone — that had the terms of royalty been fixed, we will say, the first year of life of that patent, it would almost certainly have been inequitable.

If anybody can compel the patent owner to issue a license, the patent ceases to be his "exclusive right," or even his property at all; and the sole inducement for which inventors, manufacturers and capitalists devise and expilot invention is absolutely destroyed.

IV

The clamor against so-called "license restrictions" — that is, agreements between the patent owner and his customers, defining the manner in which the patented article shall be used or disposed of — arises chiefly from a popular misconception of the recent *Dick* patent case.

The notion engendered by Chief Justice White's dissenting opinion in that case that Henry would have been held as an infringer, if Miss Skou or any other user of the Dick mimeograph had bought Henry's ink at a corner drugstore, has absolutely no foundation in fact.

The infringement in the *Dick* case, the Supreme Court expressly held, consisted in the fact that Henry, knowing of the license restriction, and with the expectation and intention that Henry's ink would be used for the purpose of violating this license restriction, — to which Miss Skou, as Henry well knew, had expressly assented when she acquired the mimeograph, — had supplied Miss Skou with the means of accomplishing this wrongful act. Indeed, the court below expressly found that Henry had deliberately and knowingly instigated Miss Skou to this wrongful act, and had even instructed her that if she would pour Henry's ink into Dick's can, and throw away Henry's can, she would not be caught violating the license restriction.

No argument is needed to justify a license restriction, to which the customer's attention is drawn at the time he acquires the article, and to which he voluntarily assents when he acquires it, which merely requires that he use the article only with supplies that are specially prepared for it, or in continuity with machines that are specially adapted to it, or in some particular manner requisite in order to accomplish the purposes for which the article was intended. "It may be that the article is of such nature that, in order that it shall work properly, it shall require very great care in select-

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ing certain conditions of use, certain materials to be used in connection with it," explained an officer of the Inventors' Guild. "It certainly is a fact that, in some instances, a man's market for a good article would be completely destroyed, if he could not insure himself in seeing that it was properly used after it left his hands."

The suggestion that the self-interest of the user is sufficient guaranty that proper supplies, well adapted accessory machines and correct methods of operation will always be used does not prove sound in practice. In the case of staple commodities, this rule doubtless obtains. Most patented articles, however, are not in this class. They are new devices in the arts, and depend for their marketability and value upon their demonstrable efficiency. They must make their way in competition with older appliances, and only as they prove their superior efficiency, in producing the results for which they were invented, can they obtain any market and attain any value. When this result depends, in any considerable degree, upon the supplies, the accessory machines, or the method or operation, it frequently is necessary, and always is reasonable, that the patent owner, whose time, effort and capital are staked upon the result, should require of the customer, as a condition of acquiring the machine, that it be used only with such supplies, accessory machines and method of operation as shall insure a satisfactory result. Since every patented article is essentially new, most users must necessarily be more or less unfamiliar with many of the elements involved in its satisfactory operation. Unaware of the reasons why some particular kind of supplies, or some particular accessory machines, or some particular method of operation is more certain than any other to produce a satisfactory result, most users would succumb to the apparent economy or other superficial attractions of inferior supplies, ill-adapted accessory machines, and less efficient methods of operation. Of course, the result to the user would be unsatisfactory. Continuance of this unsatisfactory condition, if studied and analyzed by the user, might eventually induce him voluntarily to use only those specially prepared supplies, properly adjusted accessory machines and correct methods of operation, which the patent owner knows to be essential to the satisfactory operation of his machine. Most users, however, have no opportunity for such study, analysis and reflection. Unless the patented article, in whatever fashion it happens to be used, promptly demonstrates its undoubted superiority over older appliances with which it competes, most users will promptly discard it and return to the older appliances. While the user who has improperly used the machine has thus unwittingly acted against his own interests and harmed himself, he has in immeasurably greater degree injured the reputation, standard and commercial desirability of the patented machine. The patent owner, who has risked his time, effort and capital in the invention and has staked everything upon its reputation, standard and commercial desirability, is the chief loser.

"I cannot agree," declares Mr. Leonard, the independent inventor, already quoted, to whom the self-interest of the user was urged as a sufficient substitute for a license restriction, "that that would be sufficient protection to the manufacturer, whose sales depend entirely upon the perfect performance universally of the articles. I have been a manufacturer long enough to know that there is nothing which so insures

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your future business at a profit as universally high quality, and it only takes a few cases that are spread abroad by your competitors as to the improper working of an article to have a very serious effect upon your business."

V

When a man invents and patents something, it generally requires more inventive ability to build up a market for it than it does to make the invention. The experience of all the ages and the ingenuity of the most advanced salesmanship is available to the man who has anything to sell. But when a patented article is to be marketed, something essentially new and unfamiliar, which the patent owner can control only during the seventeen years that the patent endures, all the resources of past experience and advanced salesmanship are together none too adequate to accomplish this purpose.

"It takes fully seventeen years," says a leading inventor, "to develop a leading invention. I am talking now about the typesetting industry, the linotype, the typewriter and the typewriter adding machine industry." With the necessity of reaping his reward before the statutory period of the patent has elapsed, the patent owner has the additional burden and expense of "educating the manufacturer up to the manufacture of any new article, and educating the public to use any new process or to use any new machines."

"Thomas Edison told me about nine months ago," declared a leading authority in scientific salesmanship, "that he thought it was time in this country that the same brains and genius must be applied to selling and distribution that have been applied to invention." In the opinion of this expert, "the mere invention of merchandise is almost a minor consideration when put up against the selling and marketing of merchandise. There are thousands of inventions in this country which are very valuable indeed, but which can never be commercial possibilities, or are not now commercial possibilities because of the selling problems involved. There are big and serious selling problems involved in merchandise, especially patented merchandise. If you are selling shoes, there is a ready and accepted market for shoes before you manufacture, but when you take a patented article, think what you are up against! You have got to persuade the other man whom you hope to sell that this is a good thing, something that he has never used before. It may be a revolution of his habits, or it may be a revolution of something else, and you have got to overcome that resistance."

The initial expense involved in the outright purchase of a novel and untried patented article has always presented an exceedingly serious obstacle to its introduction. To avoid this obstacle and to relieve this initial expense, various plans have been devised, primarily for the benefit of the user, under which the recompense that the patent owner receives in consideration of giving to the customer the right to use the patented article depends entirely on the amount of benefit which the customer derives from exercising this right of use. "Suppose," says one of the witnesses before the House Committee on Patents, "a machine is invented for which a manufacturer can not afford to pay an adequate price outright, but the inventor lets him use it and agrees that he shall pay the inventor so many cents per hundred articles manufactured on it. That is no burden to the manufacturer, and the inventor, in the long run, has his return, and if the machine is success-

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ful he participates with the manufacturer in the success of it; but if it were going to be sold outright the manufacturer would discount all chances and require it to be sold at a very small price." Under this plan the customer obtains physical possession of the patented article, together with the right to use it under the conditions of the license, but is not obliged to pay the patent owner anything for this right of use unless he actually exercises it; and if he uses the patented article at all, he compensates the patent owner strictly in exact proportion to the efficiency of the patented article and to the benefit that he derives from its use.

VI

Under such a plan, some means must be devised to measure the extent to which the customer uses the patented article. A frequent measure is the number of articles that the machine produces. When the amount of output can be accurately and inexpensively measured, either by a register or an accounting, this mode of determining the amount of royalty is generally adopted. In the case of innumerable articles, however, there is no accurate or convenient mode of registering or accounting for the amount of use or output, and the only convenient measure is that afforded by the material used with the patented article. By requiring the user of the patented article to obtain this material from a single source, the material — to use the phrase which Judge Lurton, now Associate Justice of the Supreme Court, and Judge Taft, now President of the United States, made famous in the so-called *Heaton-Peninsular Button Fastener* case — becomes the "counters" of the profit and royalty earned by the patented article, and ensures the means for accurately and inexpensively measuring the amount of the use and output. By charging for this material a sum sufficient to cover its cost, and also an additional amount in the nature of royalty for the use of the patented article, the patent owner collects, with perfect accuracy and with a minimum of expense, the royalty for the use of the patented article.

The mimeograph, which was involved in the *Dick* patent case recently decided by the Supreme Court, is an illustration in point, as the counsel in that case explained to the Committee:

"The mimeograph is an office machine for turning out duplicate copies, and the effort is to get a machine which will produce a large number of copies in a very short time, those copies being not only legible and readable but of a high quality, to wit, in imitation of ribbon work on typewriting machines. Now, the inventor with an invention of that sort, no matter whether the field has been previously exploited or not, has to create his own market; he has to establish a demand for that particular invention. One of the best ways that he can devise how not to do it, if the committee please, is to charge the public a prohibitive price. The effort must be and is and was to charge the public such a price that all small tradesmen, public stenographers and people in other similar lines, who are of limited means, could acquire these machines readily and with ease.

So this machine was exploited by first finding the cost of producing the goods; that is, taking what is commonly called the shop cost, adding the overhead, which includes advertising, etc., and giving the machine to the user at the exact cost, or less, to the manufacturer. I may say here that the cost of making and selling the rotary mimeograph, as proved in this Dick-Henry case, was at that time something like $34, and the price paid by the vendee was only $30.

Under the scheme which the Dick Company employed — and this indicates to the committee one of the reasons why it is so attractive to the public that they have bought 50,000 of the machines — when they do not use the patented machine; when they do not utilize that patented monopoly given by the patent laws, they pay not one cent. Only when they are using the patented inventions and partaking, there-

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fore, of the benefits of the patents do they account. Their royalty takes the form of a few cents on every pound of ink producing many thousands of circular-letter copies, or a few cents per quire of paper.

VII

The patent owner today, like the owner of any other form of property, may sell, lease or otherwise dispose of all or any part of his "exclusive right." He may dispose of all of it, for use throughout the United States, or only part of it, for use in one or more states. He may grant an unqualified license, or he may grant a license limiting the user to some particular purpose. He may arrange with the manufacturer of one particular line of goods on certain terms for the use of the patented article in that line of manufacture. He may arrange with the manufacturer of another line of goods on different terms for the use of the patented article in that line of manufacture. He may fix terms on one basis for the use of the patented article with machines of a certain amount of power. He may fix terms on another basis for the use of the patented article with machines of greater or less amount of power. He may dispose of the patented article on particular terms to customers who undertake to use it with machines bought from the patent owner. He may make different terms, or decline to deal on any terms whatsoever with customers who will not undertake to use the article with machines bought from the patent owner.

Owners of other kinds of property may do all these things. There is no reason why the patent owner should not do likewise.

For the future of American industry, it is hoped that Congress will not determine otherwise.

The Fourth in Greenville

By Dan C. Rule, Jr.

UPON the village common, where plays the Greenville band,
The eager crowds foregather about the speaker's stand,
For the patriots of Greenville, loving Independence Day,
Have planned to celebrate it in the good old-fashioned way,
And to add a special luster to the glorious celebration,
Have requested E. Vesuvius Blue to deliver an oration.
The interest is breathless, for according to report,
Delivering orations is E. V.'s acknowledged forte;
He can make the British Lion look exceedingly forlorn
By twisting its imperial tail with democratic scorn.

Meanwhile, within his office Vesuvius conned his speech,
And made portentous gestures as wide as he could reach,
When suddenly, there stood within his little office door
A personage of lordly port he'd never seen before,

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Who handed him a crested card on which Vesuvius read,
"G. Aginbury Mortimer, Ninth Earl of Dunderhead."
His Grace, sedately seated in Vesuvius' swivel chair,
Explained with British bluntness the reason he was there:
"I represent the Charing Cross United Syndicates,
Which has extensive holdings in twenty-seven states;
We need the constant services of a barrister, and you,
I think, are just the man will suit us, Mr. Blue."

Vesuvius made a courtly bow. "My lord, the people wait
For me to test the life-boats upon the Ship of State;
I hope the mellow contents of yon transparent urn
Will help to speed the moments until I can return —"
"Not so," exclaimed the other, "I very much prefer,
Because of your forensic skill, to listen to you, sir!"
So to the Greenville common the helpless lawyer led
His ultra-British client, the Earl of Dunderhead,
Confronted by a problem that caused his brain to whirl! —
How to enthuse the people yet not offend the Earl.
His useless speech discarded, Vesuvius, all the way,
Implored the smiling heavens, "Ye gods, what shall I say?"

But with the outward semblance of patriotic rage,
He shouldered through the concourse, and sprang upon the stage.
He flayed the Persian satraps, and dwelt for quite a while
Upon the sins of Cheops who rules beside the Nile;
He pointed out the errors that caused the fall of Rome,
And smashed a dozen empires as he drew nearer home.
"Who placed," he cried, "those guideposts upon the sands of time,
That lead us from the wilderness of tyranny and crime?
To whose undaunted prowess upon the fields of war
We stand indebted for our state, and for the D. A. R.?
It is those soldier-colonists, whose never-dying glory
By me shall be recounted in a little allegory."

"I seem to be at Yorktown, and in my mystic dream,
I see the London Scarlets, who play the local team.
Cornwallis leads the tourists, but standing grimly by
I see that mighty Batter who couldn't tell a lie!
Cornwallis speeds a compound, reverse, parabaloid,
'Twould seem no living mortal could hit the swift spheroid.
But did our Batter hit it? Where dwells the youth, or kid,
Or man, or maid, or matron, that doesn't know he did?
My friends, I say with fervor, it gives me keen delight
To watch that glorious homer and trace it in its flight!

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"It scraped the mountain summits, and with a glancing blow,
Brought down six spotless ribbons of pure, eternal snow;
And hurtling madly northward, it reached the Ice-king's palace,
And garnered seven streamers from aurora borealis;
Then speeding from our planet, it dashed aloft into
The glittering constellations of the empyreal blue,
Then paused, and swift descending, brought with its captured bars,
To grace our glorious banner, just eight and forty stars.
Now wave, ye gallant emblem! And blow, ye trumps of fame!
We glory in the manner our fathers played the game!"

Amid terrific plaudits, Vesuvius left the stand,
And joined the Earl of Dunderhead, who warmly clasped his hand
And said, "It gave me pleasure to listen to your speech,
Which, in your Yankee idiom, was a forensic 'peach,'
But 'pon my word of honor, I own myself in doubt
What was the stirring subject you must have talked about!"

Clyde, O.

The State University Law School: III, Its Duty to Teach the Law of the Jurisdiction[1]

By William Emmanuel Walz
Dean of the University of Maine College of Law

BY TEACHING we mean a systematic training of the student, in the midst of an atmosphere of freedom, by means of subjects and courses of study that are not merely good for mental and moral discipline, but also valuable in themselves and useful to him long after contact with school has ceased, so as to fit him for the duties of life.

At every stage of its progress teaching of every kind is subject to two laws: one, purely intellectual, that there can be no intelligent practice of that which is not theoretically understood; the other, purely moral in aim and purpose, viz., that all true teaching must tend to develop the whole man, a man capable both of finding and doing his work to the best of an ability based on natural and acquired talents working together harmoniously and brought to their utmost perfection. In so far as these two principles favor as intimate a union between theory and practice as it is possible to establish in teaching, and in so far as they make for wholeness and wholesomeness of manhood, we might say by way of introduction, almost by

[1] The previous articles in this series were: "The State University Law School: I, Its Rise and its Mission," by Prof. Charles M. Hepburn 24 *Green Bag* (Apr.) 179, and "The State University Law School: II, Its Duty to Democratize Legal Knowledge, by Judge Andrew A. Bruce, 24 *Green Bag* (May) 225.

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way of argument, that these two great laws point to the desirability of the teaching, in law schools, of the law of the jurisdiction in its connection with the common law of the past as well as in its relation to the law of neighboring jurisdictions.

The subject-matter of law school teaching is the law, of course; the common law not merely as it existed once, but also and more especially as it is applicable to the condition of our own times and as it is actually so applied in our courts today. There is indeed no common law in force in any state other than such as has been or will be held applicable to existing conditions of American society. To teach the common law, then, necessarily and everywhere involves the teaching of the law of the jurisdiction, its history, origin and development, as well as its actual condition at the present time. The law of the jurisdiction may be neglected, but it cannot be, and is not, wholly ignored anywhere, not even by law schools that profess not to teach what is inaccurately and somewhat disrespectfully called the local law. There is no possible definition of the common law as a living force in the United States that could reasonably exclude from its scope the law of the jurisdiction. What the history of the race and the nature of our institutions have united cannot be severed in the classroom. This union existing between the common law and the law of the jurisdiction is a natural growth and a logical necessity. It is in the nature of things. To teach the common law, then, *is* to teach the law of the jurisdiction.

Apart from the logical impossibility of severing the law of the jurisdiction from the common law, there is a political necessity for teaching the law of the jurisdiction affecting state university law schools more powerfully than law schools based on private foundations. The state university law school cannot, and will not, oppose the will of its creator, the State, the sovereign people, as laid down by the great law of public opinion. By its very being it is bound to be the servant of the people, and must, therefore, of necessity, teach the home law as that part of the common law that has been found applicable to the past and present conditions of the state. Whatever the state university law schools may do or may fail to do, this essential part of the common law, the law of the jurisdiction, the home law, must be taught. There is no choice; but where the reason of things and the will of the people coincide the path of duty is plain, and the watchword is, Forward.

In this life of ours, however, wisdom and true necessity are often synonymous terms. Thus it is that the teaching of the law of the jurisdiction as part of the common law is the duty of the state university law schools not merely from logical and political necessities that impose themselves, but also for reasons that persuade and convince. In a very emphatic sense the teaching of the law of the jurisdiction develops the legal, the judicial, and the civic mind, and tends to form, in a pre-eminent degree, the lawyer, the judge, and the citizen. But, from the standpoint of the university law school, the greatest of these is the citizen, the man.

The teaching of the law of the jurisdiction, of the law right at hand, appeals to the student's mind very much more powerfully than any other law elsewhere, far away, and high above him. Whether naturally quick or slow, a mind, to be called a legal mind, must be able to grasp facts and principles both, and hold them fast. Attention

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is the first and chief requirement. It is the home law that arouses interest and holds the attention. What a difference between the reception extended to a case from England, Canada or Australia and the ardent welcome given to a case from the home jurisdiction! Take, for instance, the *Six Carpenters'* case, Coke 146*a*, found in every text and case book on Torts, the foundation case for the doctrine of trespass *ab initio*, a very interesting case, a little far away in time and space, a little vague, with the six carpenters in the inn just emerging from the haze of the past. Now connect this case with the home jurisdiction by not merely citing, but by taking up for class discussion, the less famous, but far more instructive case of *Boston & Maine R. R. Co.* v. *Small*, 85 Maine 462, 27 Atl. R. 349, 35 Am. St. R. 379, Opinion by Chief Justice Emery. Note the immediate interest in the time, the place, the nature of the action, in the lawyers arguing, and in the judges deciding the contest. Take a case like this from the home jurisdiction, and the men are invariably better prepared, more eager for discussion, more prompt to take sides, more ready to differ from one another and the teacher. Curiosity, interest, combativeness, all combine to fix the attention on facts and principles. New aspects are discovered, new questions asked. The old is found in the new, the new in the old. There is unity in variety, variety in unity. The facts seem plainer, the principles clearer, and the law itself appears more real to the men because it is their law, laid down by their courts speaking in the name of the State as representing the sovereign people of which, again, they themselves are part. Attention is thus held to the point at issue, more easily than under any other conceivable circumstances, until the possibilities of class instruction are exhausted for that day, that teacher, that class. Interest, attention, and passion are the chief elements of success in teaching, in study, and in life. As philosophers and psychologists down to Professor James have all assured us: Concentration, memory, reasoning power, inventiveness, excellence of the senses, are all subsidiary to this primeval and primal requisite of life. Attention, watchfulness, eternal vigilance, the being, as Frederick the Great said, *toujours en vedette*, are the essentials of victory in any cause. These qualities are most needed by home and school, by church and state, and the teaching and the study of the law of the home jurisdiction tend to develop them more certainly than any other system, however wisely framed, based on the eclectic study of all laws in general and of none in particular. To connect one idea with another is the essense of thinking; to study one case by another is the true secret of legal training. This one case, *Boston & Maine R. R.* v. *Small*, connects the *Six Carpenters'* case not only with the law of the jurisdiction, but with the laws of New England and New York as well. But it is not Maine only that has had great judges that gave great opinions, men like Mellen and Shepley, like Kent and Appleton, like Peters and Emery. Such men are to be found in other jurisdictions also. If you doubt this, seek and you shall find. Happy, thrice happy, the jurisdiction whose judges are also teachers of the law.

Studying the law in this way you get the common law as well as the law of the jurisdiction, the history of the rule as well as its application today, the substantive as well as the adjective law, or, to speak with Chief Justice Baldwin, of Connecticut, "You pick up practice necessarily and practice in a very great variety of circumstances"; — and all

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this because your work is founded upon the firm rock of a particular jurisdiction, the stable foundation from which you survey the vast and almost boundless sea of Anglo-American law. Observe yourself, your friends, and enemies, and however small your circle, you are on the way to a sound knowledge of human nature. In like manner the study and the teaching of the law of the home jurisdiction does not indeed narrow, it widens the legal horizon, and it launches the student with a strong and decided initiative into the study and the practice of the law. It tends, in a pre-eminent degree, to make of him a lawyer, an advocate capable of persuading and convincing juries and courts.

But the study of the law of the home jurisdiction does more: it develops the judicial mind. Are the decisions of the home jurisdiction right? Are they wrong? This question, of little concern to an outsider, is of great moment to a citizen of the jurisdiction. To decide it in a given case requires a mind trained to weigh principle against principle, to determine which principle applies, and why, and to apply it fearlessly, whether in the study, the classroom, or in public life. It is in the quiet days of reviewing that this judicial mind is developed. It is then that great principles are finally mastered, compared, and tested. It is then that in the pursuit of knowledge, degree, diploma, and bar examination are wholly forgotten, and that the human mind experiences the most glorious moments of intellectual activity and happiness. And what is more glorious indeed than a review of the principles of the law, not as mere abstract rules, but as living forces working out their appointed destiny in the decisions of the home jurisdiction, the country, and the world? What a spur to a noble ambition it is to try to approximate that perfect judicial mind that could tell, with regard to a given point of law, how it was decided if ever it was, and how it ought to have been decided if it never was. Such a mind would require for the perfect exercise of its judicial powers an ideal jurisdiction with an ideal system of laws. This beau ideal of the judicial mind, if ever it is reached by any man, will not be attained except by a great soul whose first step upward was taken by mastering the law of the home jurisdiction.

Nobler, however, than either the legal or judicial mind is the civic mind. Higher than lawyer and judge, higher than the President or Chief Justice of the United States, is the citizen, in the theory of our government as well as in the sober truth of historic fact. The lawyer takes his client's case and, in the exercise of a well trained legal mind, tries to convince the court that of two conflicting principles that one should prevail that will give the client what he claims as his due. The judge, in the exercise of a sound judicial mind, decides which of these conflicting principles does apply to the particular case before him, and so applies it. But the citizen, in the exercise of all his civic powers, rising above lawyer and judge, thinks neither of client nor litigants, but of all citizens without exception, perhaps of all men everywhere, and enacts, by and with the advice and consent of his fellow-citizens, what shall constitute the sum total of principles, the Body of Liberties, known as the Law of the Land, to be administered by the courts of the home jurisdiction, by their lawyers and judges, as the servants of the people. Is it not then true that a knowledge of the laws of the jurisdiction is the first prerequisite to their improvement and enforcement? Is not then the state university law school

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under solemn bonds — especially in these days of the Great Democratic Advance that preaches the doctrine of universal kingship, a message of terror as well as a gospel of glad tidings — to teach the law of the home jurisdiction, and to throw wide open its doors to every youth that wishes to study the law, not as a preliminary to practice, not as the accomplishment of a gentleman, but as a serious preparation for the business of life and citizenship? As a knowledge of the law is a growing necessity for the citizen in his daily work as well as in his public relationships, and as a better preparation for citizenship is called for by the wisest and most capable leaders of the nation, it follows that, not merely with a view to professional efficiency, but also from a due regard for the public welfare, the state university law school will ever more fully realize that the teaching of the law of the jurisdiction, as part of the common law, is at once its business, its duty, and its glory.

Bangor, Maine.

The New Lord Chancellor

THE promotion of Lord Haldane to the Lord Chancellorship, the highest law office of the British Government, has given no surprise to the English bar, his high reputation as a lawyer having been securely established by his career as a barrister and also at the War Office. Lord Haldane is a Scotsman, and like his predecessor, Lord Loreburn, the son of a lawyer. He is one of the few Lord Chancellors in the history of the land who have not held the office of Attorney-General or Solicitor-General. The avenue of a Secretaryship of State does not often lead to the woolsack. Before his advancement to the Cabinet, however, Lord Haldane had earned a peerless reputation in chancery and Privy Council practice, and is the first chancery lawyer to be promoted to Lord Chancellor since Lord Selborne's retirement in 1885, his immediate predecessors having been common lawyers.

Lord Haldane, who is in his fifty-sixth year, was educated at Edinburgh University and at Göttingen, and was called to the bar at Lincoln's-Inn in 1879. He was apprenticed to Sir Horace Davy and soon acquired a large chancery practice as a junior. He was made a Queen's Counsel in 1890, when but thirty-four years of age, and soon became one of the select band of "special" chancery leaders. He entered Parliament in 1885, serving continuously in the Commons until 1911, when he was raised to the peerage. He had established such an influential position in Parliament that his promotion to the Cabinet surprised no one. While at the War Office he showed a keen interest in legal matters, particularly in reform of the administration of the law, serving on the committee whose recommendations led two years ago to the appointment of two additional judges.

Lord Haldane has been actively interested in the Society of Comparative Legislation, and while a junior he was one of the chief editors of the sixth edition of Dart on Vendors and Purchasers. Of late years, however, he has naturally been more conspicuous as a statesman than as a lawyer, and his experience has lain largely in the field

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of administration. This, however, constitutes an advantage rather than the reverse, for the administrative duties of the Lord Chancellor are onerous, and his political position is such as to call for the selection of a statesman of the first rank.

No notice of Lord Haldane would be complete without mention of his philosophical accomplishments. Like Mr. Arthur Balfour, he is one of the foremost figures in the intellectual life of his country, and his purely intellectual achievements are of the kind which lends lustre to public office. He became saturated in German thought at Göttingen, and his published works include "Essays in Philosophical Criticism," a "Life of Adam Smith," and "The Pathway to Reality." They also include a translation of Schopenhauer's "The World as Will and Idea." A recent contribution, the address on "Great Britain and Germany" delivered at Oxford a year ago, contains a notable analysis of the development of philosophical idealism in Germany, and is quite as remarkable as a philosophical essay as it is as a political address.[1]

The retirement of Lord Loreburn, after six years of strenuous service, was ostensibly due to his impaired physical health, but it is possible that his resignation followed a courteous intimation that his presence in the Ministry was politically inconvenient. His sympathy with Lloyd-George's land legislation had irritated the Conservatives, and he had said things which were denounced "as unworthy of his great office." As a lawyer he was perhaps neither profound not brilliant, and his opinions on the subject of additional judges and progressive administration were perhaps somewhat reactionary. A man of the highest character, however, he did much to prevent the bench from being dragged into politics.

The appointment of Sir Rufus Isaacs as a member of the Cabinet is an unprecedented distinction, as he is the first Attorney-General to be so advanced. Sir Rufus Isaacs has had a brilliant career at the bar. As a stockbroker in London he found himself face to face with financial ruin at the age of twenty-six, and then took up the study of law. After his admission to the bar his wonderful mastery of intricate figures and details quickly led to his recognition as an expert in bankruptcy law and in complicated mercantile transactions. His reputation was made secure by his work in the prosecution of several noted offenders, notably Whitaker Wright. He entered Parliament in 1904 and rose rapidly in public prominence, being made Solicitor-General in 1909.

[1] Published in this country as a bulletin of the American Association for International Conciliation, Sub-Station 84, New York City, March, 1912.

Sexual Perversion as a Cause of Crime

By E. DeForest Leach

IN several of the most important murder cases which have attracted the attention of the public during the past few years, there have been unmistakable evidences of the existence of perverted sexual natures upon the part of the defendants. Whether these abnormal conditions played any part in inspiring the commission of the crimes cannot here be determined. The most

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important thing now to be considered is that the very eminent counsel who defended these cases never investigated this phase of the question. While insanity has frequently been relied upon as a defense, its existence has usually been considered sufficiently established when it is shown that the accused has a crazy aunt or had been hit on the head during his childhood.

The fact that a knowledge of well-authenticated sexual phenomena would often furnish a key for the solution of many of our most mysterious crimes is not understood by lawyers, simply because it is not generally recognized that such a science as sexology exists. While the taboo imposed upon the study of all sciences by a dogmatic religion has greatly retarded human progress in many respects, it has undoubtedly been more successful in suppressing investigations of the sex problems than any other branch of human knowledge. The antagonism of many today to a spread of a knowledge of these subjects is almost as strong as that of the early Christians to the bath. But, as the importance and utility of such knowledge becomes better understood, the prejudice will pass away.

While sexology is essentially a modern science, it must not be understood that a knowledge of sexual phenomena is limited entirely to modern times, for many primitive peoples have had quite a comprehensive knowledge of the *vita sexualis*, blended, more or less, with superstition. The passionless social ideal of the past several generations together with the lingering influence of Puritanism have practically eclipsed the results of scientific investigation, particularly in English-speaking countries. While several countries of continental Europe have surpassed us in collecting and classifying data concerning sexual phenomena during the last century, it is doubtful whether their contributions have excelled or even equaled those of English and American scientists during the past decade or so. It has remained, moreover, for these more recent investigators to improve upon the work of the older writers, to more thoroughly separate the truth from the error, and to so classify the facts that they may be studied in their relation to other social phenomena.

In analyzing the sexual impulse we have learned that there are two complementary emotional states, which, for convenience, are called "sadism" and "masochism." The sadistic emotion is one which prompts one to dominate, use force or inflict pain upon the object of adoration, and usually predominates in the masculine. The masochistic is that emotion which prompts a person to cherish the domination of, and to experience pleasure from pain caused by a loved one. This is usually the predominating emotion in the female. It must be understood, however, that these terms are only relatively accurate; that the emotional states they designate are complementary and not opposed, and that they not infrequently occur in the same person.

While these emotions are most potent forces in every normal animal, we will here only consider a few conditions where they have become accentuated in certain respects in individuals who are usually entirely normal, and are, except when dominated by sexual excitement. The most familiar manifestations of these accentuated emotions are found in acts of biting, cutting, whipping, strangulation, and many so-called cases of rape, and in the corresponding passive conduct during these acts, although a much larger classification might be made.

Of all of these manifestations biting is undoubtedly the most common. The

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important part which the "love bite" has played in literature and the frequency which we hear expressions in general conversation showing the desire of some admirer to "bite" or "eat up" another show us the universality of this impulse. It is, indeed, so common that, unless it is indulged in to excess, it is not considered abnormal. I have before me a newspaper clipping which reports a supposedly novel case in New York in which an artist was arrested upon complaint of his wife whose story to the magistrate is reported to have been as follows: "Raphael bit me and I was afraid he would kill me. I was posing for his Venus and he came over and bit my elbow awfully. I was so frightened that I ran out of the house and came to the police station just as I was. We've been married only six weeks, your honor. I did love Raphael — he paints such lovely pictures — but I can't live with him if he acts like a cannibal." The husband's only plea was, "Yes, I bite her because I love her." The conduct of the husband could not be called cruel, for to him it was a normal manner of expressing a very intense passion for his wife. It was a possibly extreme but not unusual manifestation of sadistic love. Had the wife been of a corresponding masochistic nature, such methods of courtship, instead of being repulsive, would have been highly pleasing to her.

Outside of the psychological effect of red, blood is a strong stimulus to many, sometimes more so under certain conditions than others. When blood is drawn during a "love bite" it may automatically increase the intensity of the perversion until other means, such as cutting or other mutilations are often resorted to in order to satisfy the sadistic impulse. Instances have been known where the individual was not unduly sensitive to blood, except during great excitement, or, in other words, the perversion was dormant until the emotions were aroused by some auxiliary stimulus. Of course, there are those whose peculiar perversions drive them into paroxysms which can only be satiated by blood. I have in mind a minister who was a victim of such a perversion. He was conscious of his abnormality, and because of his fear that his unnatural desires might cause him to kill some member of his family, he made it a practice when these impulses grew strong, to kill chickens, cats, or other small animals, and thus relieve himself by watching and smelling the blood. His perversion ultimately became so pronounced that he retired from the ministry and finally died insane. Cases are known where the victims have drawn their own blood when there was no other manner of satisfying their cravings. Conversations with those who have committed bloody deeds have revealed the fact that instead of suffering remorse they often seem to dilate upon the pleasure which the blood of their victims gave them. While these extreme perversions are not so common as the more obscure ones they are much more easily recognized.

The impulse to strangle the object of sexual desire and the corresponding craving to be strangled are by no means unusual, and have undoubtedly been the cause of many mysterious deaths. Havelock Ellis, in his "Studies in the Psychology of Sex," uses a letter of a lady who, in telling how the idea of being strangled by a person she loved appealed to her, said: "The great sensitiveness of one's throat and neck come in here, as well as the loss of breath. Once when I was about to be separated from a man I cared for I put his hands on my throat and implored him to kill me. It was a moment of madness,

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which helps me to understand the feelings of a person always insane. Even now that I am cool and collected I know that if I were deeply in love with a man who I thought was going to kill me, especially in that way, I would make no effort to save myself beforehand, though, of course, in the final moments Nature would assert herself without my volition."

The newspapers frequently tell us of some terrible crime; how the body of some woman has been found, usually in the water or in some hiding place, but with clear indications that she had been strangled to death and ravished. Indignation runs high, for it is generally supposed that the ravishment was accomplished after and because of the strangulation. If all the facts were known, however, they might be found to be something like this: The woman was an intense masochist; her lover an equally intense sadist. Being strangled was as pleasant to her as strangling was to him. To each of them the act was as natural and far more pleasurable than kissing. Neither intended or realized any danger. It was indulged in with mutual and increasing satisfaction until both were in a paroxysm. Then, of course, neither realized anything. With returning consciousness the man's first impression was that his mate was exhausted and his highly wrought nervous system was given a terrible shock when he discovered that she was actually dead. He can explain nothing, but his half-crazed efforts to avoid detection make him an easy prey for the officers of the law whose only interest in the case is confined to investigating the nature of the crime rather than that of the criminal.

Of course, from a purely legal standpoint a knowledge of sexual perversions is valuable only when they destroy the responsibility for the particular acts with which the accused is charged, and there are undoubtedly many who will not be willing to admit that such conditions are possible. However, I believe that it is generally conceded by those who have investigated sexual phenomena to any considerable extent that to a sexual pervert certain abnormal acts are absolutely normal, no matter whether they be the most slight deviations from the normal manifestations of sex or the most extreme violations of all human law. On the other hand, a pervert, no matter how extreme, may be entirely responsible for certain of his acts and at the same time entirely irresponsible for certain other acts which are the natural result of his particular perversion. Each case must be judged by itself.

It must not be supposed, however, that the existence of sexual perversions are necessarily evidences of criminality in the individuals possessing them. Some perversions work in the opposite direction and have been the inspiration of some of the greatest achievements of the race. You remove from the pages of history the impressions made thereon by the lives of men who have been victims of abnormal sexual natures, and they would be desolate, indeed. What would the history of Rome be without Julius Cæsar, France without Napoleon, England without Cromwell, music without Wagner, literature without Goethe, Mohammedism without Mohammed, or Christianity without Paul? The list is hardly begun.

To explain the reasons for many of the assertions made herein, which would undoubtedly make them much more acceptable to many, is too large a task for this occasion. A whole book could be written to explain why pain is a sexual stimulus and still leave much unsaid.

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Ellis, however, has summed up the matter as accurately as is consistent with the brevity used, when he says, "Pain acts as a sexual stimulant because it is the most powerful of all methods for arousing emotion." With this view before us it is not so difficult for us to understand the conduct of the complainants in cases similar to the one in Indiana not long ago where three men were indicted for rape. Two were tried and convicted. The third, who, according to the girl's story, was the principal and the most brutal of the three, escaped trial and punishment because the girl married him.

An isolated case considered by itself would certainly be difficult for us to solve, but when we realized that it is not a rare thing for the complainants in rape cases to marry the accused we readily conclude that there must be some general principle governing their conduct. The laws of many countries have recognized the existence of this principle, although it was not understood. It used to be the practice in the Isle of Man when a man ravished a maid for the judge to give her a sword, a rope, and a ring. She had her choice to behead, hang, or marry him, and she not infrequently did the latter. How many complainants in rape cases would like to do the same thing if it were not for the scorn of relatives and society will never be known, but almost every lawyer thinks that he knows of such instances.

A storm of objections will probably be raised against the use of defenses of this character in criminal cases on the ground that our criminal practice does not take into consideration the existence of such abnormal conditions, and that no means have therefore been provided for the proper handling of those shown to be so affected. In reply it may be said that while the services of experts will be necessary to establish defenses of this kind, that when properly presented they are available under our practice. The mere fact that the law provides no proper method of dealing with these unfortunates — for it is the height of barbarism to incarcerate them — is not the fault of the accused. Science has discovered a certain and speedy remedy for these abnormal conditions, and as soon as their importance as a cause of crime becomes better understood society will see that the law comprehends them.[1]

Moundsville, W. Va.

[1] For a very full discussion of this and the related subjects the reader is referred to Thoinot's excellent work on "Medico-legal Aspects of Moral Offenses" (1911) reviewed in 12 *Columbia Law Review* 473 (May 1912). —*Ed.*

Two Great Maryland Lawyers

THE late Thomas J. Morris, for thirty-three years Judge of the United States District Court at Baltimore, who died June 6, was so highly esteemed for his eminent ability and dignity of character that his demise called forth innumerable tributes to his memory expressing the high regard of his professional associates. Hon. Charles J. Bonaparte declared that the federal bench had lost one of its most distinguished, most worthy, and most faithful members, and that his life was "among the most useful and most honorable

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that Baltimore, Maryland, and the Union have ever known." Judge Morris's associate and successor on the bench, Judge John C. Rose, said the ability of the deceased was shown by the fact that only three appeals in criminal cases had been taken from his decisions in twelve years, and he had been affirmed in them all. The late jurist had a national reputation in admiralty, and had presided in some intricate patent cases.

Hon. Bernard Carter, the distinguished leader of the bar of Baltimore and Maryland, died June 3 at his cottage at Narragansett Pier, R. I. He was one of the greatest lawyers that Maryland had ever had, and was admired for his deep learning, his mastery of the arts of advocacy and argument, his commanding presence, and his integrity and courtliness. His mind retained the smallest detail of any matter in which he might be interested. As a trial lawyer he was wonderfully successful and always had a clear insight into the most complicated cases. His success at the bar was not due only to his personal attractiveness, his cool judgment, knowledge of the law, insight into the minds of men and his close attention to details, but also to his unwavering uprightness of character. His arguments, whether upon the law or the facts of a case, were always listened to with marked attention by both court and jury, and his explanations were always so lucid that all who heard him had no difficulty in grasping the point he strove to make.

Former Attorney-General Isaac Lobe Straus said of him: "His voice was beautiful, his enunciation absolutely perfect, and his powers of speech and expression, making the subtlest distinctions and the finest shades of meaning entirely clear, were marvelously consummate. His fame as a lawyer will go down with those who from the foundation of this state held the first rank at its bar — with Dulaney and Martin, Pinkney and Harper, Wirt and Taney, Nelson and Johnson, Steele and Whyte."

Reviews of Books

THOMPSON ON TRIALS[1]

ENLARGED from two to four volumes, and brought up to date by the inclusion of about ten thousand new citations, this well-known standard work, Thompson on Trials, is sure to earn for itself a place of even greater importance in the esteem of bench and bar, and to win new repute as one of the most imposing examples of American legal scholarship.

Like Dillon on Municipal Corporations, which has grown from two to five

[1] A Treatise on the Law of Trials, in Actions Civil and Criminal. By Seymour D. Thompson, LL.D., author of Thompson on Stocks and Stockholders, Thompson on Homesteads and Exemptions, Thompson on Corporations, Thompson on Negligence, etc. 2d ed., by Marion C. Early, of the St. Louis bar, editor of the 3d edition of Bishop on Statutory Crimes, author of Assignments for Benefit of Creditors, "Cyc." editor of 2d edition of Bishop on Contracts. 4 v. T. H. Flood & Co., Chicago. V. 1–2, pp. xxix + 2119; v. 3, Forms of Instructions, pp. 1207; v. 4, Table of Cases and Index, pp. 830. ($26 delivered.)

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volumes, this treatise accentuates a growing tendency that is likely to render text-books of large bulk, running into many volumes, a commonplace phenomenon of the legal literature of the near future. Just as no human institution springs into existence full-grown, but requires a period of long and slow development for its perfection, so a great treatise on any large subject in American law can be created only as the result of labor extending over a considerable length of time. The foundations once firmly laid, the superstructure rises slowly in imitation of the gradual growth of the voluminous mass of contemporary case-law from which it draws its materials. A great law book which is to retain its vitality must therefore be in a continuous state of development, and it is difficult to see how such expansion can ever be arrested. The profession will naturally soon accustom itself to the tendency, and learn to look for its law in bulky and complicated treatises, but in time, perhaps, no remedy but the drastic one of legislative codification will be in sight to afford any relief from the unendurable burden of this ponderous body of expository writings.

The new edition of Thompson on Trials follows the plan of the former edition in covering all stages of a trial, up to the filing of exceptions, but the subjects of impaneling the jury and examination of witnesses are more clearly and comprehensively treated than before, the section on cross-examination having been very fully elaborated. In addition, the origin and functions of the grand jury, and causes appealable, have been treated in new chapters. The entire volume given up to forms of instructions constitutes a prominent and valuable feature of the new edition, and will be of much aid in furnishing a ready clue to the proper instructions for a given set of facts. The work, as revised and enlarged, forms an invaluable guide to the practitioner in the conduct of all stages of a trial of issues of fact.

BLACK'S JUDICIAL PRECEDENTS

Handbook on the Law of Judicial Precedents, or the Science of Case Law. By Henry Campbell Black, M.A., author of Black's Law Dictionary, and of Treatises on Judgments, Constitutional Law, Statutory Construction, etc. Hornbook Series. West Publishing Co., St. Paul, Minn. Pp. xv, 701 + 36 (cases cited) (index). ($3.75 delivered.)

AS THE first comprehensive work in a new field, Black's Judicial Precedents is certain to furnish a service co-extensive with the thoroughness and ability with which so important a topic has been covered. Many of the principles applicable to the degree of authority to be imputed to judicial precedents, under varying circumstances, are familiar to every lawyer, having been absorbed unconsciously as part of his legal education, without having been actually made a subject of instruction, so that a large proportion of the propositions laid down are sufficiently obvious without need of a text-book. At the same time, it may sometimes be found useful to be able to refer to the forgotten sources of familiar rules, and the researches of the author among the authorities have surely been comprehensive and laborious. As a result of his industry, we have a searching exposition of the numerous qualifications to which rules governing the authority of precedent are subject, and of the manner of their application to sets of circumstances which it may never have fallen to the lot of the practitioner to consider, but concerning which he may at any moment find himself in need of guidance. Such topics as the authority of federal decisions in state courts, and

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of state decisions in federal courts, are examples of subjects which spread into unsuspected ramifications.

The book will not only be found useful in preparation for argument, but will also assist judges in determining when a decision ought to be overruled, and in distinguishing between prior adjudications of imperative authority and those merely persuasive. The writer assumes a moderate attitude with regard to social and economic conditions, and the local environment in which a case must be decided, and it is gratifying to see that he does not carry the doctrine of *stare decisis* to absurd lengths. Such topics as *res adjudicata* are properly relegated to a subordinate position, without being in any way neglected, and the law of the case receives a simple, unpedantic treatment. The treatise seems like an excellent piece of work, and is certainly well arranged and lucidly written.

THE NEWFOUNDLAND FISHERIES ARBITRATION

Argument of the Hon. Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910. Edited with Introduction and Appendix by James Brown Scott, of Counsel for the United States. The World Peace Foundation, Boston. Pp. cli, 374 149 (appendix). ($3.50.)

THE function of this book is twofold. It presents in admirable form the extended argument of Senator Root on behalf of the United State dissecting the intricate questions involved in the fisheries dispute, an argument that is a model of dignified forensic discussion of theoretical and technical subjects demanding unusual skill of the advocate. It also embodies the not unimportant contribution of a distinguished scholar who has edited Senator Root's argument with a thoroughness worthy of so notable a performance. Thus we have not only the statement of the case as made by the chief counsel for the United States, but within the same covers the historical and documentary data necessary to an intelligent understanding of the controversy, and the legal commentary necessary to a realization of the nature of the juridical questions involved and of the precise effect to be attributed to the judicial resolution of each. The book thus fills a larger place in the literature of international law and arbitration than the title would suggest.

The introduction written by Dr. Scott makes up a valuable essay of one hundred and fifty pages, setting forth the origin of the controversy regarding the Newfoundland fisheries, and tracing the successive diplomatic efforts for its adjustment culminating in the special international agreement of 1909. The seven questions singled out for determination by the Hague Tribunal are then discussed, with a detailed examination of the result of the award in each instance. Following Senator Root's argument, occupying two-thirds of the volume, is a complete appendix of all treaties, correspondence, statutes, and official circulars directly related to the dispute.

The reason why this publication was undertaken by the World Peace Foundation is sufficiently obvious. It is said that small questions only are submitted to arbitration, comments Dr. Scott, hence it is well that great cases, such as the Alabama claims and Newfoundland fisheries dispute, be noticed in order that the gradually increasing possibilities of international arbitration be recognized. The fisheries case is a striking illustration of the settlement of difficult questions of internal and external sovereignty by an appeal to reason rather than to the sword.

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Students of international law will feel grateful to Dr. Scott for his careful study and analysis of the case as presented for the United States, clearly bringing out the full import of the findings of the Tribunal and showing in what degree the award partook of the nature of a compromise between the opposing parties, and in what respects it signified victory for one or the other of them.

McELREATH'S CONSTITUTION OF GEORGIA

A Treatise on the Constitution of Georgia, giving the origin, history and development of the fundamental law of the state, with all constitutional documents containing such law, and with the present constitution, as amended to date, with annotations. By Walter McElreath, of the Atlanta bar. Harrison Co., Atlanta, Ga. Pp. viii, 676 24 (index). ($6.)

THIS work is divided into three parts. The first is purely historical, treating in eleven chapters of the constitutional history of Georgia. The second is made up wholly of the documentary matter appropriate to an appendix, containing English constitutional documents and all the written constitutions of the state in chronological order. The third is a digest of Georgia decisions constructing the present constitution, cast in the form of annotations of the text of the constitution as amended, with the addition also of historical notes to a considerable number of the sections.

The writer, with an engaging modesty, disclaims credit for having done anything more than to collect materials for a study of constitutional history, and apologizes for lack of time for continuous labor. He seems, however, to have produced a conscientious and capable piece of work, of large dimensions, which has acceptably fulfilled the end sought to be attained.

The work suggests the obvious inquiry whether it may be well to devote so much attention to the constitution and constitutional interpretations of one state, to the exclusion of those of the United States and of other states with regard to which the principle of comity should receive some application, and the question may be raised whether the constitutional system of any one state is to be considered completely self-sufficient in that sense. If, however, the bench and bar of Georgia are inclined to that attitude the purely local treatment of the subject will fully meet their needs, even though the treatise may have little usefulness beyond the state except for purposes of historical and political research.

BOOKS RECEIVED

The Supreme Court and the Constitution. By Charles A. Beard, Associate Professor of Politics in Columbia University. Macmillan Co., New York. Pp. 127. ($1 *net.*)

The Principles of Civil Jurisdiction, as Applied in the Law of Scotland. By George Duncan, M.A. Lecturer on International Law in the University of Aberdeen, and D. Oswald Dykes, M.A., Advocate. William Green & Sons, Edinburgh. Pp. xvi, 358 + 18 (table of cases) + 18 (index).

A Chance Medley of Legal Points and Stories Little, Brown & Co., Boston. Pp. 374 (index). ($1.50 *net.*)

Proceedings of the Iowa State Bar Association held at Des Moines, Iowa, 1874–1881. Compiled by A. J. Small, Law Librarian. Iowa State Library. Published by the Iowa State Bar Association. Pp. 262.

Anomalies of the English Law. By Samuel Beach Chester, of the Middle Temple, Esq., Barrister-at-Law; Fellow of the Royal Geographical Society; Companion of the Military Order of the Loyal Legion of the United States, Commandery of Pennsylvania; Member of the (U. S.) Military Service Institution, Governor's Island, New York Harbor. Little, Brown & Co., Boston. Pp. 287. ($1.50 *net*).

A Treatise on the Modern Law of Evidence V. 3, Reasoning by Witnesses. By Charles Frederic Chamberlayne, Esq., of the Boston and New York bars, American editor of Best's Principles of the Law of Evidence, American editor of the International Edition of Best on Evidence, American editor of Taylor on Evidence. Matthew Bender & Co., Albany, N. Y. Pp. xxxiii, 1278 + 93 (index). ($28 for the four volumes.)

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Index to Periodicals

Aerial Law. "The International Law of Aërial Space." By Amos S. Hershey, *American Journal of International Law*, v. 6, p. 381 (Apr.).

"Control of the aërial space by the territorial power underneath is necessary for various purposes in time of peace as well as in time of war." For example, to protect wireless telegraphy, to prevent espionage and smuggling, to enforce the collection of customs duties, and to maintain sanitary regulations.

Bankruptcy. See Stockbrokers.

Commerce. "Constitutional Aspects of Federal Regulation of Business." By James Parker Hall. *Journal of Political Economy*, v. 20, p. 473 (May).

"Through taxation, through its postal powers, through its control over interstate commerce, and particularly through its control over corporations engaged in interstate commerce. Congress probably has power effectively to regulate the capitalization, the production, and the distribution of all large commercial businesses in this country."

See Monopolies, Public Service Corporations, Railway Rates.

Copyright. "The New Law of Copyright in Russia." By L. P. Rastorgoüeff. *Journal of Comparative Legislation*, N. S. no. 26, p. 302 (May).

Corporations. "Entities and Real and Artificial Persons." By W. E. Singleton. *Journal of Comparative Legislation*, N. S. no. 26, p. 291 (May).

"With regard to English corporation law it is sometimes supposed that the realism theory and the fiction theory are mutually exclusive. This is not so. It is possible to recognize the convenience apart from law of describing the phenomena of corporations in terms of entities from which the scientist deduces no consequence. It is possible at the same time to believe it to be part of the law of England that in the case of a corporation the existence of an artificial person is to be assumed and that legal consequences are to be deduced from this assumption."

See Trade Unions.

"*De Facto* Corporations." By Charles E. Carpenter. 25 *Harvard Law Review* 623 (May).

"In establishing the *de facto* doctrine it seems the courts were neither making nor annulling legislative enactments, but following their common practice of adapting the common law to changed conditions."

Courts. "The Supreme Court of Minnesota." By George E. Longsdorf. 19 *Case and Comment* 39 (June).

Criminal Law. "Report of the Committee of the Kansas Bar Association on Crimes and Criminal Procedure. "By William E. Higgins. 3 *Journal of Criminal Law and Criminology* 12 (May).

Criminal Law, Administration of. "Charging the Jury in a Trial for Murder and Delay in the Execution of Murderers." By Robert Ralston. 46 *American Law Review* 397 (May-June).

"While some improvement of existing conditions might be effected by legislation, the delays which now occur at all stages of the proceedings can be avoided in one way only, and that is by the prompt and vigorous action of those whose duty it is to administer and execute the law."

"The Chicago Police — Report of the Chicago Civil Service Commission." By Messrs. Campbell, Flynn and Lower. 3 *Journal of Criminal Law and Criminology* 62 (May).

This is an extended and valuable report, which throws much light, particularly, on such subjects as gambling and prostitution. The report finds a connection existing between the police and the criminal classes of Chicago, maintained by a bipartisan political combination. A large number of wholesomely progressive recommendations are offered.

Criminal Procedure. "Criminal Procedure in Canada." By Justice William Renwick Riddell. 3 *Journal of Criminal Law and Criminology* 28 (May).

Read before the New York State Bar Association last January (see 24 *Green Bag* 140).

See Criminal Law, Procedure.

Criminology. "Professor Ferri's Comment on the Seventh International Congress at Cologne." Summarized by Robert Ferrari. 3 *Journal of Criminal Law and Criminology* 49 (May).

"This new justice for minors, up till now, abandoned, abnormal, delinquent, shall become the justice of tomorrow for all juveniles and adults. This justice is founded upon the firm ground of the doctrines of our school: the study of the individual, in himself, as an organism, and in his relation to family and social causes that spurred him on to wrong, full power in the magistrate, who shall be expert in penal justice, and hence, well furnished with psychobiologic and sociological, as well as juridical, cognitions, to adopt various means depending on the diversity of the cases, and execution of the sentence with the view to the social readaptation of the convict. Only then shall we see justice, not armed with the sword, but illumined by science, co-operating to dimish the pain and the misery of human life."

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"The Recent Federal Census of Prisoners." By Joseph A. Hill. 3 *Journal of Criminal Law and Criminology* 32 (May).

"There is then a fair prospect at this census of achieving results beyond those hitherto attained in the field of federal criminal statistics. . . . Congress, however, has not felt justified in appropriating for the Census Bureau a sum sufficient to permit of the continuation of this branch of the work."

"Crime and Insanity in the Twenty-first Century." By Cesare Lombroso. 3 *Journal of Criminal Law and Criminology* 57 (May).

"In the future we will find in the few prisons, which must be maintained, schools, conferences, libraries, interviews with men of judgment and honesty, premiums for work well done. And it will be shown to the criminaloid, and to the criminal moved by passion, that nothing is done to curb him, but everything is done for his good."

"Criminal Statistics, 1910." 37 *Law Magazine and Review* 308 (May).

See Criminal Law, Penology.

Defamation. "Privilege in Defamation Actions in Australia." By James Edward Hogg. *Journal of Comparative Legislation*, N. S. no. 26, p. 299 (May).

General Jurisprudence. See Corporations.

Government. "The New Role of the Governor." By John M. Mathews. *American Political Science Review* 216 (May).

"The open leadership of an able, responsible, and fearless Governor is becoming an effective instrumentality for the control of public policy by public opinion. Only men of unusual ability are capable of playing this new role."

"The Illinois Constitution — Shall it be Amended or Shall there be a Constitutional Convention?" A Symposium. 72 *Illinois Law Review* 42 (May).

"The Possibility of Illinois being Divided into Two States." By Charles LeRoy Brown. 7 *Illinois Law Review* 30 (May).

"The Parliament Act of 1911." By Alfred L. P. Dennis. 6 *American Political Science Review* 194 (May).

"A Program of Radical Democracy." By Prof. J. McKeen Cattell. *Popular Science Monthly*, v. 80, p. 606 (June).

"The national government being historically a federation of states may need some Constitution, but it does not need much of one or one very much. It would be entirely safe for the Congress to decide what the nation shall do and what shall be left to the separate states. Great Britain is better off without a written constitution."

See International Law and Arbitration.

Habeas Corpus. "What Shall be Done With the Writ of Habeas Corpus?" By Charles B. Elder. 7 *Illinois Law Review* 1 (May).

The following reforms in the Illinois system are proposed: defining the territorial jurisdiction of the courts other than the Supreme Court, provisions to prevent undue delay in disposition of habeas corpus proceedings, provisions for appellate revision, and a habeas corpus judge in each court of Cook County.

"Suspension of the Writ of Habeas Corpus." By Edgar L. Masters. 7 *Illinois Law Review* 15 (May).

Harlan. "The Dissenting Opinions of Mr. Justice Harlan." By Justice H. B. Brown (retired). 46 *American Law Review* 321 (May-June).

"His dissents will always be referred to with a respect due to their learning, their manifest patriotism and their careful exposition of the law. Some of them will doubtless become the basis for future legislation," as in his "fellow servant "cases, "and perhaps for a reversal by the Court itself."

Insurance. "Governmental Regulation of Insurance in Canada." By Avard L. Bishop. 6 *American Political Science Review* 175 (May).

International Law and Arbitration. "The Evolution of a Permanent International Judiciary." By Dr. James Brown Scott. *American Journal of International Law*, v. 6, p. 316 (Apr.).

"For the purpose of tracing the development from self-redress to arbitration by private contract, and from arbitration to judicial procedure as illustrated by the growth of the Roman judiciary, I shall rely upon certain well-known writers. The facts are patent and only require to be analyzed and interpreted. . . .

In 1899, the First Hague Conference unconsciously followed Roman precedent by creating a panel or list of judges, the Roman *Album Judicum*, from which the temporary tribunal could be selected for the individual case. . . . .

"The temporary tribunal, with judges of the parties' choice, formed for the trial of a particular case, is unsatisfactory." It requires diplomacy to constitute it, and diplomacy is proverbially slow, it is a private court, it has no permanent life and therefore no continuity, and the method is expansive.

The logical, but unconscious development of the temporary into the permanent international court finds its historical parallel in the conditions leading up to the establishment of the Supreme Court of the United States.

"The current of history is with us, and although the stream may be stemmed for a time, obstruction must needs be futile."

"The Development and Formation of International Law" (*concluded*). By Ernest Nys. *American Journal of International Law*, v. 6, p. 279 (Apr.).

"The Middle Ages even furnish examples of permanent arbitration. The perpetual peace which was concluded in 1516 between François

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I and the Swiss cantons contains a permanent arbitration clause to be binding on the subjects of both high contracting parties. . . . .

"The notion of private war was the outcome of false conceptions. The notion of public war, or of war, to employ the term which is always used, rests likewise on a false foundation. It must be driven out by the aid of reason."

"Russia's Liability in Tort for Persia's Breach of Contract." By Clement L. Bouvé. *American Journal of International Law*, v. 6, p. 389 (Apr.).

"Is Hudson Bay a Closed or an Open Sea?" By Thomas Willing Balch. *American Journal of International Law*, v. 6, p. 409 (Apr.).

"International Law and Subject Races." By Sir John Macdonell. *Journal of Comparative Legislation*, N. S. no. 26, p. 280 (May).

"Closely connected with, if not a part of, international law is a group of duties on the part of dominant races to those under their control or influence. These duties, now imperfectly recognized, may be made clearer; they may be enlarged; the observance of them may be made stricter by wise co-operation."

"The French Spoliation Claims." By George A. King. *American Journal of International Law*, v. 6, p. 359 (Apr.).

See Aerial Law, Maritime Law, Pufendorf.

Juvenile Delinquency. See Criminology.

Labor Disputes. "The Living Wage in the Australian Arbitration Court." By Prof. Harrison Moore. *Journal of Comparative Legislation*, N. S. no. 26, p. 202 (May).

"Mediæval Industrial Courts." By Kenelm C. Cotes. 37 *Law Magazine and Review* 286 (May).

"Haywood and Haywoodism." By Carl Hovey. *Metropolitan*'v. 36, p. 17 (June).

"Haywood is a mass leader of demonstrated ability, and Haywoodism is a mass movement, little intellectualized, with a vague and transcendently ideal scheme as its ultimate goal. Its methods are those of Syndicalism."

Legal Education. "Conditions of Admission to the Legal Profession Throughout the British Empire." By C. E. A. Bedwell. *Journal of Comprative Legislation*, N. S. no. 26, p. 209 (May).

Legal History. "The Genius of the Common Law III." By Sir Frederick Pollock. 12 *Columbia Law Review* 387 (May).

See 24 *Green Bag* 255.

See Labor Disputes.

Maritime Law. "The International Regulation of Ocean Travel." By Everett P. Wheeler. 19 *Case and Comment* 15 (June).

"The Present Federal Law of Damages for Death by Negligence at Sea." By George Whitlock. 19 *Case and Comment* 18 (June).

See Survivorship.

Minimum Wage. See Labor Disputes.

Monopolies. "The Enforcement Provisions of the Sherman Law." By Prof. Ernest Freund. *Journal of Political Economy*, v. 20, p. 462 (May).

"We are reminded of the history of railroad rate regulation. After the courts had proclaimed the principle of reasonableness, they attempted to apply it; but they were not equal to the task, and eventually it had to be committed to an administrative commission. And so, in the matter of trusts, judicial regulation will merely point and open the way for regulative legislation, to be administered by way of guidance and prevention. When the historian of the future comes to survey the evolution of the anti-trust legislation in the United States, he will record the futility and failure of the attempt to deal with difficult economic problems through criminal punishment; but he will also see therein another illustration of the astonishing flexibility of equitable jurisdiction, which here as so often before has anticipated statutory reform, and which has enabled the United States to cope with certain powerful organizations at a time when all other nations stood helpless before trusts and syndicates. And he will conclude that the framers of the Sherman act builded better than they knew."

"The Powder Trust, 1872–1912." By William S. Stevens. 26 *Quarterly Journal of Economics* 444 (May).

The history of the powder trust is set forth in detail. Its policy in dissolving over sixty of its subsidiary corporations and purchasing their properties places it in a different position from other monopolies prosecuted under the Sherman act. No decree can attempt to restore the previous conditions in the explosives trade.

See Commerce.

Negligence. "The Humanitarian Doctrine." By M. E. Otis. 46 *American Law Review* 381 (May-June).

"In general terms, the Humanitarian Doctrine [in the courts of Missouri] called more frequently the Doctrine of the Last Clear Chance, is the rule in torts 'that notwithstanding the previous negligence of a plaintiff, suing to recover for injuries to his property or person, the defendant will be liable, if at the time the injury was done, it might have been avoided by the exercise of reasonable care.'"

See Maritime Law.

Patents. "Patents and the Public." By Seth K. Humphrey. *Atlantic*, v. 109, p. 734 (June).

"Under our present system, the most fortunate inventors are those who succeed in establishing their patents on a royalty basis. The

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law might as well bring this opportunity to every inventor, with the added advantage to him and the community that, instead of being restricted to one license, both would do business with an entire industry. The royalties, carefuly graded to provide just compensation, would be paid to the inventors, and a penalty for not so paying them would enforce this reasonable exaction."

Penology. "Where Prisoners are Trusted." By W. E. Collett. 3 *Journal of Criminal Law and Criminology* 43 (May).

"The effect of the 'trusty' system, as employed by Colorado penitentiary officials, has had a wholesome effect upon the discipline of the institution."

"The Payment of Prisoners." By F. Emory Lyon. 3 *Journal of Criminal Law and Criminology* 36 (May).

A strong argument for just compensation for the labor of the prisoner.

"Donald Lowrie's Life in Prison." By Charles Vale. *Forum*, v. 47, p. 735 (June).

Gloomy pictures of the life of convicts in St. Quentin prison, California, from a book written by one who set down the facts without exaggeration as he saw them.

See Criminology.

Political Issues. "Two Democratic Candidates." By George Harvey. *North American Review*, v. 195, p. 721 (June).

Dealing with Champ Clark and Oscar W. Underwood, sympathetically setting forth the qualifications of either for the Presidency.

Procedure. "The Delays of the Law. By Charles W. Tillett. 46 *American Law Review* 353 (May-June).

The writer discusses the the habit of not trying cases at the first term of court, the inadequate number of judges and courts, judicial rotation in office, failure of counsel to file complaints promptly, continuances, absence of preparation for trial, time consumed in selection of juries, too many causes of challenge, etc.

See Criminal Law, Criminal Procedure.

Public Service Corporations. "Judicial Review of Public Regulation." By Milo R. Maltbie. *Journal of Political Economy*, v. 20, p. 480 (May).

"One may safely predict that if a system of court review is generally adopted, whereby a corporation that is dissatisfied with any act or order may appeal to the courts and thereby delay for a long period a final decision, and perhaps upset the conclusion reached by the administrative body because the court has a different opinion of what is wise, expedient, or warranted by the facts, a return may be made to legislative regulation which is subject to no such review, whenever it seems likely that advantage is to be taken of litigation to secure delay."

See Commerce, Railway Rates.

Pufendorf. "The Great Jurists of the World: XIV, Samuel Pufendorf." By Coleman Phillipson, LL.D. *Journal of Comparative Legislation*, N. S. no. 26, p. 233 (May).

"To Leibnitz's harsh and unfair judgment is largely due the under-estimation of Pufendorf by many of his successors. Locke's high opinion, however, may serve as a corrective of that of Leibnitz. Sir James Mackintosh, too, says; 'His treatise is a mine in which all his successors must dig.' And in recent times the eminent economic historian, Prof. Roscher, has expressed his emphatic dissent from the opinion of Leibnitz; indeed, he places Pufendorf also among the greatest political and economic writers.

"In his various writings, especially in his legal work, Pufendorf does not show the genius, the penetration, the profound erudition of a Grotius, nor the practical sagacity, the argumentative skill, the power to grapple with actual conditions of a Gentilis. And in originality also he is certainly inferior to the first, and in some respects to the second. But none the less his treatises on jurisprudence occupy a high place, as they elaborate for the first time a systematic body of law, magnificent in its proportions, logically coherent, congruous, scientifically constructed, and based throughout on fundamental principles; although the adoption of these first principles is to be largely attributed to his study of, and attempt at reconciling, the doctrines of Hobbes and Grotius. He is at once the best representative and the head of the school of natural law. His works display a spirit of tolerance, an impatience with narrow sectarianism, a determination to separate law from theology, a desire to mete out justice to all mankind, whether Christian or heathen, whether high or low in the scale of civilization."

Railway Rates. "The Regulation of Railway Rates under the Fourteenth Amendment." By Justice Francis J. Swayze. 26 *Quarterly Journal of Economics* 389 (May).

Treating the subject historically, in the light of judicial decisions involving the scope of the Fourteenth Amendment. The subject of valuation receives illuminating discussion. The most serious problem of the future is declared to be that presented by our dual system of government.

See Commerce, Public Service Corporations.

"The State as a Rate-Maker." By John H. Atwood. 19 *Case and Comment* 3 (June).

"The Nation as a Rate-Maker." By Balthasar H. Meyer. 19 *Case and Comment* 8 (June).

Riparian Rights. "The Alienability of the State's Title to the Foreshore." By Royal E. T. Riggs. 12 *Columbia Law Review* 395 (May).

Stockbrokers. "The Rights of the Defrauded Customer of an Insolvent Broker." By Garrard Glenn. 12 *Columbia Law Review* 422 (May).

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Survivorship. "The *Titanic* Disaster as Raising Questions of Survivorship." By Alexander H. Robbins. 74 *Central Law Journal* 416 (June 7).

"Almost all of the common law rules relating to the administration of estates, marriage and divorce, husband and wife, parent and child and many other great divisions of the law have been supplanted in favor of the civil law rules by chancery and statutory innovations. If this be true in all these great particulars, why may it not be true with respect to the common law rules governing the question of survivorship in a common disaster?"

See Maritime Law.

Trade Unions. "The Status of Trade Unions in England." By W. M. Geldart. 25 *Harvard Law Review* 579 (May).

The legal entity of the trade union is also discussed in Mr. Singleton's article on the reality and fiction theories of the corporation in the *Journal of Comparative Legislation*. (See Corporations, *supra*.)

Trustees. "Money Stolen by a Trustee from One Trust and Used for Another." By R. D. Weston. 25 *Harvard Law Review* 602 (May).

Latest Important Cases

Employers' Liability. *Modification of Contributory Negligence Rule.* U. S.

The United States Supreme Court, in *Missouri Pacific Ry. Co.* v. *Castle*, decided May 13, (Oct. term, 1911, no. 344) held that the police power of the state justifies a statutory modification of the doctrine of contributory negligence by providing that such negligence on the part of an injured employee shall not be a bar to a recovery against the employer, where the employee's negligence was slight, and that of the employer gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

Mr. Chief Justice White, in giving the opinion of the court, said: "Obviously the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow servant also justify a similar departure in regard to the effect of contributory negligence." In this respect the authority of the *Mondou* case was recognized as binding.

Employers' Liability. *When Employee is Member of a Relief Society — Private Contracts cannot Exempt Employer from Liability under the Federal Act.* U. S.

In deciding a case that came to the Supreme Court from the Court of Appeals of the District of Columbia, Mr. Justice Hughes held, May 13, that the federal employers' liability act did not exempt the employer from civil liability for the injury of an employee who agreed to accept the relief offered by an employees' benefit association. *Phila., Balt. & Wash. R. Co.* v. *Schubert*, Oct. term, 1911, no. 549.

The suit was brought by a brakeman for damages on account of personal injuries sustained in the line of his employment. Judgment for $7500 was awarded him. The railway company defended on the ground that Schubert was a member of a relief society organized among the employees of the road and that he had signed certain regulations, among them one agreeing to exempt the company from any liability on account of injuries sustained in the line of his employment. The court, relying upon a recent decision of last term in the case of *C. B. & Q. Railroad* v. *McGuire*, which involved the constitutionality of an amendment to the employers' liability law of Iowa, which enacted that an employee could not enter into a contract through a relief society that would exempt the employer from liability, took the view that the same rule applies to the federal act. (23 *G. B.* 320.)

The court put aside the contention of the railroad that, because Schubert had signed the regulations of the relief fund before the employer's liability act was passed, such agreement of membership amounted to a contract in existence at the time the law was enacted which could not be impaired by the statute. The court declared the power of Congress to regulate interstate commerce could not be interfered with by existing private contracts.

Monopolies. *Terminal Facilities — Combination Excluding Some of the Railroads Compelled to Use Them — Sherman Act.* U. S.

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While the mere combining of several independent railway terminal systems into one does not necessarily operate as a forbidden restraint of interstate commerce under the Sherman anti-trust law of 1890, the combination and unification of the terminal facilities at St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them — the inherent conditions being such as to prohibit any other reasonable means of railway access to that city — violates the provisions of the anti-trust act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize such commerce which must pass through the gateway at St. Louis. This was the finding of the United States Supreme Court in *U. S.* v. *Terminal R. Assn. of St. Louis*, decided April 22 (Oct. term, 1911, no. 386).

Mr. Justice Lurton, who delivered the opinion of the Court, said: —

"It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities."

Motor Vehicles. *Statute Requiring Owner of Car in Accident to Stop and Give His Name to the Police — Sustained as Valid Exercise of Police Power — Privilege Against Self-Incrimination.* Mo.

A statute which has been declared unconstitutional in New York has been upheld in Missouri. A law passed by the Missouri legislature in 1911 (Session Acts, 1911, p. 322) provides for compulsory registration and requires the owner of an automobile to stop and report to the police when an accident occurs, and to give his name and address, and the number of the vehicle, and to render assistance to the person or persons injured. This statute was borrowed from one first adopted in New York in 1910. After its adoption in Missouri, the intermediate appellate courts in New York held it unconstitutional. *People* v. *Rosenheimer*, 128 N. Y. Sup. 1093, 130 N. Y. Sup. 544.

In *Ex parte Kneedler*, decided by the second division of the Missouri Supreme Court June 1, the applicant for a writ of habeas corpus had been in his automobile when it ran over and killed a man in East St. Louis on the night of Oct. 14, 1911. In an indictment he was charged with violating the statute already referred to, in that he had commanded and induced his chauffeur to flee. Circuit Judge James E. Withrow of St. Louis held that the defendant was charged with the commission of a felony, as an accomplice after the fact. The defendant then filed a motion before Judge Withrow to quash the information, on the ground that the statute was unconstitutional and void because it required the defendant to testify against himself. This motion being overruled, Kneedler applied to the Supreme Court for a writ of prohibition based on the same contention. The writ was denied, and Kneedler then brought habeas corpus proceedings in the Supreme Court.

Judge Ferris, in denying the application, and in affirming Judge Withrow's ruling, upheld the statute as a valid exercise of the police power, and said: —

"The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved it arises from other statutes. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. *State* v. *Davis*, 108 Mo. 67. . . .

"Every person who operates or uses a motor vehicle must be regarded as exercising a privilege and not an unrestricted right. It being a privilege granted by the Legislature, a person enjoying such privilege must take it subject to all proper restrictions."

Self-Incriminating Testimony. See Motor Vehicles.

Workmen's Compensation. See Employers' Liability.

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The Editor's Bag

MAGAZINE MISREPRESENTATION

THE articles which have been appearing lately in *Everybody's Magazine*, on the subject of "Big Business and the Bench," are so typical of a great deal of the ephemeral periodical literature of the day that when this author, for instance, is castigated, a blow is dealt at his whole disgraceful crew. The rebuke administered by Dean Wigmore, in the opening pages of the *Journal of Criminal Law and Criminology* for May, is a blow delivered in a good cause, at a time when such offenses are too frequent to be summarily dealt with, and the silence of those who could readily expose the fraud perpetrated on the reading public is due solely to the insignificant standing of the ignorant or inaccurate muckraker in the councils of serious discussion.

Our popular magazines — and these remarks do not apply to *Everybody's* alone — have it in their power to play a dignified role by working for the advancement of an enlightened public opinion, instead of pursuing methods which they have adopted from yellow journalism, and just as a politician need not necessarily be a mountebank and demagogue to be popular, a low-priced magazine need not employ the arts of misrepresentation to build up a prosperous circulation.

The utter inaccuracy of these articles on the alleged subservience of the courts to the railroads has been shown up by Dean Wigmore in a manner as impartial as convincing, and similar service has been done by William D. Guthrie of New York, recently, in bringing Colonel Roosevelt to book for his unfair presentation of the facts regarding the decision of the United States Supreme Court in the employers' liability cases. If editors and journalists will not take the trouble to protect the community from perversions of the truth, it is the duty of the legal profession, which is often able to see at a glance what the general public requires to be clearly explained, to follow the example of such men as Messrs. Wigmore and Guthrie.

Hampton's has had to pay the penalty of detriment to its business for misrepresentations like those in the Moffett article mistakenly linking the Corn Products Company with the Standard Oil, and eventually an economic remedy for muckraking will perhaps apply itself automatically. As soon as the magazines find that muckraking, in the sense of slovenly, irresponsible attack, does not pay, they will decide to pursue more dignified practices.

DEAN LAWSON RESIGNS

JOHN D. LAWSON, LL.D., has resigned as Dean of the University of Missouri Law School in order that he may devote more time to writing. We are gladdened by the prospect

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of an increase in the product of his versatile pen, which has long rendered effective service to all sound movements for the advancement of law and the improvement of its administration.

THE BEGINNINGS OF A NEW SCHOOL?

PROFESSOR MUNROE SMITH of Columbia University delivered a course of lectures last winter at Johns Hopkins, to graduate students of political science, on the data and elements of jurisprudence. When these lectures are published in book form, as they presumably will be shortly, they are certain to excite profound interest not only in this country but abroad. Professor Roscoe Pound's anticipated work on Sociological Jurisprudence will likewise be of prime importance.

Whether the United States offers a congenial environment for the development of a native school of philosophical jurists remains to be seen. There are various signs which indicate that we were never nearer than we are at the present time to the realization of such a hope. The Old World can no longer claim a monopoly of intellectual discovery in the fields of philosophy, economics, sociology, and medicine, and we believe that the time is near when it must surrender a share of its triumphs in jurisprudence and politics to the New.

GOVERNOR CORWIN AS A STORY-TELLER

A CORRESPONDENT who has contributed many anecdotes to the *Green Bag*, J. T. Holmes, Esq., of Columbus, O., writes to us regarding the regrets of the late Governor Corwin of Ohio to discover himself famous chiefly as a story-teller. We quote:—

"On the stump in a political campaign, he was incomparable as a wit and humorist. So fixed were his talent and reputation, in these respects, that it is part of his history that he has been known to convulse great audiences with laughter and applause by mere expressions, not by contortions of his face, and by slight changes in the attitude of his person, after rising to his feet to speak and before uttering a word.

"He was really one of the greatest statesmen and philosophers of this commonwealth. He had been Governor, Senator — opposing the Mexican War while in Congress, speaking of our own soldiery, he made famous the phrase, 'I would welcome them with bloody hands to hospitable graves' — later Minister to Mexico. Finally stricken on his way home from that country, in his last few days he expressed the fear and regret that he would be remembered as a wag and a humorist rather than for his higher, sterner, more substantial and useful qualities and the record which they had helped him make.

"It was a rational feeling. One would rather be remembered, if at all, for 'the weightier matters of the law,' than as a story-teller, or as author of the stories themselves. The case of President Lincoln is unique. There is no danger that the stories imputed to him, or which he told for illustration or relief from the intense strains of his position, can ever overshadow the tragedy of his last four years."

A VERSIFIED PLEADING

IN response to a suggestion from the lawyers of Creek County, Okla., we publish copy of a petition filed in the District Court of Creek County, at Sapulpa, Okla., on May 2, 1912. Hon. Wade S. Stanfield, the

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District Judge, granted a restraining order on the petition. The parties litigant were of African descent. The petition was prepared by J. R. Miller, Esq., of the law firm of Hughes & Miller of Sapulpa:

IN THE DISTRICT COURT, WITHIN AND FOR CREEK COUNTY, IN THE TWENTY-SECOND JUDICIAL DISTRICT, OF THE STATE OF OKLAHOMA

Ella Brown, Plaintiff,
v.
Henry Brown, Defendant. } *No.* 2445

PETITION

Most noble Judge, Hear the plaintiff, Ella Brown,
Who donning her best, has come up town,
Not as of yore, on work is she bent,
But imploring justice, defendant won't repent.
And these constitute her cause of action,
Enough? Yes to drive her to distraction.

First

The plaintiff at the age of just nineteen,
Was as fair a damsel as ever was seen.
T'was then the defendant, dashing Henry Brown,
Wooed and won her in old Muskogee town.
On the twelfth day of November, Nineteen hundred and four,
The gallant Henry called at her mother's door.
He vowed his love for her should never fail,
And he would tote in juicy possums by the tail.
He would furnish her things to her heart's content,
So long as he had a dollar, dime or cent.
With such wonderful eloquence Sir Henry pled,
That Ella consented and straightway they were wed.
Two years in Muskogee lived Mr. and Mrs. Brown,
When they heard of Sapulpa, the magical town.
To the wonderful City they started by rail,
But to them the train's pace seemed slow as a snail.
The marvelous Sapulpa was reached at last,
And six more years have faded into the past.
In Creek County, Oklahoma, plaintiff has lived more than a year,
The year next preceding, now do you hear.
To this one time happy home of yore,
Came prattling children numbering four.
Of these, three survive unto this good day,
Namely, Venore, Jessie and Ona May.
The first a girl of six, second a boy of four,
Third a baby girl 'bout a year or little more.

Second

Plaintiff further states, that during all this time
She has been a loving wife, keeping dutifully in line;
Not so with the defendant, Henry Brown,
He has been a rounder in the good old town.
Scattered his affections to the Oklahoma breeze,
Staying out late at night, doing as he please.

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Broke the loving promises he eight years ago did plight,
Then centered his affections on a girl that isn't white,
She's dusky Georgia May ——, last name unknown.
(I'm telling his short-comings in an undertone.)
And just because he's guilty and I've found he isn't true,
He says he'll kill me with his pistol and kick me with his shoe.
This year, on unlucky Friday, April twenty-six,
He carried out his plan of beating me with sticks.
The big end of a buggy whip is what the villian used,
And from my head and arms the blood did freely ooze.
From such inhumane treatment, I'd like to get relieved,
And this I'm entitled to, if my story is believed.
I'd like you to enjoin him and make him stay away,
And let me live at home with my babies day by day.
The household goods I'd like to have and alimony if you please;
Better give the coin to me, he'll fling it to the breeze.
He's young and stout and able to work and hustle,
That's better than licking me to exercise his muscle.
Lots 25 and 26, Block Two, Westport Addition to Sapulpa, I own,
(The deed was made to Henry), but I want it for my home.
Now don't forget my lawyers, they helped me out in this,
An attorney fee, PENDENTE LITE, I'm sure will not come in amiss.

WHEREFORE, Judge, to you plaintiff prays for a decree
That from the bonds of matrimony will ever set her free;
Also the children, to feed and clothe and send to school,
She'll teach them good manners, and to observe the Golden Rule.
As from her fireside defendant so frequently did roam,
She'd like to have the house and lots, to make her earthly home,
And the household goods in it she'll need,
And for these she will ever plead;
And to her lawyers, a hundred-dollar fee, without subtraction,
Also, please charge up to Henry the costs of this action.

Hughes & Miller, Attorney for Plaintiff.

ANOTHER SACROSANCT INDICTMENT

"AS everyone knows," observes a Philadelphia lawyer, "the court cannot concern itself, in any case before it, with side issues, these are rigorously excluded. This principle was curiously illustrated in a trial in a western state I had the pleasure to attend.

"The charge was one of forgery. During the course of his testimony a witness for the defense contrived to slip in the statement: —

"'I know that the prisoner cannot write his own name.'"

"'All this is excluded,' said the judge, peremptorily, 'The prisoner is not charged with writing his own name, but that of some one else.'"

GEORGE ELIOT USED A LEGAL OPINION

IT is said that George Eliot often sought advice from her friend Frederic Harrison in regard to points of law that came up in the course of her stories. She particularly needed advice in a vital part of "Felix Holt," for, conscientious worker as she was, and as all really great artists are, she was not content to make a guess. Mr. Harrison listened gravely to the presentation of her problem as if it concerned real individuals.

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The next day he sent her a carefully and concisely worded opinion, which she used in her book as he wrote it. In the story it is ascribed to "the Attorney-General," and is referred to as "final authority." It is the part printed in italics in Chapter XXXV.

Mr. Harrison was both surprised and pleased to see his own words used. He expected that the novelist would wish to express his legal opinion in her own language. "Thanks to George Eliot," said he, with a modesty that perhaps went too far, "I have written something that will live forever in English literature!"

TARDY JUSTICE

Judge Parkinson of Michigan, signed a decree of divorce, separating Hughie Cannon from his wife, Emma. Cannon died in a Toledo hospital a few hours before the signing of the decree.

—*News item.*

JUDGE PARKINSON'S a little late
With his divorce decree.
The court's reversed by cruel fate, —
Emma and Hughie both are free.
Hughie has gone off sudden
And Emma's left, to find
To fit the shoes he stood in,
A husband to her mind.
It looks as if poor Hugh
Had shown contempt of court,
Or will the case be tried anew
In court of last resort?
Perhaps the Judge up yonder
Will find some legal flaw
And so acquit him under
The Can(n)ons of the law.

SIRIUS SINNICUS.

EX POST FACTO

IN South Carolina they tell of a lawyer named Calhoun White, who during the course of a suit tried in a court of that state indulged in frequent references to "the ex-facto-post-hole law."

At last the judge, with a quiet smile, set him right.

"You mean, of course," he said, "the ex-post-facto law."

Whereupon Mr. White assumed an attitude of great dignity and replied: —

"I begs the pardon of th' Co't, but yo' honah cert'n'y is lame on th' meanin' of that term. Why, gentlemen, that is the law that prohibits a man from diggin' the hole after the post is set."

THE COURT AT A DISADVANTAGE

HON. JOSEPH W. BAILEY of Texas tells of the kindness of heart and roughness of tongue of a judge in that state.

It appears that in a suit brought before this judge a youthful attorney was arguing a motion that was rather too much for him. Naturally the novice was unmercifully beset by counsel for the other side, who made the young lawyer a mark for shaft after shaft of ridicule. When this sort of thing had proceeded far enough, the judge himself took up the argument on the young attorney's account and gave the older and more experienced lawyer a good dose of his own medicine.

The young man, delighted and encouraged by this unlooked-for aid, attempted to "edge in" a word or two on his own account as His Honor went on. But the latter turned and shouted at him: —

"Keep quiet, young man. I am arguing this motion on our side and may win, but if you blunder into it the Court will be sure to decide against us."

MIXED RELATIONSHIP

A LAWYER "up New York State" recently received a call from a new client, a man bent upon recovering

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a sum of money advanced upon a note and not repaid.

"Who is the party?" asked the lawyer.

"Oh, she's a relative of mine."

"How nearly related?"

"Very nearly."

"But, my dear sir," persisted the lawyer, "you must be more explicit."

"Well, she may be my mother-in-law."

"May be? Then you are likely to marry her daughter?"

"I've already married the daughter."

"Then, of course, the defendant is your mother-in-law."

"Perhaps you'd better hear the whole story," said the client. "You see, a year ago we lived together, my son and I. Across the way lived the widow Morgan and her daughter Clara. I married Clara and my son married the widow. Now perhaps you can tell me whether my son's wife is my mother-in-law or my daughter-in-law."

The lawyer did not answer. The problem was unfamiliar. He was not ready. "I don't think I can take your case," he said. "It presents too many complications."

"Very well," returned the man, taking his hat, despondently. "But there's one thing I forgot. Since our double wedding a child has been born to each of us. What relation are those two children to each other?"

A MERRY JURY

On the third trial of the case, a jury in Paterson, N. J. gave City Counsel Edward F. Merry a verdict of six cents damages for libel in his suit against the Guardian Printing and Publishing Company.
—*News item.*

IT was in Paterson, N. J.,
A place you all have heard of,
The case was tried the other day
And we have just got word of
The verdict which the jury found.
For feeling grieved and sore
They say the plaintiff has good ground.
The libel's proved, and what is more,
After a long-endured suspense
With caution necessary,
The plaintiff gets six copper cents
At which, of course, he's Merry.

SIRIUS SINNICUS.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, fossils, and anecdotes.

USELESS BUT ENTERTAINING

The "Knave" in the *Oakland Tribune* has published several anecdotes about the late Dennis Spencer, of Napa, who was noted as a lawmaker, orator and lawyer. The following story is particularly good: —

One day there entered his office in Napa a bright-looking, well-dressed Chinaman. He took a chair and proceeded straight to the point: —

"You Mr. Spencer, the big lawyer?"

"Yes."

"How much you charge to defend a Chinaman?"

"For what crime?"

"Murder."

"Five hundred dollars."

The Chinaman said he would call again.

A few days later he returned to Spencer's office, gravely placed $500 in coin on the desk before the astonished attorney, and said: —

"All lite. I kill 'im."

John is seven and the son of a lawyer. The father is much given to making fine distinctions in evidence, and the boy had often heard his father discuss the technical difference between absolute lying, misstatements of fact and the like.

The youngster had been caught in some boyish misdeed, and for once, in a way, though ordinarily a truthful lad, he attempted to smooth matters over.

"Son, look me straight in the eye and tell me if that statement is the truth," said the father, severely.

"Well, dad, I think that was a misstatement of fact," replied the boy. "It would have been a lie if I had expected you to believe it, but I didn't have much hope."

The father will be more careful in the future how he discusses abstract subjects around the house. —*Exchange.*

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The Legal World

Monthly Analysis of Leading Events

The month has witnessed no novel development of large importance, national politics continuing to engross the larger part of public attention. The most prominent legal proceedings before the country seem to have been those connected with the Archbald and Hanford impeachment cases, the Gompers contempt case, the re-opening of the Thaw case, the tardy vindication of New York justice in the Brandt case, and the trial of Darrow on charges of bribing jurors. None of these litigations is in any way discreditable to the prosecuting party except the Thaw case. It seems as if the machinery of the New York courts should be employed for better purposes than the re-examination of the mental condition of an insane murderer.

Constitutional changes having been agitated in two states, Ohio and Indiana, similar work has been begun in another state, namely New Hampshire. The newer social and political proposals have figured prominently in the proceedings of these conventions, but the action taken has not been sensational.

A great court cannot be created at one stroke, and one is therefore surprised at the impatience shown by the Senate in striking out the salaries of the Commerce Court judges from the appropriation bill. The Commerce Court has exceeded its powers and has been reversed by the Supreme Court several times, but this does not prove that such a court is not needed in the judicial machinery of the country and that it may not have a useful future. The Archbald case has undoubtedly distracted much attention from the importance of the real issue involved. That such a court will come in time to lend to the decisions of the Interstate Commerce Commission a greater authority, in such disputes, for example, as that over the differential rates of the five chief Atlantic ports, ought to be clearly recognized by the country's lawmakers.

The opposition of the bar to the recall of judges and of judicial decisions expresses itself in resolutions adopted by the Bar Association of the District of Columbia. These resolutions find the existing feeling of discontent in large degree based upon political, social, and moral unrest the evils of which have been augmented by political agitators, and denounce the proposed measures as destructive of the independence of the judiciary. The resolutions are negative rather than constructive in tenor, and in this respect are perhaps typical of the narrower tendency in the legal profession which refuses to admit the existence of real evils demanding wiser and more efficacious treatment than laymen will ever be able to devise. A partial remedy, for example, might be afforded by the provision lately adopted by the Ohio constitutional convention, requiring five or six judges of the Supreme Court of that State to pronounce a law unconstitutional.

Personal

Sam B. Dannis, who for the past six years has been engaged in the practice of law in the canal zone and Panama, has lately moved his offices to the Title Insurance Building in Los Angeles.

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George Q. Richmond, formerly judge of the Colorado Court of Appeals, and more recently leading counsel for the city of Denver, has resumed the general practice of law, with offices in room 800 Central Savings Bank Building, Denver.

Hon. J. Whitaker Thompson has been appointed United States District Judge for the eastern district of Pennsylvania succeeding Judge McPherson, recently elevated to the United States Circuit Court of Appeals. Judge Thompson has been United States Attorney for the district since 1904.

After thirty-six years of active service on the faculty of Columbia University, Prof. John W. Burgess, Ruggles Professor of Political Science and Constitutional Law, has retired. In recognition of "long and distinguished service," he receives the title of Professor Emeritus. In resolutions which they adopted the Trustees of Columbia said in part: "In his published writings he has made intelligible to the civilized world the full significance of the constitutional organization and the judicial protection of liberty under the government of the United States."

Miscellaneous

Senator George Sutherland, of Utah will deliver an address before the annual meeting of the American Bar Association in August at Milwaukee. Senator Sutherland was chairman of the recent federal commission to investigate employers' liability and workmen's compensation.

Mr. Justice Oliver Wendell Holmes was re-elected president of the Harvard Law School Association at its annual meeting June 19. Charles F. Choate, Jr., '90, of Massachusetts was added to the list of vice-presidents. Joseph Sargent, '98, of Boston was elected Secretary, and Roger Ernst, '03, was re-elected treasurer.

Because of the increasing number of automobile accidents in Chicago, a new court was decided upon to try violations of the speed ordinance, and held its first session June 5. "One hundred dollars' fine and twice as much if you do it again," was the way Judge Hugh Stewart punished one Thompson, who was convicted of running an automobile thirty-six miles an hour.

The National Association of Credit Men held their annual convention June 19–21 in Boston. Among the numerous speakers were James M. Olmstead, who discussed recent amendments to the federal bankruptcy act, Congressman John W. Weeks, who advocated the passage of the Aldrich-Vreeland monetary reform bill, Congressman Ernest W. Roberts, who talked on Federal Incorporation," and Sereno S. Pratt, who described the arbitration system of the New York Chamber of Commerce. Fred R. Salisbury of Minneapolis was elected president.

Fifty-seven proposals were submitted at the New Hampshire constitutional convention, the sixth in the history of the state, meeting at Concord, N. H., in June. Favorable action was taken on an amendment allowing the legisture to impose a direct tax on the incomes of public service corporations. A proposed change in the present method of amending the constitution by popu-

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lar ratification was defeated. Reduction of the size of the lower branch of the legislature was favored. Woman suffrage was defeated 208 to 149 on a roll call. The deliberations of the convention were terminated prematurely by the limited size of the appropriation allowed for its expenses.

The twenty-seventh conference of the International Law Association was held in Paris June 3–8. A valuable report was presented by Mr. Justice Phillimore and Dr. Ernest Schuster on "An International Law of Bills of Exchange and Cheques." Dr. Evans Darby gave a résumé of "The Progress of International Arbitration," and suggested that the present alliances and ententes of the European powers might develop into a peaceful federation. "Territorial Waters" was discussed by Sir Thomas Barclay and others. The law of the air was taken up, the British doctrine as expounded by Harold D. Hazeltine of the University of Cambridge, to the effect that the sovereingty of the state extends in full measure over the air above its territory, being impugned by Messrs. Fanchille and Desouches, who upheld the theory of the freedom of the air. W. P. Phillimore, discussing the unification of law, thought it possible in the fields of maritime and commercial law, and in procedure, but impracticable as regards questions of domestic relations and land tenure.

The Academic Roll of Honor

The following members of the bench and bar received honorary academic degrees in June:–

White, Edward Douglass, LL.D. Columbia.
Chief Justice of the United States.

Burgess, John William, LL.D. Columbia.
Professor Emeritus of Political Science and Constitutional Law, lately Dean of the Faculties of Political Science, Philosophy, Pure Science, and Fine Arts, in Columbia University.

Drago, Luis Maria, LL.D. Columbia.
Formerly Minister of Foreign Affairs of the Argentine Republic, member of the Permanent Court of Arbitration at the Hague.

Thayer, Eyra Ripley, LL.D. Brown.
Dean of Harvard Law School.

Reed, Alfred, LL.D. Princeton.
Jurist.

Whitehouse, William Penn, LL.D. Bowdoin.
Chief Justice of the Supreme Judicial Court of Maine.

Morrill, John Adams, LL.D. Bowdoin.
Commissioner in charge of the last revision of the statutes of Maine.

Beale, William Gerrish, LL.D. Bowdoin.
Of the Chicago bar.

Holmes, Oliver Wendell, LL.D. Williams.
Associate Justice of the Supreme Court.

Adams, Melvin O., LL.D. Dartmouth.
Lawyer and railroad president.

Lodge, Henry Cabot, LL.D. Amherst.
United States Senator.

Baldwin, Simeon E., LL.D. Wesleyan.
Governor of Connecticut.

Murlin, Lemuel H., LL.D. Wesleyan.
President of Boston University.

Butler, Charles H., A.M. Princeton.
Reporter of the Supreme Court of the United States.

Sargent, John G., A.M. Tufts.
Attorney-General of Vermont.

Niles, Edward Cullen, A.M. Trinity.
Chairman of the New Hampshire Public Utilities Commission.

Smith, Judge Edward Laurence, A.M. Trinity.
Of Hartford, Conn.

Obituary

Carter, Bernard of Baltimore, the recognized leader of the Maryland bar, died at Narragansett Pier June 13 at the age of seventy-eight. A graduate of Harvard Law School, he became widely known in public life and in his profession. He was at one time pro-

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fessor in the Maryland University Law School, and he later was made provost of the University. He was one of the counsel of the Pennsylvania Railroad and its affiliated lines.

Dewitt, David M., former Congressman from the 13th New York district, died at Kingston, N. Y., June 24, aged seventy-five. Two of his works, "The Judicial Murder of Mary E. Surratt" and "The Trial and Impeachment of Andrew Johnson" created great interest. both here and abroad.

Ernst, George A. O., who died June 13, before he became director of the Municipal Research bureau of Boston had had a good legal practice, being made in demand as an authority on corporation matters, trusts, and wills and had also rendered admirable public service in public positions. He worked hard for the advancement of the welfare of his city, and particularly for that of the working classes. He wrote "The Law of Married Women in Massachusetts."

Gantt, James Britton, Justice of the Supreme Court of Missouri for twenty years, and a noted Confederate veteran, died at Jefferson City, May 28, in his sixty-seventh year.

Higgins, Anthony, formerly United States Senator from Delaware, died June 26, aged seventy-one. He was active in promoting the adoption of the Fifteenth Amendment to the Constitution, to secure political rights for the negro.

Izlar, James F., former Congressman from South Carolina, having also served as state circuit judge and state senator, died in May 26 at Orangeburg, S. C., in his eightieth year.

Murphy, Robert S., former Lieutenant-Governor of Pennsylvania, died at Overbrook June 24. He had marked ability as a lawyer, was an eloquent orator, and was widely esteemed for his sterling character.

Palmer, Horace E., formerly Judge of the Court of Civil Appeals of Tennessee, died in Murfreesboro, Tenn., June 11, in his fifty-seventh year. He was permanent chairman of the state Democratic convention of 1906, He practised law from 1877 until the date of his appointment as judge, and also after his retirement from the bench.

Schofield, Judge William, lately United States Circuit Judge, died June 10 at his home in Malden, Mass. He was a graduate of Harvard Law School, and for four years an instructor in torts in that institution, later teaching Roman law at Harvard for four years. After rendering conspicuous service in the legislature, he was appointed to the bench of the Massachusetts Superior Court in 1903. After the death of Judge Francis Cabot Lowell, in 1911, he was appointed to the position on the federal circuit bench thus left vacant, but illness prevented his taking his seat, and the court was abolished before he recovered his health. He was not only an accomplished judge, but a resourceful debater and eloquent orator.

Stanton, Ambrose P., former speaker of the Indiana House and member of the state board of education, died May 25 at his home in Indianapolis.

Walker, Gen. Duncan S., who for several years was secretary of the Democratic national committee, and was at one time owner and editor of two papers in Washington, D. C., where he once had a large legal practice, died June 4, in Hoboken, N. J., where he had lived for the past fifteen years.

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THE LATE KNOX LIVINGSTON

A LEADING MEMBER OF THE SOUTH CAROLINA BAR

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The Green Bag

Volume XXIV August, 1912 Number 8

The Late Knox Livingston

By W. H. Muller
of the Dillon, S. C., Bar

COL. KNOX LIVINGSTON, president of the South Carolina Bar Association, who died March 22, 1912, was born in Madison, Fla., on the first day of January, 1850. He was one of a number of children of Daniel G. Livingston, who, in the year 1826 came from Glendurnel, Argyleshire, Scotland, and settled first in Richmond County, North Carolina, from which place he subsequently moved to Marlboro District in South Carolina, where he met and married Rhoda Townsend, a daughter of Samuel Townsend. In 1845 he moved to Madison, a small town in the state of Florida, where he continued to live during the remainder of his life. His son, Knox, attended the public schools in Madison and later entered the University of North Carolina, at which place he was distinguished for his zeal as a student and devotion to duty.

Upon completing his work at the University of North Carolina, he began the study of law under Judge Vann of the Madison bar, and in the year 1869 was admitted by a special act of the legislature of the state of Florida to practice law in that state. A short time after he came to Bennettsville, Marlboro County, was admitted to the South Carolina bar in 1870, and formed a partnership for the practice of law with J. H. Hudson, subsequently a Circuit Judge of South Carolina, and H. H. Newton, the firm name being Hudson, Livingston & Newton. This association continued for some time, and Bennettsville became the permanent home of Colonel Livingston.

In later years he was in partnership with Col. Edward McIver of Cheraw, Capt. Harris Covington of Bennettsville, Capt. W. J. McKerrall of Marion, Judge C. P. Townsend, J. B. Gibson and W. H. Muller, all of whom held him in the highest esteem and respected him as a man of unusual personality and talents.

In the year 1871 he was married to Ella Wells, a daughter of Jacob H. Wells of the city of Columbia, and had born to him five children, three of whom lived to maturity. The eldest, Sadie, married William M. Hamer of Dillon, S. C., and died in 1910. The second daughter, Rhoda, married H. J. Haynesworth, a prominent attorney of Greenville, S. C., and is still living, while the third, a son, Vann, lives in Atlanta, Ga.

As a lawyer, attorney and advocate, Colonel Livingston had very few if

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any superiors in the state. The judges of the bench, the attorneys of the bar, and his clients all had the utmost confidence in his integrity, ability and sincerity. The esteem in which he was held by the bar of the state cannot be better shown than by reference to his election as president of the State Bar Association at its last session in 1912. His legal ability is made apparent by reference to the reports of the cases decided by the Supreme Court of the state, in many of which he appeared as counsel, very prominent among them being the case of *Sternberger* v. *C. F. & Y. V. Railroad*, wherein the jurisdiction of the state courts in matters of interstate commerce was first judicially established, and in the determination of which he was largely instrumental. The confidence of his clients was shown by the large and lucrative practice which he enjoyed during his long career of forty years at the bar. As an advocate he so far excelled as to win for himself the soubriquet of the "Little Giant of the Pee Dee." His manner in the court room was especially pleasing, and his beauty of speech, courtliness of address, and power of oratory were the envy of his brother-members of the bar.

In political life he was equally active, and to as great extent held the confidence of the whole people. In his early years he was made the mayor of the town of his adoption. Later he was elected Probate Judge, and subsequently was called upon to represent his county both in the House of Representatives and the Senate, in which he ranked and was regarded as second to none. His energy, power and ability were ever directed in those matters which tended toward the welfare of his state, and he was equally strenuous in opposing measures which he deemed improper and detrimental to the best interests of his people.

He enjoyed the distinction of being twice called upon by special selection to make the nominating speeches for two Governors of the state of South Carolina, Hugh S. Thompson and J. P. Richardson, a privilege regarded as one of unusual honor and compliment. With the former especially he was very intimate and served upon his staff with the rank of Lieutenant-Colonel. At this time he was in his palmiest days, and was in direct line of promotion when the political revolution of 1890 displaced him and robbed him of his well-merited reward.

Great as Colonel Livingston was as a lawyer, successful as he was as a servant of the state in a political capacity, he will be remembered by those who came in contact with him more lastingly as a private citizen. Being a man of broad ideas, a scholar of unusual learning, a conversationalist of unusual ability, and feeling a deep interest in all mankind, it is little wonder that he had hosts of friends whose great delight was to come in contact with him and feel the impress of his charming personality and obtain the encouragement, instruction and good-will that resulted from meeting such a character. To say that he was genial hardly conveys a true conception of him. He was more. It was a pleasure to meet him. Being a great reader, and having an unusually retentive memory, he was a fountain-head of information for his friends.

His home was a place of culture, purity and refinement, largely due to his high ideals of his duty toward those who dwelt there and to those who, on frequent occasions, were its guests.

Truly it may be said that his death was a loss to his community, his state and his profession.

He was buried with Masonic honors,

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(having been for many years an enthusiastic member of that order) in Oak Ridge Cemetery in Bennettsville. His resting place was a veritable bower of floral tributes from various bar associations and his many friends, all making a last testimonial of the great esteem in which he was held.

Bennettsville, S. C.

The Lawyers of Dickens-Land

By Denis Æ. Behen
of the Pittsburgh, Pa., Bar

DICKENS' amazing versatility in creating types of character, in becoming a part of them and in making them think and talk and act so realistically, is nowhere more in evidence than in his characterizations of types of men of law. When we consider his short clerkship in an attorney's office and his limited experience as a law reporter, it is astonishing with what familiarity he makes use of the technique of legal forms and phraseology and describes legal manners and customs. Satire and caricature require an intimate knowledge of the subject, yet to lawyers themselves there are no more delicious bits of this phase of Dickens' humor than those contained in his pictures of courts and lawyers, and his accounts of legal trials. His descriptions of the Chancery Court in "Bleak House," of Doctors' Commons in "David Copperfield," and of the Old Bailey in "Great Expectations"; his reports of the famous cases of *Bardell* v. *Pickwick*, in "Pickwick Papers," of *Rex* v. *Darnley*, in "The Tale of Two Cities," and of *Jarndyce* v. *Jarndyce*, in "Bleak House"; and his delineations of all his lawyer-characters, though reflecting the ludicrous squint of the satirist, have the technical touch of the master. And such is the power of the artist, that the lawyer who loves his Dickens, while reading of these court scenes and legal lights, will suppress the wince that follows the treading of his professional toes, to join in the universal chuckle over the follies of humanity and the unmasked pretensions of the sciolist and the hypocrite. How many lawyers have not appreciated what a difficult witness Sam Weller makes, in his cross-examination by Sergeant Buzfuz, and have not sympathized with the learned cross-examiner in his discomfiture when he finally thinks better to drop the witness altogether. What a fluent opening is that of Mrs. Bardell's counsel, so pat in its statement of his client's case, so flattering in its unction of the jury, so characteristic in its exaggeration of all that bears on his own side and its belittlement of all that appertains to Pickwick's. There may be still heard in our courts any day much of this Buzfuzzian style of oratory, which seeks to bamboozle a jury by flattery, and makes a mountain of evidence out of every little mole-hill of circumstance.

Among the gallery of portraits, grotesque and otherwise, which go to make up the inhabitants of Dickens-land, we find many lawyers. Dickens has introduced almost forty men of law into his different romances,[1] every one — even

[1] In "David Copperfield" there are six — Uriah Heep, Mr. Wickfield, Tommy Traddles, Mr. Spiker, Francis Spenlow and Mr. Jorkins; in

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the most obscure — a distinct type of the legal confraternity. It is remarkable, too, that they are all sharply defined and individualized, running from the low shyster type of Sampson Brass to the bland and dignified Lord Chancellor himself. In type, temperament or idiosyncrasy every one of them is *sui generis;* for among these *dramatis personæ* of his comedies and tragedies of human life, he has run the whole gamut of human emotion comprehending in delineation and detail a diversity exceeded only by humanity itself.

Besides these, there are innumerable lawyers' clerks, some of whom are famous to us as quaint characters aside from their professional association There is our old friend Dick Swiveller, always getting those "inscrutable and unmitigated staggerers" at the mysterious conduct of his lawyer-employers. There is Tom Pinch, who tries to draw out Mr. Fips as to the identity of his employer, but gets for his pains only the equivocal answer, "Be careful how you go, it's rather dark." There is John Wemmick, who must be first "seen" before his employer, Jaggers, will talk with a client, and who never permits a hint or mention of the "Aged Parent" or the "castle" while in the office. There is the smart and "spoffish" law-student, Percy Noakes. And there is Bazzard, who has written "The Thorn of Anxiety," a tragedy which, like a thorn in the flesh, "will not come out."

Dickens himself was frank to confess that he exaggerated these types in his license as a satirist; for it must be admitted at the beginning that an acquaintanceship with these legal gentlemen does not beget a flattering impression of the profession, or its followers, in England during Dickens' day. The early experiences of the novelist as a reporter in the London police courts had brought him into contact with the lowest and most debased class of lawyers who practised there, and these impressions remained with him in describing the scenes and characters of his novels in later years.

There is Uriah Heep, in "David Copperfield," the sly, oily villian, always humble and deprecatory, but weaving all things to his own purposes. There are Sampson Brass and *Mr.* Sally Brass, in "Old Curiosity Shop," the lowest types of shysters, who in the end meet with the retribution they deserve. There is Mr. Fips, in "Martin Chuzzlewit," with his dark, yellow-jaundiced little office at the back of the house, with the worn out mat outside, which regularly tripped up every one of his clients and apprised him of their visits; and with the great black sprawling splash inside in one corner, which looked as if some old clerk had cut his throat there, years ago, and had let out ink instead of blood. There is the yellow-haired Mr. Rugg, in "Little Dorrit," whose round white visage looked as if all his blushes had been drawn out long ago. He is a collector of debts, general agent, and landlord of Mr. Pancks. The tenancy of Mr. Pancks was limited to one airy bedroom; he covenanting and agreeing with Mr. Rugg, his landlord, that in

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"Bleak House" there are four — Conversation Kenge, Mr. Tulkinghorn, Mr. Vholes and Mr. Tangle; in "Old Curiosity Shop" there are two — Sampson and Sally Brass; in "Our Mutual Friend" there are two — Mortimer Lightwood and Eugene Wrayburn; in "The Tale of Two Cities" there are two — Sydney Carton and William Stryver; there is one in "Martin Chuzzlewit" — Mr. Fips; one in "Edwin Drood" — Hiram Grewgious; one in "Great Expectations" — Mr. Jaggers; and one in "Little Dorrit" — Mr. Rugg. And in the short stories, sketches and plays there are eight — Samuel Briggs and Percy Noakes ("The Steam Excursion"); Joseph Overton ("The Great Wringlebury Duel"); Mr. Bintrey ("No Thoroughfare"); Mr. Clarkson ("The Detective Police"); Thomas Craggs and Jonathan Snitchey ("The Battle of Life"); and Owen Overton ("The Strange Gentleman").

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consideration of a certain scale of payments accurately defined, and on certain verbal notice duly given, he should be at liberty to elect to share the Sunday breakfast, dinner, tea or supper, or each or any or all of these repasts or meals, of Mr. and Miss Rugg (his daughter) in the back parlor. The daughter's feelings had been ruthlessly mangled and her heart severely lacerated by a "fiend in human form," a middle-aged baker, resident in the vicinity, against whom she had, by the agency of Mr. Rugg, found it necessary to proceed at law, and from whom she had recovered substantial damages which she had invested in the public securities — through which circumstance she had acquired a little property and much distinction in the neighborhood.

William Stryver, in "The Tale of Two Cities," is sharply drawn as a type of the elbowing windbag and demagogue, stout, loud, red, bluff, and free from any drawback of delicacy. It is said that Stryver is patterned after Lord Thurlow, who when he needed the law he lacked, had many jackals of the Sydney Carton type to look it up for him. Among these assistants of Thurlow were John Scott, who after became the famous Lord Chancellor Eldon, and the Welsh lawyer who became eminent as Lord Chief Justice Kenyon.

Mr. Kenge, of the firm of Kenge and Carboy, in "Bleak House," stands for the charlatan and pettifogger. He is called "Conversation" Kenge, because he enjoys beyond everything the sound of his rich, mellow voice. He is a portly, important looking gentleman, dressed all in black, with white cravat, gold watch seals, gold eye-glasses and a large gold seal ring. He always listens to himself with obvious satisfaction, and sometimes gently beats time to his own music with his head, or rounds a sentence with his hand.

SERGEANT BUZFUZ

Harry Furniss's picture of the driving, chaffing bar orator who proves that Mr. Pickwick's note about "chops and tomato sauce" is a declaration of love, and that his reminder "not to forget the warming-pan" is only a flimsy cover to express the ardor of his affections.

Mr. Vholes, also in "Bleak House," the chancery lawyer, is, we are told, a type of the placid treasurers and presidents of mining, agricultural, commercial and railroad companies, who preserve, on the strength of salaries notoriously disproportioned to their abilities, a calm, mysterious sublimity of expression, while comforting inquiring stockholders with the vague assurance that all will be right in the end.

Mr. Tulkinghorn, another lawyer in "Bleak House," is one of the malignant types of the Dickens lawyer, yet unique

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in its malignancy. Too passionless to be either a friend or an enemy, he is mechanically faithful, without attachment, to his clients. Ever vigilant of their interests, he is absolutely devoid of pity, compunction or any of the softer emotions. His one passion in life, if such a man can be said to have a passion, is the acquisition of aristocratic secrets and the holding possession of such power as they give him, with no sharer or opponent in it. The family skeletons, difficulties, mortgages and delicate affairs of the *beau monde* are all treasured up within his old black satin waistcoat. He is therefore jealous of the profit, privilege and reputation of being master of the mysteries of great houses. He is an oyster of the "old school" whom nobody can open. There is an air of prescription about him which is agreeable to the vested interests, who receive it as a kind of tribute. They like his dress: there is a kind of tribute in that, too. It is eminently respectable, and likewise, in a general way, retainer-like. It expresses, as it were, the stewart of their legal mysteries, the butler of their legal cellars. His face is an expressionless mask, watchful behind a blind which is always down and which never betrays his close, dry and silent nature. Impenetrable as the sphinx, he has had only one friend in life, a bachelor and a lawyer of the same mold, who lived the same kind of life until he was seventy-five years old, and then, suddenly conceiving (as it was supposed) an impression that it was too monotonous, gave his gold watch to his hair-dresser one summer evening, and walked leisurely home to the temple and hanged himself. One peculiarity of his black clothes, and of his black stockings, be they silk or worsted, is that they never shine. Mute, close, irresponsive to any glancing light, his dress is like himself. He never converses when not professionally consulted. He is found sometimes, speechless but quite at home, at corners of dinner-tables in great country houses and near doors of drawing-rooms, concerning which the fashionable intelligence is eloquent; where everybody knows him, and where half the peerage stops to say, "How do you do, Mr. Tulkinghorn?" He receives these salutations with gravity, and buries them along with the rest of his knowledge — along with the mysterious store of family confidences of which he is known to be the silent depository.

When not speechlessly at home in country houses, Mr. Tulkinghorn lived and had his office in a large house, formerly a house of state, in Lincoln's Inn Fields. His apartment is like himself, lofty, gloomy, rusty, out of date, withdrawing from attention and able to afford it. Heavy, broad-backed, old-fashioned mahogany and horsehair chairs, not easily lifted, obsolete tables with spindle-legs and dusty baize covers, presentation prints of the holders of great titles in the last generation, or the last but one, environ him. The titles on the backs of his books have retired into the binding. Everything that can have a lock has got it; no key is visible. Very few loose papers are about. He keeps no staff; only one middle-aged man, usually a little out at elbows, who sits in a high pew in the hall and is rarely overburdened with business. Mr. Tulkinghorn is not in a common way. He wants no clerks. He is a great reservoir of confidences, not to be so tapped. His clients want *him; he* is all in all. Drafts that he requires to be drawn are drawn by special pleaders in the temple on mysterious instructions; fair copies that he requires to be made are made at

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the stationer's, expense being no consideration. The middle-aged man in the pew knows scarcely more of the affairs of the peerage than any crossing-sweeper in Holborn. Mr. Tulkinghorn very rarely tells him anything more explicit than "I shall be back presently."

It is around this lawyer that the complicated plot of "Bleak House" revolves. Being the family lawyer of Sir Leicester Dedlock, he accidentally gets a clue which makes him suspicious of the past of Lady Dedlock. He then pursues her doggedly and unwearyingly, with no touch of compunction, remorse or pity; while her beauty, and all the state and brilliancy surrounding her, only give him greater zest for what he is set upon and make him the more inflexible in it. Cold, cruel and immovable in what he has made it his duty to unravel, he determines to permit nothing to remain hidden from him in ground where he has secretly burrowed all his life. Despising the splendor of which he is a distant beam, he treasures up slights and offenses in the haughty affability of his gorgeous clients, and scents and ferrets out the scandal in her ladyship's life. It results in driving her to a shameful and pitiful death and indirectly causes his own murder. The masterly manner in which Dickens unravels the threads of the plot through the instrumentality of Mr. Tulkinghorn and his detective, Mr. Bucket, and the human interest he gives to the other characters in this novel — the Smallweeds, Guppy, Jo, Mr. George, the Bagnets, the Snagsbys, Krook, Mr. Jobling and Hortense, the maid, who are created for the purpose of working out the minor details and of completing the chain of circumstantial evidence against Lady Dedlock — are a striking proof of the remarkable genius of the author.

A good type of the "criminal lawyer," as he is sometimes called, and his manner of dealing with the degenerates among mankind who go to make up the *clientèle* of this branch of the profession, is to be found in Mr. Jaggers, in "Great Expectations." He is Pip's guardian, or intermediary, in dispensing the bounty of Pip's unknown benefactor — a convict client of Mr. Jaggers whom he had defended on a capital charge and got off with transportation to the English penal colony in New South Wales. Mr. Jaggers was a burly man of an exceedingly dark complexion, with an exceedingly large head and a correspondingly large hand. He was prematurely bald on the top of his head, and had bushy black eyebrows that wouldn't lie down but stood up bristling. His black eyes were set deep in his head, and were disagreeably sharp and suspicious. He had a large watch-chain and a gold repeater watch, worth one hundred pounds. Wemmick tells Pip, anent this watch, that there are about seven hundred thieves in town who know all about that watch; that there's not a man, a woman or a child among them who wouldn't identify the smallest link in the chain, and drop it as if it was red-hot, if inveigled into touching it. He had strong black dots where his beard and whiskers would have been if he had let them, and an air of authority not to be disputed, and a manner expressive of knowing something secretly disparaging about everyone, if he only chose to mention it. He had the habit of biting the side of his great forefinger as he bullied and cross-examined witnesses, and he always insisted upon the categorical answer "Yes" or "No" to his questions. He cross-examined everything, everybody — his clients, his food, his wine, his glass, his books; and his entire conversation was ever

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guided by the strictest rules of evidence. He never laughed. But he wore great, bright, creaking boots; and in poising himself on these boots, with his large head bent down and his eyebrows joined together, awaiting an answer to one of his cross-questions, he sometimes caused the boots to creak, as if they laughed in a dry and suspicious manner. To his clerk, Wemmick, he always seemed as if he had set a man-trap and was watching it. "Suddenly, click, you're caught!" To others he gave the idea that they must have committed a felony and somehow forgotten the details of it.

In trying a case, if anybody, of whatsoever degree, said a word that Jaggers didn't approve of, he instantly required to have it "taken down." If anybody wouldn't make an admission, he said, "I'll have it out of you!" and if anybody made an admission, he said, "Now I have got you!" The magistrates shivered under a single bite of his finger, and thieves and thief-takers hung in dread rapture on his words, and shrank when a hair of his eyebrows turned in their direction. He always carried an expressive pocket handkerchief of rich silk and imposing proportions, which was of great value to him in his profession. He would terrify a client or a witness by ceremoniously unfolding it as if he were immediately going to blow his nose, and then pausing, as if he knew he should not have time to do it before such client or witness committed himself; and oftentimes the self-committal followed directly quite as a matter of course. He washed his clients off as if he were a surgeon or a dentist. He had a closet in his room, fitted up for the purpose, which smelt of scented soap like a perfumer's shop. It had an unusually large jack-towel on a roller inside the door, and he would wash his hands and wipe them and dry them all over this towel, whenever he came in from a police-court or dismissed a client from his room.

Jaggers' office, handy to Newgate prison, reflected his affiliations with the criminal branch of the law. Dismal and but dimly lighted, it was ornamented with odd objects that Mr. Jaggers kept there as gruesome souvenirs of his professional experience. There was an old rusty pistol, a sword in a scabbard, several strange looking boxes and packages, and two dreadful ghastly casts on a shelf, of faces peculiarly swollen and twitchy about the nose. His own high-backed chair was of deadly black horsehair, with rows of brass nails round it, like a coffin, in which Mr. Jaggers leaned back and bit his forefinger at, and cross-examined, his clients. These latter seemed to have a habit of backing up against the wall, where, especially opposite to Mr. Jaggers' chair, it was greasy with shoulders. On Pip's first visit to this office, he finds lounging around several of Jaggers' clients who had got into the meshes of the law. These were all told to "see Wemmick" (the clerk who "kept the cash") and were then dismissed, — confident that as long as Jaggers was "for them," he "would do it if it was to be done."

In the firm of Spenlow & Jorkins, in "David Copperfield," we have a genteel pair of piratical proctors. At the suggestion of his aunt, and on the payment by her of one thousand pounds to them, David is articled to this firm. "What is a proctor, Steerforth?" David asks his friend. "Why, he is a sort of monkish attorney," replies Steerforth. "He is to some faded courts held in Doctors' Commons — a lazy old nook near St. Paul's churchyard — what solicitors are

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to the courts of law and equity. He is a functionary whose existence, in the natural course of things, would have terminated about two hundred years ago. I can tell you best what he is by telling you what Doctors' Commons is. It's a little out-of-the-way place where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete old monsters of acts of Parliament, which three-fourths of the world know nothing about, and the other fourth supposes to have been dug up, in a fossil state, in the days of the Edwards. It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes about ships and boats."

When David first meets Mr. Spenlow, the senior member of this firm of proctors, he has just hurried back to his office from court, in a black gown trimmed with white fur. He was a little light-haired gentleman, with undeniable boots and the stiffest of white cravats and shirt-collars. He was buttoned up mighty trim and tight, and must have taken a great deal of pains with his whiskers, which were accurately curled. His gold watch-chain was so massive that a fancy came across David that he ought to have a sinewy gold arm, to draw it out with, like those which are put up over the gold-beaters' shops. He was got up with such care, and was so stiff, that he could hardly bend himself; being obliged, when he glanced at some papers on his desk, after sitting down in his chair, to move his whole body from the bottom of his spine, like Punch.

Mr. Jorkins, the other member of fhe firm, was a large, mild, smooth-faced man of sixty, of a heavy temperament. He had originally been alone in the business, and now lived by himself in a house hear Montague square, which was fearfully in want of painting. He came to the office very late in the day, and went away very early. He never appeared to be consulted about anything, and he had a dingy back-hole of

SIDNEY CARTON
ON THE SCAFFOLD

"It is far, far better thing that I do than I have ever done; it is far, far better rest that I go to than I have ever known."

his own upstairs, where no business was ever done, and where there was a yellow old cartridge-paper pad upon his desk, unsoiled by ink and reported to be twenty years of age. He took so much snuff that there was a tradition in the Commons that he lived principally on that stimulant, having little room in his system for any other article of diet. Jorkins' place in the business was to keep himself in the background and be constantly exhibited by name as the most obdurate and ruthless of men. If a clerk wanted his salary raised, "Mr. Jorkins would not listen to such a proposition." If a client

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were slow to settle his bill of costs, "Mr. Jorkins was resolved to have it paid." And however painful these things might be (and always were) to the feelings of Mr. Spenlow, Mr. Jorkins would have his bond. The heart and hand of the good angel Spenlow would have been always open, but for the restraining demon Jorkins. "As I have grown older," David comments, "I think I have had experience of some other houses doing business on the principle of Spenlow & Jorkins."

David asks Mr. Spenlow one day what he considered the best sort of professional business. He replied, that a good case of a disputed will, where there was a neat little estate of thirty or forty thousand pounds, was perhaps the best of all. In such a case, he said, not only were there very pretty pickings in the way of arguments at every stage of the proceedings, and mountains upon mountains of evidence on interrogatory and counter-interrogatory (to say nothing of an appeal lying first to the delegates and then to the Lords); but the costs being pretty sure to come out of the estate at last, both sides went at it in a lively and spirited manner, and expense was no consideration. You made a quiet little round game of it, among a family group, and you played it out at leisure.

After David's aunt has lost her fortune, David goes to Spenlow to see if his articles can be cancelled and the unearned portion of the thousand pounds refunded to him. He explains the situation to Spenlow, how he really does not know where his means of subsistence are to come from, and how his aunt is penniless and must now depend upon him. All he can get from Spenlow is, "If it had been my lot to have my hands unfettered — if I had not a partner, Mr. Jorkins —" Mr. Spenlow shook his head discouragingly. "Heaven forbid, Copperfield, that I should do any man an injustice; still less, Mr. Jorkins. But I know my partner, Copperfield. Mr. Jorkins is not a man to respond to a proposition of this peculiar nature. Mr. Jorkins is very difficult to move from the beaten track. You know what he is." David then goes upstairs to the "dingy little back-hole" and waits until Mr. Jorkins comes. He evidently astonishes that gentleman very much by making his appearance there. He states his case to Mr. Jorkins pretty much as he had stated it to Mr. Spenlow. "He said I should object?" asked Mr. Jorkins. David was obliged to admit that Mr. Spenlow had considered it probable. "I am sorry to say, Mr. Copperfield, I can't advance your object," said Mr. Jorkins nervously. "The fact is — but I have an appointment at the bank, if you will have the goodness to excuse me." With that he rose in a great hurry and was going out of the room, when David made bold to say that he feared, then, there was no way of arranging the matter. "No," said Mr. Jorkins, stopping at the door to shake his head. "Oh, no! I object, you know," which he said very rapidly, and went out. "You must be aware, Mr. Copperfield," he added, looking restlessly in at the door again, "if Mr. Spenlow objects —" "Personally, he does not object, sir," said David. "Oh, personally!" repeated Mr. Jorkins in an impatient manner. "I assure you, there's an objection, Mr. Copperfield. Hopeless. What you wish to be done, can't be done. I — I really have got an appointment at the bank." With that he fairly ran away, and to the best of David's knowledge it was three days before he showed himself in the Commons again.

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Dickens hits off a delicious bit of satire in making Spenlow, who had been so careful in other people's affairs and an expert in testamentary dispositions, die leaving his own affairs in a very disordered condition and without having made a will. As Tiffey, the old clerk, said to David, "if you had been in the Commons as long as I have, you would know that there is no subject on which men are so inconsistent, and so little to be trusted." It appeared a wonderful thing to David, but it turned out that there *was* no will. Mr. Spenlow had never so much as thought of making one, so far as his papers afforded any evidence; for there was no kind of hint, sketch or memorandum of any testamentary intention whatever.

But if lawyers are apt to resent these types of the profession, through which Dickens seems to show an almost universal ridicule and contempt for their kind, they may be consoled in the remembrance that it is a lawyer whom the author presents to the world as the noblest and most sublime character in the whole range of literary fiction. This character is Sydney Carton, in "The Tale of Two Cities." There is not a grander or lovelier figure in all literature than this self-wrecked, self-devoted man, who in the Old Bailey of London saves his double from conviction on a capital charge, and after the Revolutionary Tribunal in France has condemned him to the guillotine, saves the same man's life by sacrificing his own. Profligate and ambitionless, leading a life of sloth and sensuality, he is like one who died young. All his life might have been, and he drifts, through indifference and cynicism, into a disappointed drudge playing the jackal to Stryver's lion, — doing the other man's work and permitting the other to take the credit for it. Meeting Darnley, who remarkably resembles him in face and figure, he is shown suddenly and vividly what a life of temperance and diligence might have made him. The sting of a hopeless love for the fiancé of Darnley throws him, however, into deeper dejection and despair. "Waste forces within him, and a desert all around, this man stood still on his way across a silent terrace, and saw for a moment, lying in the wilderness before him, a mirage of honorable ambition, self-denial and perseverance. In the fair city of this vision there were airy galleries from which the loves and graces looked upon him, gardens in which the fruits of life hung ripening, waters of hope that sparkled in his sight. A moment and it was gone. Climbing to a high chamber in a well of houses, he threw himself down in his clothes on a neglected bed, and its pillow was wet with wasted tears. Sadly, sadly, the sun rose; it rose upon no sadder sight than the man of good abilities and good emotions, incapable of their directed exercise, incapable of his own help and his own happiness, sensible of the blight on him, and resigning himself to let it eat him away."

And again we may forgive Dickens all his other lawyers in the delightful creation of Tommy Traddles, in "David Copperfield," who becomes a staid and respectable judge at the end of the book and who, we are told, stands for the portrait of the author's intimate and dear friend, Sergeant Talfourd.

Eugene Wrayburn, in "Our Mutual Friend," is another lawyer who deserves well of us, at whom we must smile during his cynicisms, but who comes through the plot unscathed and finally lands right side up. Many a young attorney will appreciate that delicious piece of Eugene's, which well hits off the inertia with which the ethics of the legal pro-

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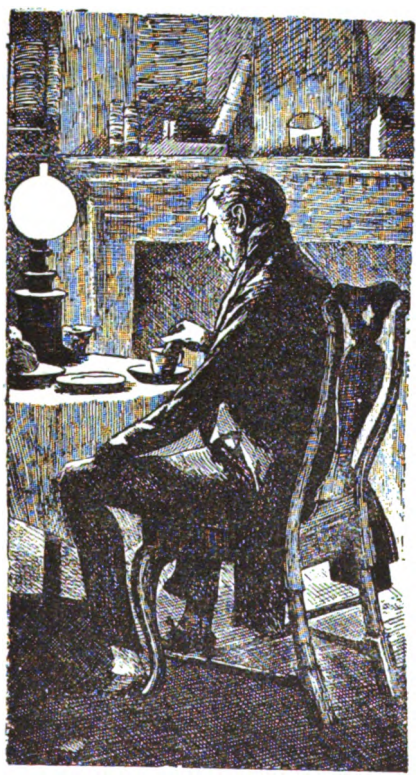
fession hedge in the youngster during his first years as a briefless barrister: "Idiots talk," says Eugene to his friend, Mortimer Lightwood, "of energy. If there is a word in the dictionary, under any letter from A to Z, that I abominate, it is 'energy'. It is such a conventional superstition! such parrot gabble! What the deuce! am I to rush out into the street, collar the first man of wealthy appearance that I meet, shake him, and say, 'Go to the law upon the spot, you dog, and retain me, or I'll be the death of you?' Yet that would be *energy*."

Hiram Grewgious, Esquire, Agent and Collector of Rents, is another of Dickens' quaint lawyer-characters whom we all hold in loving memory. He is one of the most felicitous of Dickens' creations as well as one of the last — appearing in "The Mystery of Edwin Drood." Awkward and hesitating in manner, ungainly in appearance, whimsical, near-sighted, wooden and impassive — yet shrewd withal — he "still had some strange capacity in him of making on the whole an agreeable impression." He was an arid, sandy man who, if he had been put into a grinding-mill, looked as if he would have ground immediately into high-dried snuff. He had a scanty flat crop of hair, in color and consistency like some very mangy yellow fur tippet; it was so unlike hair that it must have been a wig, but for the stupendous improbability of anybody's voluntarily sporting such a head. The little play of features that his face presented was cut deep into it, in a few hard curves that made it more like work; and he had certain notches in his forehead, which looked as though Nature had been about to touch them into sensibility or refinement, when she had impatiently thrown away the chisel, and said "I really cannot be worried to finish off this man; let him go as he is!" An habitual characteristic gesture was to smooth his head from back to front, as if he had just dived. With too much throat at the top and too much shank at the bottom, he is a "particularly angular man," as he himself frankly admits to Rosa, his ward. "A particularly angular man, I half believe I was born advanced in life, and seem to have come into existence a chip. I was a chip — and a very dry one — when I first became aware of myself." And when she invites him to eat his Christmas dinner with her, he accepts, saying, "As a particularly angular man, I do not fit smoothly into the social circle, and consequently I have no other engagement at Christmas time than to partake, on the twenty-fifth, of a boiled turkey and celery sauce with a — with



HIRAM GREWGIOUS, ESQ.

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a particularly angular clerk I have the good fortune to possess, whose father, being a Norfolk farmer, sends him up (the turkey up), as a present to me, from the neighborhood of Norwich. I should be quite proud of your wishing to see me, my dear. As a professional Receiver of Rents, so very few people *do* wish to see me, that the novelty would be bracing."

He had his set of chambers in Staple Inn, Holborn, in a corner house in a little inner quadrangle, presenting in black and white over its ugly portal the mysterious inscription,

P
J T
1747

In this set of chambers he lived his lonely existence with Bazzard, his clerk, never having troubled his head about the inscription, "unless to bethink himself at odd times on glancing up at it, that haply it might mean *P*erhaps *J*ohn *T*homas, or *P*erhaps *J*oe *T*yler," — or when making a requisition on the wine cellar below the common stair, "if P. J. T. drank such wines, then for a certainty, P. J. T. was *P*retty *J*olly *T*oo."

He had laid himself out in the beginning for "chamber practice"; to draw deeds — "convey the wise it call," as Pistol says. But conveyancing and he had made such a very indifferent marriage of it that they had separated by consent. Coy conveyancing would not come to Mr. Grewgious. But an Arbitration being blown towards him by some unaccountable wind, and he gaining great credit in it as one indefatigable in seeking out right and doing right, a pretty fat Receivership was next blown into his pocket by a wind more traceable to its source. So, by chance, he had found his niche. Receiver and Agent now to two rich estates, and deputing their legal business, in an amount worth having, to a firm of solicitors on the floor below, he had snuffed out his ambition (supposing him to have ever lighted it) and had settled down with his snuffers for the rest of his life under the dry vine and figtree of P. J. T., who planted in seventeen-forty-seven.

There was no luxury in his room. Even its comforts were limited to its being dry and warm and having a snug though faded fireside. What might be called its private life was confined to the hearth, and an easy-chair, and an old-fashioned occasional round table that was brought out upon the rug after business hours from a corner where it elsewhere remained turned up like a shining mahogany shield. Behind it, when standing thus on the defensive, was a closet usually containing something good to drink. An outer room was the clerk's room. Mr. Grewgious' sleeping apartment was across the stair, and he held some not empty cellarage at the bottom of the common stairs. Three hundred days in the year at least, he crossed over to the hotel in Furnival's Inn for his dinner, and after dinner crossed back again, to make the most of these simplicities until it should become broad business day once more, with P. J. T., seventeen forty-seven. Accounts and account-books, files of correspondence and strong boxes garnished his room in conscientiously precise and orderly arrangement. The apprehension of dying suddenly and leaving one fact or one figure with any incompleteness or obscurity attaching to it, would have stretched Mr. Grewgious stone dead any day. The largest fidelity to a trust was the life-blood of the man. And as Dickens says, "there are sorts of life-blood that course more

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quickly, more gayly, more attractively, but there is no better sort in circulation."

There is a pathetic note marking the delineation of this odd bachelor-lawyer, in the hint Dickens gives us of his romantic attachment to the memory of the girl he had doted on, at a hopeless, speechless distance, years before — the mother of his ward. His life and soul are wrapped up in the interests of his ward, who is beginning to look astonishingly like her mother. He shrewdly detects the indifference of Edward's love for her, and warns his generous nature of its dangerous possibilities before it becomes too late. To those who read this unfinished novel, it is easily perceptible that it is he who is to fathom the sardonic nature and purposes of Jasper, and is to be the Nemesis who is finally to unmask Jasper's pretensions and crime and bring him to justice with the usual Dickens climax. The description of Rosa's visit to the lawyer's chambers after her flight from Cloisterham to evade Jasper, and the dinner there, is one of the most delightful chapters in all Dickens — a fit companion-piece to hang beside the picture of the meeting between Dick Swiveller and the Marchioness, in "Old Curiosity Shop."

Some one has said that folly makes lawyers possible and necessary. Were there no folly, there would be no lawyers. It is their unenviable lot to live, like moral cannibals, on the misfortunes and weaknesses of their fellow-men. It is therefore but natural that they should be made immortal themes of exhaustless satire and abuse. What a general blessing have professional men not been to the whole literary tribe! The priest's love of ease and power, the lawyer's cunning and dilatoriness, the physician's wise look and his blunders hidden by the grave, are subjects which must find a ready response in the general heart, since books are full of them. Queen Mab tickles the parson's nose as he lies asleep, with a tithe-pig's tail, and he straightway dreams of another benefice; she drives over the lawyer's fingers, and he perforce must dream of fees!

From the time whereof the memory of man runneth not to the contrary, lawyers have therefore been a bright shining mark for the shafts and sallies of the satirist. Even the patron saint of the profession, Saint Ives, though he had so lived as to afterwards merit canonization in the eyes of posterity, could not escape this critical cannonading from his contemporaries, but was libeled even in the tomb and lampooned in an epitaph — simply because he was a lawyer who was honest: —

> Sanctus Ivo,
> Advocatus non latro,
> Res miranda populo.

The majority of Dickens' lawyers, therefore, are really contemptible characters — tricksters and pettifoggers, schemers and charlatans — and at best the author shows but a grudging toleration for those high up in the profession. Even the Lord High Chancellor himself has not escaped his excoriating lash. He seems to have believed in the old story which makes the Devil the lawyers' patron saint; and he makes use in one of his tales of the inscription over the door of the queer old house of Rochester in Kent, which places proctors and rogues in the same class: —

> Richard Watts, Esq.,
> by his Will, dated 22 Aug. 1759,
> founded this Charity
> for Six Poor Travellers,
> who, not being Rogues or Proctors,
> May receive gratis for one night
> Lodging, Entertainment, and Fourpence each.

The reason for this antipathy towards lawyers lay perhaps in Dickens'

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dislike for the law itself — for its delays, its interminable red tape and its senseless jargon and forms as it was administered in England in his day. He had been an attorney's clerk for eighteen months and had seen when a young man many instances of individual hardship which certain particular applications of the law had worked. At best he seems to have considered the science of jurisprudence as a vast mesh of artful contrivance — a labyrinthine spider-web — and lawyers themselves as a species of arachnidan accomplices, whose function it is to further entangle those who are unfortunate enough to get caught by the great Spider, Authority.

> When once they are imbrangled,
> The more they stir, the more they're tangled.

Lawyers themselves will resent the imputation that Dickens' types of their profession stand for the profession itself. Just as Dickens has been criticised, and justly too, for going too far in his ridicule of the pompousness of the proceedings of a court trial in "The Tale of Two Cities," and for his attacks upon the English High Court of Chancery, in "Bleak House," so may he be justly censured in somewhat too broadly caricaturing a profession which, of all others, is most admirable in its personnel. In the legal profession, there are lawyers and lawyers; there are bad men as well as good. The cloak of a learned profession does not change the character of the individual within, and to paraphrase the words of Bobby Burns, "a lawyer's a man for a' that." Mankind has been the same since civilization commenced, and the same types are to be met with today that Dickens satirized — aye, even that Terence exposed and Juvenal vilipended over two thousand years ago. They are present in any other walk of life as well as in the law.

Although Dickens' lawyer-characters are far from admirable, they do not, therefore, necessarily stand for the profession itself; they are simply types of men who may be encountered in every walk of life since civilization first made crookedness and hypocrisy possible among mankind. With an eye always open to the grotesque and humorous side of life, Dickens was little impressed with the solemnity of the shammer or the ceremonial of the charlatan. His keen powers of observation easily detected the ass beneath the lion's skin. It was rather the abuses of the law — its protracted delays or the injustice and inconsistency of some of its institutions — as for instance, the debtors' prison — and the pretensions of its pettifogging practitioners — that the author attacked and aimed to correct or eliminate. That he was justified in much of his criticism is obvious from the fact that the publicity he gave through his novels subsequently brought about the needed remedy in the things he criticised.

After all is said, and remembering that Dickens always wrote for a purpose, is it not possible that his satirical condemnation of the useless intricacies of law and the mysterious chicanery of lawyers, has been effective in weeding out the jargon of forms and the shysters of men who could make the law itself possible of condemnation? And in shortening much of the delay for which the English law stood arraigned in his day since Shakspere's time, must it not be admitted that his attacks on the system at least called attention to the evils to be remedied? It has been the policy both of American and English jurisprudence of latter years to get down to simpler forms, to prune away the *ambages loquendi* in the formal pleadings, to expedite litigation and to raise the general standard of the profession to a loftier and nobler plane. And if by

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exaggerating the evil or caricaturing the type, the satirist causes the one to be less prone and the other to disappear, then right-minded men should applaud his efforts, even if sometimes his shaft pierces with a personal puncture. For this reason all respectable lawyers, who love their profession and desire to see it advance, owe a debt of lasting gratitude to Charles Dickens.

The County Court

By William D. Totten

AMID the ancient oaks and elms,
Befringed with verdant sward,
The county court house sheltered stands
Within its spacious yard;
Its massive tower rising high
Is like a sentinel
To symbolize the warder's cry
Proclaiming all is well.

The twittering swallows circle round
From nests beneath its eaves,
And chirping sparrows to and fro
Are flitting 'mid the leaves,
While slowly up the court yard path
The judge and lawyers walk,
Attending court from far and near,
Enjoying friendly talk.

And (rare surprise for laymen's eyes)
These brothers at the bar
Come kindly hither arm in arm
From places near and far —
His Honor stately in the lead,
The sheriff by his side,
And in the rear the litigants
With cases to be tried.

Within, the Judge ascends the bench,
The sheriff opens court,
The clerk soon calls the calendar,
And jurymen report.

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With steady nerve and winning smile
Each lawyer, well at ease,
Presents his case with courtesy
And tries the Court to please.

For country people round about
This is a famous day,
The farmers and their friends turn out
To pass the time away
In trade and gossip in the square,
And see their county town,
And listen to the arguments
Of lawyers of renown.

The chosen jurors rise and swear
They'll most impartially
Upon their oaths hear every cause
And keep from bias free,
Betraying that their pleasure is
To serve and draw their pay,
Regardless of all prejudice,
And have their holiday.

And yet the stream of Justice there
Is seldom found unclean,
Its source is round the firesides
Where virtue long has been,
And where amid the flowered fields,
Since love of God began,
Old natures planted purest thoughts
Within the heart of man.

As one by one the cases come
And suitors wage their wars,
With many grave entanglements
And storms of jangling jars,
The audience delighted hears
The raucous "I object,"
Enjoying all the lawyers do
That zeal and grit reflect.

And many broad triumphant smiles
And many frowns besides
Are seen among the listeners
When points the Judge decides.

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And then the stream aforesaid flows
In an unfettered way,
While counsel glare and tables pound
Their valor to display.

A pleasant sight it is to see
The lawyers battling there
With many rare varieties
Of whisker, nose and hair,
And hear the champions orate,
For clients clean and white,
Whose adversaries' cases are
As dark as blackest night.

The lawyer with a verdict won,
His feet spread wide apart,
Stands round for admiration
While his friends proclaim *"he's smart!"*
The vanquished in the outer hall,
Profane with drooping jaw,
Hears many people say, "He's good,
But lost on pints o' law."

The winner's clients says to him,
"Your pleading was sublime";
The winner says, "Your case was clear,
I knew it all the time."
Yet many nights he'd lain awake
And mourned his client's plight,
For fear he'd lose the verdict in
That selfsame lucky fight.

The loser to his lawyer says:
"The judge is clearly wrong,
The jurors were nonsensical,
On blunders they were strong."
His lawyer says: "You're right, old man,
For you I deeply feel;
We'll give them still another round
And lick 'em on appeal."

Sometimes the Court is criticised,
And dubbed an arrant fool,
As blind as any crazy bat
While laying down a rule.

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And hot volcanic epithets
Most picturesquely mean
Are spoken of his Honor, out
Upon the court yard green.

At last the final case is closed,
And compliments are free,
The Judge extols the jurors for
Their fine ability.
Who joyously reciprocate
And say they can't refrain
From giving such a righteous Judge
A gilded headed cane.

And then the warriors of the bar,
Their battles being o'er,
Lock arms and chum together when
Outside the court house door,
While nudging farmers wink and smile,
And say: "They're mighty tame;
The fightin' is all make believe,
It's all within the game."

And when the term is over and
The court room closed again,
With law and justice meted out
To erring wrangling men,
A-ringing in the court-house tower
Is heard the evening bell.
In sweet melodious harmony
To tell us all is well.

Seattle, Wash.

The Mistake (?) of Our Forefathers in Adopting the Common Law of England

THE opinion is not often expressed that the United States would have done better to adopt the Civil Law instead of the common law which we derived from England. That, however, is the view of Charles F. Beach, who said in a recent address delivered at the St. Paul College of Law [1]:

"A study of the Civil Law and a

[1] "The Civil Law in America." By Charles F. Beach. Published by A. Pedone, 13 Rue Soufflot, Paris. Pamphlet. Reprinted in *Chicago Legal News*, June 29, July 6.

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practical familiarity with its working brings a common law lawyer — who has not blindly prejudged the matter and is in consequence not open to conversion — finally around to the notion that it was very unfortunate for us in this country that in breaking with England we did not break away from her law, as we did from her monetary system, her social order and her state church. Our money, our manner of life, our art and our architecture were developed substantially on French lines, and molded after French models. Our law and our weights and measures might well have followed the same course. At the time of our Revolution it would have been entirely possible for our lawyers to have worked out a reform in our jurisprudence along the lines of codification, somewhat as the French did at the time of their Revolution after 1789. . . .

"Was anything ever more incongruous and absurd than for civilized men to assume to derive their law from a parcel of savages, and then to belaud it as superior to the Civil Law, and to befool themselves by singing the *Te Deum* over and over! We might just as wisely affect admiration for the way those people prepared their food, or for their taste in the matter of dress or in architecture, or for their constructive genius in letters or in the fine or mechanical arts. All of it is the merest worship of idols, a sheer bowing down to a fetich, an adoration of images — not even graven images at that, but a mere figment of the uninstructed imagination of the fathers. It is as much forbidden by the first commandment of Moses as anything that ever goes on in a Chinese joss-house. Jeremy Bentham, a hundred years ago, pricked the bubble, but the waters closed over him, and we have gone on for another century in the old blind fashion. In our own day David Dudley Field did some manly work in a right manly way to promote the codification of our law; but he, too, is dead, and his sanity seems swallowed up in the ocean of common law indifference to reform."

The common law is unscientific, says Mr. Beach; "our system of reporting precedents and of relying upon them as authoritative statements of the law — forbidden by the *Code Napoléon*, and unknown to the civil law anywhere — is an impossible one, and has in it the seeds of death. Only a moment's connected thinking is sufficient to demonstrate that, and it ought not to be hard for us to realize it, especially here in St. Paul, sitting as we do under the shadow of the great reporting enterprise of the West Publishing Company, and thus having a first-hand knowledge of the present volume of American case law." Our system of judicial precedent "is perfectly uneconomical of time and money and effort, and an absolutely unscientific scheme for formulating legal principles. It reduces common law research and practice to a mere fishing about in pools of muddy water for stray bits of law suspected of being immersed or in solution therein — the pools growing larger and deeper and muddier, and the fishing becoming more difficult and unsatisfactory *die in diem*."

The upshot is that "we shall be compelled in no very long time, by the sheer necessities of our case, to abandon common law theory and practice, and to come squarely to the Franco-Roman law scheme of codification, thus getting in line in our law and in our procedure as we ought to have done hundreds of years ago, with the rest of the modern world as well as with the wisdom of the ancients."

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Reviews of Books

MAITLAND'S EQUITY

Equity: also, The Forms of Action at Common Law. By the late Professor F. W. Maitland. Edited by A. H. Chaytor, M. A., and W. J. Whittaker, M. A. University Press, Cambridge; G. P. Putnam's Sons, New York, Pp. 412 (indices). ($4.)

PROFESSOR MAITLAND'S two courses of lectures on Equity and on the Forms of Actions at Common Law, issued posthumously by two editors who have performed their task with irreproachable skill, have already met with a most favorable reception, and are likely to become the most widely read book of the great legal historian. While most of their material is to be found in the larger work of Pollock and Maitland on the History of English Law, they present a condensed treatment which entitles them to be regarded as a legal classic worthy to rank with such treatises as Maine's Ancient Law, and their literary charm smooths over many difficulties for the student and supplies the American lawyer with a concise statement of the historical foundation of modern principles not elsewhere to be found. Moreover, the value of the work is by no means historical alone, owing to the frequency with which later cases are discussed and the firm grasp which is exhibited of the principles of the modern system of English equity jurisprudence.

The clear explanations of the nature of the system of equity will be prized. For example, a valuable definition is given of a trust: "When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or that purpose, and he is called a trustee." It is likewise helpful to the reader to be informed that trusts are in their essential nature agreements which ought to be treated as contracts, but which escaped being dealt with in that way because when the *cestui* first sought to enforce his rights the action of assumpsit was not yet in existence. "In my view," says Professor Maitland, "equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution, namely, the trust; and three novel and fertile remedies, namely, the decree for specific performance, the injunction, and the judicial administration of estates. Round these, as it seems to me, most of the equitable rules group themselves. . . .

"We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system; at every point it presupposed the existence of the common law. Common law was a self-sufficient system. . . . Normally the relation between equity and law has not been one of conflict. The fairly good government of the country for the last six centuries shows this. If there were two conflicting systems of law, there must have been no just government at all. Law and equity are like code and supplement, or text and gloss. Equity was a collection of glosses on various chapters of the law; a set of additional rules of law. Every part of equity pre-supposed a system of common law. . . . One vast appendix was added to property law under the title of trusts. The bond which kept these various appendixes together under the head of equity was the jurisdictional and procedural bond. That bond is now broken by the Judica-

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ture Acts. Instead of it we find a mere historical bond — 'these rules used to be dealt with by the court of chancery' — and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice."

Consequently equity, which in a historical sense was, as Professor Langdell pointed out, a branch of the law of remedies, is actually "a certain portion of our existing substantive law." How this development has come about is indicated in Professor Maitland's paraphrase of Maine: our substantive real property law "has been secreted in the interstices of the forms of actions."

The character of equitable rights is also lucidly explained: "Equitable rights and interests are rights *in personam*, but they have a misleading resemblance to rights *in rem*" (p. 122). . . . Modern developments have not changed the essential nature of the rights of the beneficiary, consequently "as between merely equitable claimants, the court can consider the moral merits of the parties" (p. 134).

REESE'S MEDICAL JURISPRUDENCE

Text-Book of Medical Jurisprudence and Toxicology. By John J. Reese, M.D., late Professor of Medical Jurisprudence and Toxicology in the University of Pennsylvania; late President of the Medical Jurisprudence Society of Philadelphia. 8th ed., revised by D. J. McCarthy, A.B., M.D., Professor of Medical Jurisprudence (Geo. B. Wood Foundation) in the University of Pennsylvania, Neurologist to the Philadelphia General and St. Agnes Hostpitals. P. Blakiston's Son & Co., Philadelphia. Pp. viii, 654 + 6 (index). ($3 *net*.)

WRITTEN primarily for students of legal medicine, Reese's Medical Jurisprudence, which now appears in a revised eighth edition, is a standard work of high authority well adapted to serve as a book of reference for the legal practitioner and medical expert. The editor, Professor McCarthy, has brought it up to date by the addition of new material on insanity, commitment of the insane, the toxicology of formaldehyde and chronic bismuth poisoning, and anaphylaxis in toxicology. The revision has been conscientiously and skillfully carried out, and the work in its improved form is in every way superior to many of the existing treatises on medical jurisprudence.

JUDSON'S INTERSTATE COMMERCE

The Law of Interstate Commerce and its Federal Regulation. By Frederick N. Judson, of the St. Louis Bar. 2d ed. T. H. Flood & Co., Chicago. Pp. xxiv, 630 + 77 (appendix) + 26 (table of cases) + 71 (index). ($6.50.)

THE rulings of the Commerce Court have affected some of the decisions of the Interstate Commerce Commission, but many of these rulings have been reversed by the Supreme Court, and the large body of law derived from the activity of the Commission as a judicial body has not suffered any considerable modification. Consequently Mr. Judson's work promises to offer an adequate treatment of the subject for some time to come. In its new edition, the first since the Supplement of 1906 to the original treatise, it contains a valuable and interesting summary of the law of interstate commerce. The treatment is comprehensive, embracing the administrative as well as the judicial rulings of the Commission, and the decisions of the Supreme Court in controversies involving interstate commerce and the Sherman anti-trust law as well as the regulation of railway rates.

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Of a lawyer like Mr. Judson nothing but a luminous discussion of any subject requiring a knowledge of constitutional law could be expected. The work is admirably arranged, and rulings not easily accessible but of value as precedents are cited for the purpose of illustrating the law as administered by the Commission. The treatment of federal sovereignty in interstate commerce, concurrent and exclusive powers, business combinations, labor combinations, and federal control of state regulation of railways engaged in interstate traffic is lucid and authoritative. The various federal statutes are presented in convenient form with the annotations of the author.

BOOKS RECEIVED

The Inheritance Tax Law; containing all American decisions and existing statutes. By Arthur W. Blakemore of the Boston bar, author of Massachusetts Court Rules Annotated, and "Wills" in the Cyclopædia of Law and Procedure, etc., and Hugh Bancroft, formerly District Attorney, northern district of Massachusetts, author of Inheritance Taxes for Investors. Boston Book Co., Boston. Pp. 1280 + 96 (tables, index).

A Hoosier Village: A Sociological Study, with special reference to Social Causation. By Newell LeRoy Sims. Columbia University Studies in History, Economics and Public Law, v. 46, no. 4 (whole number 117). Columbia University; Longmans, Green & Co., New York, and P. S. King & son, London, agents. Pp. 181. ($1.50, paper covers.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Attachments. "When and in What Cases will Statutes Providing Attachment Proceedings Be Available in Support of Actions *Ex Delicto*." By Walter J. Lotz. 74 *Central Law Journal* 399 (May 31).

"Non-Residence as a Ground for Attachment." 1 *Bench & Bar N. S.* 64 (June).

Compulsory Condemnation. See Eminent Domain.

Constitutional Law. See under special subjects, especially Government.

Contracts. "Replacement in the Market." By A. G. Sedgwick. 12 *Columbia Law Review* 519 (June).

Copyright. "Advantages and Defects of the Copyright Act, 1911." By G. Herbert Thring. *Fortnightly Review*, v. 91, p. 1132 (June).

Describing the British legislation of the past year, which in the main follows the program adopted by the Berlin Convention of 1908, dispensing, for example, with the formalities of registration, and otherwise aiding the author. The pressure of trade interests, however, has resulted in some restriction of the author's rights, particularly in the case of musical composers.

Corporations. "Piercing the Veil of Corporate Entity." By I. Maurice Wormser. 12 *Columbia Law Review* 496 (June).

Various cases are reviewed for the purpose of showing under what conditions the concept of corporate entity shall be ignored and "the veil drawn aside." By way of summary: "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing men and women shareholders, and will do justice between real persons. This is particularly true in courts of equity, but finds many illustrations in courts of law as well."

"The Government and the Corporations." By Francis Lynde Stetson. *Atlantic*, v. 110, p. 27 (July).

"We may sum up the whole matter, and may answer the inquiry as to the proper relation of the government to the corporation, in our conclusion that not necessarily as creator or patron, but in the old sense of visitor, the appropriate government should provide for the great corporations, as businesses, suitable supervision and administrative regulation to forfend public

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injury, without denial of reasonable opportunity for just and honest enterprise."

"Limitations of the Statutory Power of Majority Stockholders to Dissolve a Corporation." By William H. Fain. 25 *Harvard Law Review* 677 (June).

Criminal Procedure. See Penology.

Direct Government. "The Direct Primary Experiment." By Evans Woollen. *Atlantic*, v. 110, p. 41 (July).

"It was to be expected that party efficiency would deteriorate under the decentralizing influences of a direct primary."

See Government, Recall of Decisions, Recall of Judges.

Eminent Domain. "The Power of 'Compulsory Purchase' under the Law of England." By William D. McNulty. 21 *Yale Law Journal* 639 (June).

This power, known in this country as that of eminent domain, is not limited in England by any constitutional provisions as with us, but the legislation adopted under it is more carefully drawn than in this country, and we may study English methods to advantage for the purpose of learning to avoid excessive litigation in connection with analogous provisions of our own laws.

Evidence. "Written Evidence and Alterations." By Adelbert Moot. 25 *Harvard Law Review* 691 (June).

General Jurisprudence. "The Lien or Equitable Theory of the Mortgage — Some Generalizations." By Edgar N. Durfee. 10 *Michigan Law Review* 587 (June).

"If it be objected that a legal lien without possession, an 'hypothecation' in our terms of jurisprudence, is an anomaly in our law, it may be answered that the treatment, as creating a mere lien, of what is in form a conveyance on condition subsequent, is itself anomalous and that the anomaly is certainly not made greater by treating it as creating a legal lien than by treating it as creating an equitable lien — but contrariwise. It may be further answered that a non-possessory legal lien is not wholly anomalous, as we have, not to go beyond our modern law, examples of it in judgment and execution liens and in mechanics' liens. But conceding that a legal lien of this sort is to some extent anomalous in our law, is this not such an anomaly as, from the point of view of legal tradition, is to be expected in any radical reform of the law. And, from the point of view of jurisprudence, is not this anomaly but a natural and logical step in the process of refining the pledge-idea? And would not the statutes denying ejectment to the mortagagee have been unnecessary and would not those statutes have received a liberal construction in all the states, were it not that in Anglo-American law the pledge has been chiefly represented by its ruder forms, as a result of which the essence of the pledge-idea has been obscured?"

See Corporations.

Government. "Separation of Powers: Administrative Exercise of Legislative and Judicial Power." By T. R. Powell. *Political Science Quarterly*, v. 27, p. 215 (June).

The article deals more with legal doctrine than political theory, extended examination being made of judicial decisions. The writer avoids the dogmatic position, clearly recognizing the fictitious character of the distinction between powers. He shows that even the courts have had to recede somewhat from the traditional doctrine. That doctrine, however, still protects individual citizens from disturbance in the enjoyment of their rights by one branch of the government not acting concurrently with at least one other branch. Such concurrence is made necessary except in those cases where an individual's privilege, rather than his right, is at stake, or where the rights of the public are treated by the courts as the prime consideration.

"A Draft of a Frame of Government." By T. S. Tyng. *Political Science Quarterly*, v. 27, p. 193 (June).

Foreign observation usually regards the legislative department of our government distinctly inferior in efficiency to the judicial and executive branches. Recent experience has shown how the processes of legislation may be improved upon. This experience is summed up in the concrete form of a rough, tentative draft of a proposed state constitution not modeled after that of any existing state. The writer herein proposes that the members of the upper house shall be eligible for pensions, after a given period of service, that the Governor shall exercise larger power especially with regard to legislative and budget proposals, that the popular control over legislation shall be preserved, and that the removal of judges shall be made easier, this latter responsibility however, being borne by the legislators, without a popular recall of judges. Mr. Tyng's draft is a moderately and intelligently written document which will assume importance in the eyes of students of

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political science and comparative legislation, and should help the solution of political questions confronting every state that is thinking of amending its constitution.

"National Power and State Interposition, 1787–1861." By Edward S. Corwin. 10 *Michigan Law Review* 535 (May).

The most important discussion of the "state's rights" or state sovereignty theory that has appeared for some time. The treatment is mainly historical, the purpose being to ascertain the intent of the framers of the Constitution in the light of the important utterances of the members of the convention and later statesmen. The writer, in his handling of this evidence, makes out a strong case for federal sovereignty.

"Unconstitutional Laws and the Federal Judicial Power." By Charles H. Burr. 60 *Univ. of Pa. Law Review* 624 (June).

"The assertion cannot be gainsaid, that up to the pronouncement of the decision in *Marbury* v. *Madison*, no record exists of speech or writing in which the power is questioned of the federal judiciary to declare void an unconstitutional act of Congress. On the contrary, on every side may be found admissions and declarations as to the existence of such a power."

"A Word About Commissions." By Herbert J. Friedman. 25 *Harvard Law Review* 704 (June).

"The death-knell of the *laisses faire* doctrine that prevailed at the end of the eighteenth century and the beginning of the nineteenth century has been sounded. The commission has been instrumental in burying it. It is developing, as a public servant, the technical man. Commissions have been created where technical knowledge is of the greatest possible value and necessity. So long as commissions continue to give satisfaction, we must expect that the public will demand new commissions from time to time touching new branches of industry and society. And so we are rapidly coming to be governed by commissions."

"Has Your State Sufficient Judges?" By Alexander B. Andrews, Jr. 60 *Univ. of Pa. Law Review* 643 (June).

Interesting statistics are presented showing how judges are distributed in proportion to population, in various typical states and cities.

"The Judicial Function." By Attorney-General George W. Wickersham. 60 *Univ. of Pa. Law Review* 601 (June).

Defending the power given the courts to determine whether legislation is constitutional, and the independence of the judiciary now threatened by proposed popular measures.

"The Constitution and its Makers." By Senator Henry Cabot Lodge. *North American Review*, v. 196, p. 20 (July).

"By making the three branches of the government entirely separate and yet co-ordinate, and by establishing a representative system and creating a Supreme Court of extraordinary powers, the framers of the Constitution believed that they had made democracy not only all-powerful, but at the same time safe."

See Direct Government, Legal History.

Labor Unions. See Monopolies.

Legal History. "The Pelatiah Webster Myth." By Edward S. Corwin. 10 *Michigan Law Review* 619 (June).

The error of attributing so important a part in shaping the Constitution to Webster is exposed in this review of Hannis Taylor's "Origin and Growth of the American Constitution." See also the review of this book, of similar tenor, in 25 *Harvard Law Review* 747 (June, 1912).

"The Genius of the Common Law; IV, Enemies in the Gate." By Sir Frederick Pollock. 12 *Columbia Law Review* 481 (June). See 24 *Green Bag* 255.

See Government.

Legal Interpretation. See Evidence.

Legal Profession. "The Twentieth Century Lawyer." By Chief Justice John B. Winslow of Wisconsin. 7 *Illinois Law Review* 65 (June).

"The law is really the science of sciences; the science to which all others ought to contribute. The lawyer or judge who confines his studies to abstract principles of law alone *must* become one-sided; he, if anyone, will justify the the criticisms now leveled at the courts and bar. In the efforts now everywhere being made which aim to minimize the differences between the the fortunate and prosperous citizen and his unfortunate and unhappy brother, to mold legal and economic conditions so that individual effort may have its due reward, and at the same time that life shall have its message of brightness and hope for all, there are many able and unselfish people from all ranks and professions who are already at work with tongue end pen, upon the platform, in the press and in legislative halls.

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The danger is that they will go too fast; the field is largely new and experimental; they have much courage and enthusiasm, but they will greatly need the wise constructive and sympathetic aid of the trained legal mind which not only knows the evils to be corrected, but fully understands the legal difficulties in the way. Here is where the opportunity and the duty of the lawyer of the twentieth century, in his capacity as a citizen, come together — an opportunity as valuable as the duty is imperative. But no man can grasp the opportunity or discharge the duty unless he be not merely learned in the law, but a man whose education and reading enables him to bring to the subject the breadth of view of the patriot and the philanthropist, as well as the accurate knowledge of the lawyer."

Life Estates. "Implication of Life Estates, Distributive Construction and Disposition of Intermediate Income." By Albert M. Kales. 10 *Michigan Law Review* 509 (May).

Martial Law. "Martial Law." By Henry Winthrop Ballantine. 12 *Columbia Law Review* 529 (June).

Inter armes silent leges "clearly does not mean that on the occurrence of war, the government of England, of the United States, or of a state can by proclamation be converted into a military despotism."

Monopolies. "The Conservation of Business Opportunity." By Gilbert H. Montague. *Journal of Political Economy*, v. 20, p. 613 (June).

At the Congressional hearings on trust regulation, when the United Shoe Machinery Company was under consideration, it was "the overwhelming testimony of small shoe manufacturers, and of numerous large manufacturers who had risen from small beginnings, that their business existence depended, and still depends, upon the leasing system, as distinguished from the system of outright purchase; upon the concentration of machinery manufacture and repair service, as distinguished from the variety of manufacture and repair service by different machinery manufacturers; and, above all, upon the absolute equality of treatment toward every shoe manufacturer, 'big and little, rich and poor, on the same terms.' "

"Political Obstacles to Anti-Trust Legislation." By H. Parker Willis. *Journal of Political Economy*, v. 20, p. 588 (June).

The first political obstacle to the amendment of the Sherman Anti-Trust law is the lack of consecutive presentation and advocacy of some plan of amendment for more than a year at a time. A second obstacle is found in the pressure of strong, although obscure, special interests which have grown up. The third, and probably one of the most serious obstacles, is the refusal of politicians to admit that the trust question is complex in its nature and can be dealt with only through action along a number of different lines.

"The Trust Problem — Prevention *vs.* Alleviation." By Chester W. Wright. *Journal of Political Economy*, v. 20, p. 574 (June).

"We should inquire whether a policy of regulation discriminating between trusts and trust evils, and based on preventive methods, should not be substituted for our present indiscriminate, purely alleviative, and generally ineffective policy of destruction and enforced competition."

"Labor Organizations and the Sherman Law." By James A. Emery. *Journal of Political Economy*, v. 20, p. 599 (June).

Mortgage. See General Jurisprudence.

Panama Canal. "The Panama Canal." By George D. Smith. 7 *Illinois Law Review* 98 (June).

Treaty provisions are examined, and the proposition advanced that "the United States has an unmistakable right to fortify at all times, and in its discretion, for the purpose of protecting its own interests, but aside from that the treaty imposes on the United States an unmistakable duty to fortify."

Patents. "Restrictions on the Use of Patented Articles." By Edward S. Rogers. 10 *Michigan Law Review* 608 (June).

"In conclusion, the case of *Henry* v. *Dick* does not, in the opinion of the writer, depart from accepted doctrine, but, on the contrary, is a reaffirmance by the Supreme Court of a rule of law and of policy long established and widely acted upon."

Penology. "The Suspended Sentence and Probation in Theory and in Practice." By William McAdoo, Chief City Magistrate. *Bench & Bar*, N. S., 58 (June).

"I can only speak for myself when I say that I believe it would have to be an extraordinary case if a man who was convicted for the second time of burglary, robbery, picking pockets, or any of the other deliberate and premeditated crimes, would be given by me the privileges of probation. Most of these people are deter-

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mined to prey on the community and their whole lives are in open defiance of law."

Porto Rico. "The Administration of Justice in Porto Rico." By Justice James H. MacLeary. 7 *Illinois Law Review* 77 (June).

Procedure. "Procedural Law Reform." By Willis B. Perkins. 10 *Michigan Law Review* 519 (May).

"With the passage of a simple practice act, placing the responsibility of regulating court procedure upon the courts themselves, the adoption by the several states of statutes similar to the federal statute recently passed, providing that no reversal shall be had except for errors affecting the merits, and the restoration of the common law powers of the trial judges, with the right to summarize and comment upon the evidence, as is now done in our federal courts, will carry us a long way toward the realization of the fruits of the present movement for procedural law reform."

Public Insurance. "The British National Insurance Act." By Edward Porritt. *Political Science Quarterly*, v. 27, p. 260 (June).

A description of the Act of 1911 providing for insurance against sickness and unemployment.

Railway Rates. "Interest and Profits in Rate Regulation: Practice of the Wisconsin Railroad Commission." By H. T. Lewis. *Political Science Quarterly*, v. 27, p. 239 (June).

A clear and useful statement of the advanced position of the Wisconsin Commission, which has made practical application of the economic theory it has developed.

Recall of Decisions. "Constitutional Chaos." By Charles H. Hamill. *Forum*, v. 48, p. 45 (July).

"Our present institutions are not necessarily right because they exist, but neither is the proposed change good because it is new. The burden is on the proponent. Tested by reason and by the experience of history, it fails to persuade."

"The Significance of the Recall of Judicial Decisions." By Karl T. Frederick. *Atlantic*, v. 110, p. 46 (July).

"It does not promise in very substantial degree to smooth the path of social workers and philanthropists."

See Direct Government.

Recall of Judges. "Judicial Recall." By Frederick N. Judson. 21 *Yale Law Journal* 659 (June).

"Whatever is done, we should not make impossible the remedying of the existing deplorable defects of our judicial system, which have been the outgrowth of our political conditions, by further degrading the judicial office through impairing judicial independence. On the other hand, while simplifying and expediting the procedure of removing, upon due hearing, the judge who dishonors his office, we should direct all of our efforts to the elevation and dignifying the judicial office, in enlarging the judicial discretion, and thus securing needed reform in the prompt administration of justice, and further insuring the judicial independence which is essential to a self-governing people."

"The Recall of Judges." By Senator Robert L. Owen. 21 *Yale Law Journal* 655 (June).

"The federal judges should be elected subject to recall by resolution of Congress. This policy should be pursued to keep them in sympathy with the matured judgment of the American people.

"The same reasoning which justified the state in the control of the state judiciary applies to the federal judiciary with equal force and conclusiveness. . . .

"Thirty-five states have three ways of recalling judges — impeachment, automatic recall and legislative recall. Forty-eight states have two ways of recalling — impeachment and either legislative recall or automatic recall by fixed tenure."

See Direct Government.

Sales. See Contracts.

Separation of Powers. See Government.

Socialism. "Social Justice and Social-ism." By George Harvey. *North American Review*, v. 196, p. 1 (July).

"Have the American people ceased to think or to care? Cannot they perceive that 'Social Justice,' as now exploited is Socialism pure and simple?"

Tariff. "Report of the Tariff Board on Wool and Woolens." By F. W. Taussig. *American Economic Review*, v. 2, p. 257 (June).

Unemployment Insurance. See Public Insurance.

Wills. See Life Estates.

Workmen's Compensation. See Public Insurance.

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Latest Important Cases

Commerce Court. — *Jurisidiction — Court without Power to Perform Administrative Functions — Cannot Grant Relief in Absence of Affirmative Action by Interstate Commerce Commission.* U. S.

In *Proctor & Gamble Company* v. *U. S. et al.*, the Supreme Court, in an opinion filed June 7, held that the Commerce Court, under the act of Congress by which it was created, had merely the jurisdiction of the United States Circuit Courts and could not, therefore, entertain a petition from an order of the Interstate Commerce Commission which directed no affirmative relief.

The complainant, believing the demurrage rates on its own private tank cars unjust, prayed that the railroads be enjoined from collecting them. The Interstate Commerce Commission issued an order denying relief, and the complainant then filed a petition, to which the Commission demurred on the ground that the application could not be entertained as no affirmative relief had been granted in the order. The Commerce Court held that it had jurisdiction, but dismissed the application on the merits. The Supreme Court overruled the Commerce Court, holding that under the first section of the Act of June 18, 1910, now section 207 of the Judiciary Act of March 3, 1911, 36 Stats. 1148, the Commerce Court was given only the jurisdiction then possessed by the Circuit Courts in certain specific cases mentioned in the act. When the act was passed, it was well settled that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined "by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred." But the courts had no power to interfere with the performance by the Commission of its administrative functions, while acting within the scope of its authority; in other words, as to subjects which in their nature are administrative and within the competence of the Commission to decide, the court was without the power "by an exercise of original action to enforce its conceptions as to the meaning of the Act to Regulate Commerce by dealing directly with the subject, irrespective of any prior affirmative command or action" by the Commission.

Mr. Chief Justice White delivered the opinion of the court.

On the strength of the *Proctor & Gamble* case the court held that the Commerce Court was wrong in taking jurisdiction over the complaint of Cincinnati shippers about rates which the commission had put into force over the Cincinnati, New Orleans & Texas Pacific Railway Company from Cincinnati to Chattanooga. Both cases had been a basis for criticism of the Commerce Court. The Cincinnati-Chattanooga decision marked the end of the fight of Cincinnati shippers for lower rates to Chattanooga.

The Supreme Court also reversed the Commerce Court's decision which would have allowed railroads to carry railraod fuel coal at lower rates than commercial coal. The Interstate Commerce Commission again was upheld. The Commerce Court had enjoined the Commission from prohibiting the Baltimore & Ohio, the Pennsylvania and other railroads from allowing reduced rates for the transportation of coal owned by other railroads. Mr. Justice McKenna handed down this decision.

The United States Supreme Court held June 11 that the Commerce Court had power to enjoin temporarily an affirmative order of the Interstate Commerce Commission in order to review it, and therefore sent the Federal Sugar Refining Company's lighterage case back to the Commerce Court for further determination. The case was begun before the Interstate Commerce Commission by the Federal Sugar Refining Company. The Commission had held that there was an unjust discrimination in not giving the company the same allowance for lighterage as that given to the Arbuckle Brothers, but the Commerce Court issued a temporary injunction against the Commission's enforcing its order.

Conspiracy. *Federal Jurisdiction — Constructive Presence of Alleged Conspirators.* U. S.

Prosecution of offenders against federal law was given a tremendous impetus June 11 by the Supreme Court of the United States holding that conspiracy to violate federal laws could be punished in any state where an overt act was done to further that conspiracy. Mr. Justice McKenna laid down the doctrine, which

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was supported by Chief Justice White and Justices Day, Van Devanter and Pitney. Mr. Justice Holmes dissented and with him were Justices Lurton, Hughes and Lamar. The judgment of the Court of Appeals in the District of Columbia, in the conviction of Frederick A. Hyde and Joost H. Schneider of conspiracy to defraud the United States out of public lands in California and Oregon was affirmed.

In giving his opinion Justice McKenna declared that the federal statute had given a meaning to the offense of conspiracy different from that it had at common law. He declared that if the Government was put to the necessity of trying alleged conspiracy cases at the place where the conspiracy was formed the defendants might escape punishment entirely for the reason that it was not always possible to prove the place where the conspiracy was actually formed.

At the same time, and involving practically the same questions, the Court affirmed the sentence of Frank V. Brown and E. C. Moore, who were arrested in California at the instance of the Federal authorities in Nebraska, as alleged members of the notorious Maybray gang of fake horse race operators.

The indictment set out that the conspiracy was formed in a place "unknown to the grand jury," and the case rested entirely on certain overt acts in furtherance of the alleged conspiracy, principally the alleged fraudulent use of the mails in the Omaha post-office.

Insurance. *Corporation's Insurable Interest in Life of an Employee — Unaffected by Employee's Leaving his Employment.* O.

The Ohio Supreme Court on June 24, for the first time in its history, passed upon a case involving the right of a manufacturing corporation to insure the lives of its managing officers and skilled employees. This right was affirmed. The case involved two policies of $5,000 of the Northwestern Mutual Life upon the life of Thomas J. Gainor, taken out while he was vice-president and general manager of the company. The first policy was made payable to the *Coshocton (O.) Glass Co.* The other by mistake was made to Mrs. Mary M. Gainor, and later assigned to the company. Mr. Gainor left the service of the company several months before he died, and on this fact hinged the contest. The court refused to take the view that the glass company had no insurable interest in Mr. Gainor's life and that if an insurable interest did exist at the time the policies were taken out if lapsed when he left the service of the company.

Insurance. *Policy Payable to Wife — No New Agreement Created by Transactions Aimed at Making Policy Payable to Estate of Policyholder.* N. Y.

By a divided court, voting four to three, it was held, May 24, that where a man took out a policy of insurance payable to his wife, or to her children on her death, and she died first leaving no issue, the insured thereupon asking the company to make the policy payable to his own estate, receiving the written assurance that this would be done, and paying the premiums for five years up to his death under this understanding, the policy belonged to the estate of the wife, rather than to the estate of the husband, and the belief of the husband that the contract could thus be changed was based upon a misapprehension of the law and could not work the result which he contemplated. This was the decision of the New York Court of Appeals in *Bradshaw et al., executors,* v. *Mutual Life Ins. Co. of New York.*

Judge Gray wrote the opinion, Haight, Hiscock and Chase, J.J., concurring. Cullen, Ch. J., and Vann, J., read dissenting opinions, with which Willard Bartlett, J., concurred. *N. Y. Law Jour.*, June 7.

Pure Food Laws. *States May Adopt Legislation not in Conflict with Federal Act — Interstate Commerce.* U. S.

In a decision announced by the United States Supreme Court June 7, the Indiana Pure Food Law of 1907 was upheld as constitutional. The question of the constitutionality of the statute was raised in *Savage* v. *Jones*, the plaintiff being manufacturer of a medicinal product.

Justice Hughes, in announcing the court's unanimous decision, said a state had a right to compel the statement of ingredients of such an article, and that this was what the Indiana law required. Therefore it did not interfere with the federal law, which dealt with "false and misleading" labeling. The federal law, it was added, did not cover the entire field, but left certain powers to the states in the regulation of inter-state commerce in foods. States may enact legislation without interfering with the Federal Pure Food and Drugs Act of 1906.

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The Editor's Bag

THE REMOVAL OF JUDGES FOR INCOMPETENCE

IT IS seriously proposed to change the practice in impeachment proceedings, so as to make the removal of judges for corruption simpler and more expeditious, and there is nothing revolutionary in such a plan. It would be nothing more than a wholesome extension of our corrupt practices legislation to a field where, to be sure, there is no momentous public exigency calling for the innovation, but where, nevertheless, it is well to facilitate the swift and sure application of justice.

It is also proposed to make it possible to remove judges for incompetence, and this proposal is more closely connected with the proposed popular recall than is the plan for simplified impeachment. Unlike the project for popular recall, the plan to which we refer contemplates the removal of judges not by popular vote, but by the action of some responsible public agency, such as the upper branch of the legislature, or in the case of judges of inferior courts, by the supreme court. A method of getting rid of unfit judges by a method not allowing popular caprice free play is entirely practicable. Whether it would be either useful to the community or acceptable to the elements asking for the recall is of course a different matter.

We are bound to suffer from more or less incompetence on the bench at all times, and human nature has not reached that state of perfection which would insure the success of any system, however intelligently devised, of selecting and removing judges. A public not shrewd enough to select competent public servants ought to admit frankly that a bad condition can be remedied only by a more intelligent discharge of the duty of citizenship; an electorate simply by recalling its officials cannot thereby recall its own blunders. Regarded in this light, the popular initiative and referendum are objectionable not only for the reason that they tend to lessen the responsiblity of representatives of the people in the legislature, but for the weightier reason that they impair that popular sense of responsibility which is necessary to insure good government. There is the same objection to any attempt to mitigate the evil of popular indiscretion by facilitating the removal of judges who owe their election or appointment, directly or indirectly, to the free exercise of popular sovereignty.

A community which chooses its judges by direct popular vote would be apt to recoil from the inconsistency of delegating the removal of its judges to a responsible organ of the government, and communities which have an appointive judiciary, while they could consistently confer on the appointing power the power of removal, are likely to recognize the propriety of insisting on appointments of such merit that they will not need to be recalled. A government is not strengthened but de-

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bilitated by a superabundance of checks and balances, for we have outlived Montesquieu's philosophy of the state. The fewer checks we have on incompetence, the more imperative will be the popular demand for efficiency, and this consideration applies with particular force to proposed remedies for the unfitness of judges.

THE CONSTITUTION OF INDIANA

THE present constitution of Indiana provides that amendments cannot be submitted to the people before they have been passed by two successive legislatures. Governor Marshall himself drafted a proposed new constitution to which he evidently thought that this rule would not apply. He put a great deal of labor into the proposed constitution, which was admittedly an able document, and then hurried it through the legislature, where it was adopted within two weeks with little if any debate, for submission to popular vote in 1912.

The notion underlying this procedure seems to have been that an entirely new constitution would not call for the same process of adoption as amendments to an existing one, that it was sufficient that it be proposed by the representatives of the people for their direct action, and that the original proposal might as properly come from the legislature as from a constitutional convention. The inherent sovereignty of the people of the state is thus supposed to give them the right to adopt a new constitution without pursuing the procedure indicated by the constitution already in force.

This position undoubtedly finds able advocates,[1] but nevertheless seems rather a strange one. Where the people of a state, in their constitution, have clearly indicated the procedure to be adopted in revising, amending, or changing the document, such provisions would appear to be mandatory, rather than merely permissive, and if they apply to the amendment of the existing constitution, they would *a fortiori* seem to apply even more positively to the adoption of an entirely new one, because of the presumption that even stronger safeguards were contemplated in the event of a proposal to alter the constitution in its entirety.

The decision handed down by the Indiana Supreme Court on July 5, holding a constitutional convention necessary, was in harmony with the method usually followed by the states of this country in adopting a new fundamental law, for it is unusual to delegate the functions of a constitutional convention to the legislature. The rule of construction according to which delegations of popular power are broadly to be construed, in favor of the people, should also be considered.

[1] See for example, paper by J. F. Dunn, in Proceedings of American Political Science Association, 1911, p. 43.

JUDGE DODGE'S APPOINTMENT

THE Senate on July 23 confirmed the President's nomination of District Judge Frederic Dodge to be a United States Circuit Judge for the first judicial circuit. The President had been strongly inclined to let this appointment go to Chief Justice Parsons of New Hampshire. But the Massachusetts Bar Association had recommended Judge Dodge's promotion, and the indorsement of Senators Crane and Lodge, supported by the influence of Senator Root, had great weight.

Judge Dodge's office was not affected by the federal judiciary act which went into effect at the beginning of this year, affecting the circuit judges. Judges Putnam, Colt, and Schofield thus con-

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fined their work to the Circuit Court of Appeals, the lower circuit court having been abolished. The vacancy in the district court occasioned by Judge Dodge's promotion will now have to be filled.

WESTBURY'S FRANK HUMOR

LORD WESTBURY had that sense of humor which relishes the fun occasionally to be derived from a frank statement of the honest truth of a homely situation. After retiring from the office to which Lord Haldane has only lately been advanced, he took an active part in the judicial functions of the House of Lords. The other law lords were Lord Chelmsford and Lord Colonsay, and Lord St. Leonards.

Lord St. Leonards never attended. One day Lord Westbury chanced to meet him and said, "My dear St. Leonards, why don't you come and give us your valuable assistance in the House of Lords?"

"Ah," said Lord St. Leonards, "I should be of no use. I am old and blind and stupid."

"My dear man," said Westbury, "that does not signify in the least. I am old, Chelmsford is blind, and Colonsay is stupid, yet we make the very best court of appeals which has ever sat in the Lords."

WAS HE CRAZY?

EMILE V. VAN BEVER, the young Chicago attorney, who a few months ago sprang into prominence as a criminal lawyer by his defense of one of the Kaufmann murderers, was defending an old man on a charge of murder. Van Bever had worked up a perfect defense of insanity and announced that the defense rested. The judge turned solemnly to the accused and asked if he had anything further he wished to offer in his own defense.

The accused rose in the prisoner's box, and defiantly raised his quivering hand, as if to address the court.

Van Bever jumped to his feet, and shouted at him, "Sit down, Mr. ——! Sit down! Don't say anything! I advise you not to say anything"! Then, seeing that the old gray-haired man did not intend to obey, Van Bever half cried, half moaned to him, "For God's sake, Mr. ——, don't say anything! Wait — wait — let me talk to you first, if you insist on saying anything!"

The old man's whole frame shook with anger and trepidation, and turning to Van Bever he vehemently burst out:—

"I won't listen to you any more! I am through with you! You have almost made me believe that I am crazy But I tell *you*, gentlemen of the jury, that I am not crazy — I am not half as crazy as my crazy lawyer here, or the other lawyers, or that judge, or the rest of you. I know I killed that woman. Yes, sir, there is the hammer I did it with. I wish I would have killed a half dozen more of them while I was at it, because I see what I am up against here. That woman was a German. Every one of you men on the jury is a German. The judge there is a German. The prosecuting attorney here is a German. The Sheriff is a German. The Governor is a German. And even my own crazy lawyer there is a German. Everyone against me is a German! What show has a poor old Irishman like myself, without money and without friends, in the hands of such a gang! I see what I am up against. I see I can't get away from it. Find me guilty of murder, if you like, but whatever you do, don't, no, for God's sake, don't find me crazy too and

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send me out to that crazy house at Kankakee."

When the jury finally returned with their verdict, they had found the old man guilty and sentenced him to fourteen years.

QUERY: Who was crazy?

OATH AND AFFIRMATION

A MEMBER of the Washington Bar tells of the distinction made by a colored witness in a Virginia case with reference to an oath and an affirmation.

When this darky entered the witness box he said he thought he wouldn't swear. He thought he would just affirm.

"How is this?" asked the judge, "A month ago, when you last appeared before me, you consented readily enough to swear. Why is it that you will now only affirm?"

"Yo' honah," said Moses, "de reason is that I expects I aint quite so shore 'bout de facts of dis case as I was 'bout dem of the other."

THE LEGAL STATUS OF THE QUEEN

THE quaintness of many provisions of British law is curiously exemplified in the status of the Queen of England. So far as Her Majesty's private business is concerned, she is not regarded by the laws and customs of England as a married woman at all. She is the only woman in Great Britain who does not come within the scope of the Married Woman's Property Act.

The idea in all this is that affairs of state consume all the time of the King, and therefore no responsibility for the Queen's business rests upon him. If the Queen contracted debts in her husband's name he would not be responsible for them, as any other husband in the United Kingdom would. The King cannot be sued for debt; but the Queen can be. Should the King die, some authorities hold that the Queen could not marry again, in case she wished to, without the license of the King's successor.

WOMEN AS WITNESSES

AN EXPERIENCED barrister has lately furnished a London newspaper with some of his impressions of feminine witnesses. In his opinion, most women are more skilled in concealing anything they do not wish to be known than men are. Men may be bolder liars when it comes to perjury, but they lack the air of candor and simplicity which are a woman's chief defense in a similar predicament.

Women, he considers, are not usually good witnesses with regard to precise dates and details. In numberless cases most important letters written by ladies have been vaguely dated "Sunday night" or "Thursday — after dinner." When you press the importance of the date, the witness usually shakes her head and says, "But I really don't remember."

A mere man may be frightened or bullied into making admissions by a determined cross-examiner, but any such attempt with a woman witness ends only in a flood of tears, the indignation of the jurymen, and the probable loss of the case.

While the educated woman is usually able to parry any awkward questions, witnesses of less education and lower social position sometimes get nervous and lose their heads, and that is why the evidence of domestic servants is regarded as doubly dangerous, in the divorce court especially. An indiscreet witness called for the defense has

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in this way often proved the strongest possible witness for the other side.

A COLONIAL JUSTICE

A JUSTICE of the peace in the early Colonial days of New England was regarded as the representative of his "Sovereign Lord the King." The royal commission by which he held his office called him "Our trusty and well-beloved," and he had the privilege of appending the title "esquire" to his name. The community spoke of him as the Squire, and treated him with great respect.

He was not appointed a justice because he was wise and learned in the law, but because he was known to be loyal, to exhibit a dignified deportment, and to be one of those "substantial men that are prudent persons and of substantial estate."

He took an oath to "dispense justice equally and impartially in all cases, and do equal rights to the poor and to the rich after your cunning wit and power according to the law."

His most pleasing function was to marry those who came to him to be joined in wedlock, for in those Puritan days marriage was celebrated by the justice, and not by the minister. Those who came to him to be married had to bring the town clerk's certificate that their intention to marry had been proclaimed at three religious meetings in the parish during the preceding fortnight.

The justice had an extensive jurisdiction, for he was a criminal judge, a civil judge, and the chief of police. He took care that there should not be traveling, labor, nor amusement on Sunday, and that all able-bodied persons should attend the public services in the meeting-house.

Profane swearing and cursing of persons or creatures were criminal offenses which the justice punished.

A PROSPECTIVE CRIME WAVE

An Oklahoma dentist says that kissing should be made a crime. —*News item.*

SIN is sometimes repulsive,
But in the present case,
Given a heart impulsive,
Likewise a pretty face,
The subtle sense subliminal
Which all possess, 'tis said,
Might make a good man criminal, —
Or any pretty maid.

This wickedness, deep-hidden,
Might sudden outlet seek
If some fair girl, unbidden
Should "turn the other cheek."
And if this good Christian damsel
Should make a little slip,
And, 'stead of cheek, the dear ma'mselle
Should turn her ruby lip,

Who would be such a coward
Or such an awful prude
Or so completely soured
Or so uncommon rude
As to refuse? since any court
Can soon eliminate
The evidence, for no girl ought
Herself incriminate.

SIRIUS SINNICUS.

LIVELINESS OF ILLUSTRATION

THE late Justice Harlan had a fund of good stories, and there was none he delighted more in than that pertaining to the efforts of a young and enterprising Kansas lawyer, who, during his first case, was desirous of illustrating his contention by means of hypothesis.

The youthful attorney began: "We will suppose, your honor, that your honor were to steal a horse —"

"No, no!" interrupted the judge, "Not at all, not at all, sir. Not a supposable case, sir."

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"Very well, begging your honor's pardon," said the eager advocate, with more zeal than prudence. "Very well, then, supposing that I should steal a horse —"

"Ah, yes, yes," said the judge, "that is a very different thing, very different, Mr. Parker. Proceed, sir."

PROFITABLE LITIGATION

AMONG the curiosities of litigation may be cited the following case.

On the boundary line of two farms in an Austrian village there grew a large gooseberry bush, from which the two farmers for years gathered the product. "What grows on my side is mine, and you may have the rest," was the agreement.

Some time ago the neighbors had a misunderstanding, and this came to a climax when the gooseberries became ripe. A lawsuit followed, and appeals were made to higher judicial bodies. The final decision was lately recorded in the Austrian courts.

Each party is to have the right to pick the berries which grow on his side of the line, just as it was originally, but neither may destroy the bush. The costs are charged half to each litigant. Each farmer had to pay two hundred and twenty-five krone. The yearly yield of the bush is worth about one-half krone, and the judge told the fighting farmers:

"With good luck, it will take you only eight hundred years to make the bush pay. Take good care of it."

ESCORTING THE COURT

IN COLONIAL days York, Maine, was the county seat whereto the judges and lawyers from New Hampshire and Massachusetts went. The court sessions were attended by much pomp and ceremony, as is evidenced by an entry in the journal of John Adams, who, as a young "barrister" went to York in 1774.

"When I got to the tavern on the eastern side of the Piscataqua River, I found the sheriff of York and six of his deputies, all with gold-laced hats, ruffles, swords and very gay clothes, and all likely young men who had come out to that place to escort the Court into town."

This bit of description by Adams gives us just a hint of the pomp and splendor affected by the court officials of those days, when the judges wore robes of scarlet with large cambric bands, and immense wigs, and the barristers had gowns and also bands and tie-wigs.

As the judges approached the shire towns, the sheriff met them with an escort and flourish of trumpets. Their arrival was announced by cannon and the daily summons to the court before bells were introduced was by beating a drum.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

"Now," said the lawyer, "please tell us how the altercation began."

"I didn't see any altercation," replied the witness. "I was too busy watchin' the fight."

— *Chicago Record-Herald.*

Georgia Lawyer (to colored prisoner). — "Well, Ras, so you want me to defend you. Have you any money?"

Rastus. — "No; but I'se got a mule and a few chickens and a hog or two."

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Lawyer. — "Those will do very nicely. Now, let's see; what do they accuse you of stealing?"

Rastus. — "Oh, a mule and a few chickens and a hog or two." —*Life.*

The court was having trouble getting a satisfactory jury.

"Is there any reason why you could not pass impartially on the evidence for and against the prisoner?" asked the judge of a prospective juror.

"Yes," was the reply, "the very looks of that man makes me think he is guilty."

"Why, man," exclaimed the judge, "that's the prosecuting attorney!"

—*Ladies' Home Journal.*

Magistrate (about to commit for trial). — "You certainly effected the robbery in a remarkably ingenious way; in fact, with quite exceptional cunning —"

Prisoner. — "Now, yer Honor, no flattery, please; no flattery, I begs yer." —*Sketch.*

Study

By Col. Milton H. Anderson

"The Iowa Poet"

I HAVE studied physics, philosophy and law,
I find them hard and dry,
But by hard persevering study
You can master them if you try.

All are votaries to the God of Wisdom
If we would enter his temple door,
We must study patiently for years,
Then patiently study some more.

Hancock, Iowa.

The Legal World

Monthly Analysis of Leading Legal Events

A popular movement such as that for the recall of judges does not spring from theories of the nature of popular government, but gathers its strength from special incidents which furnish a text for inflammatory utterances that would not be called forth if concrete examples were not available to bear out the contention. There had been little, recently, to indicate that the demand for the judicial recall was growing. There may, on the contrary, have been some ground for a belief that it was approaching a low ebb, even though such a temporary subsidence would have been unlikely long to continue. Then came the Hanford and Archbald cases, which necessarily have had their effects. Of these cases

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one has not been finally disposed of, and as the House did not draw up articles of impeachment against Judge Hanford it is well to withhold judgment on the merits. The case for the impeachment of Judge Archbald having been completed by the House, and the adverse vote having been practically unanimous, the character of the judge already stands impeached, even though he may still be entitled to the legal presumption of innocence. These two proceedings have intensified the demand for more expeditious procedure in impeachment cases on the part of the more sober-minded, and for the recall of judges on the part of our more impetuous popular leaders.

The bar cannot help coming under the influence of this movement. Lawyers continue to denounce the recall as subversive of the independence of the judiciary, quite rightly, but there is perhaps less of a disposition to ignore the intricacies of the situation leading to this popular demand than there was a few months ago. The inclination of bar associations, for example, to adopt a negative rather than a constructive attitude on the question, to which we referred last month, is perhaps less marked.

To illustrate, the request of the committee of the Pennsylvania Bar Association that the subjects of the initiative, referendum, and recall be referred back to it for further consideration may have some significance. There are lawyers of the calibre of Frederick N. Judson who recognize the need of simplifying and expediting impeachment proceedings, and this question will figure in the approaching Presidential campaign. Plans for compulsory retirement of incompetent judges not by popular recall but by responsible official action, such as that proposed by T. S. Tyng in the *Political Science Quarterly*, are likely to receive more earnest consideration in future.

A state bar association rarely accomplishes more productive work of importance that the Pennsylvania Bar Association did recently at its annual meeting. Action was taken to bring about such things as a new codification of the state statutes, a codification of the law of decedents' estates, and the abolition of appeals based on merely insubstantial error. The tendency of the state associations to adopt the American Bar Association measure, recently enacted into law by Congress, to remedy the evil of appeals in insubstantial error evinces a sincere desire to promote the cause of procedural reform through the greater part of the country. A bill to expedite trials, for example, has been approved by the North Carolina Bar Assocation.

Disbarment proceedings throughout the country are frequent and are not often noticed in this column. The activity of the Chicago Bar Association in purging the ranks of the profession of those guilty of unethical practices is especially noteworthy.

The Pennsylvania Bar Association

The eighteenth annual meeting of the Pennsylvania Bar Association was held at Cape May, N. J., June 25–27.

The address by the President, George R. Bedford of Wilkes-Barre, upon "Some Suggested Changes of the Law," urged that the legislature should confer upon the citizen a right of action against the Commonwealth, and should reverse the rule now in force by which, in cases of insolvency, debts due the State are paid first. He recommended that a stringent law should be passed and enforced forbidding the possession of

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dangerous weapons or high explosives without a government license. He declared the change in our institutions indicated by the "initiative, referendum and recall" as undesirable, because likely to impair the efficiency of representative government and the independence of the judiciary. He asserted, also, that lawyers and their clients are to a large extent responsible for delays in litigation, rather than the courts.

Cyrus G. Derr of Reading read a paper entitled "The Best of our Knowledge, Information and Belief," a discussion of the grounds upon which we may reasonably rely upon the testimony of others.

Henry Budd of Philadelphia read a paper entitled "Decisions, Reports and some Reporters," in which he criticized the tendency of judicial legislation, and pointed out the inferiority of the modern reports to those of ancient times.

The Committee on Law Reform submitted four proposed acts, providing for the direction of special verdicts on specific questions submitted in civil cases, for the operation of admission to the Supreme Court as admitting to practice in every other court of the state, for the abolition of appeals based on technical errors, and for the continuance of writs for the beginning of actions in force for one year from this date.

All these proposed acts were approved with minor or immaterial amendments.

The suggestion made by Judge John Marshall Gest in a recent paper entitled "Suggestions for the Amendment of the Law of Decedents' Estates in Pennsylvania," that a commission be appointed to codify the statutes on the subject, was adopted by the Association.

The report of the Committee on Uniform State Laws, recommending the approval of the act relating to desertion and non-support and the act regulating marriage and marriage licenses, was referred back to the committee for further consideration, at the request of its chairman.

The recommendation of a committee that a commission be created to revise and unify the statutory laws of the Commonwealth and report certain parts thereof to the legislature of 1915, was adopted, and the act submitted by the committee for the appointment of such a commission approved.

The association adopted a recommendation that one of its committees co-operate with a committee of the Law Association of Philadelphia in securing relief for the municipal courts of Philadelphia by furthering such legislation as may seem desirable.

The report of a committee on the judiciary was unfavorably acted upon the Association deciding that it preferred an elective to an appointive judiciary, and the continued granting of liquor licenses by the courts.

The report of the Special Committee on the Initiative, Referendum and Recall was referred back, at the request of the committee for further consideration.

The following officers were elected: presidents, Hon. George B. Orlady; vice-presidents, John J. Henderson, Crawford; Charles E. Terry, Wyoming; J. McF. Carpenter, Allegheny; N. H. Larzelere, Montgomery; Edward H. Bonsall, Philadelphia: Secretary, William H. Staake, Philadelphia; treasurer, Samuel E. Basehore, Cumberland.

Iowa State Bar Association

The eighteenth annual meeting of the Iowa State Bar Association was held at Cedar Rapids, Ia., June 27–28. The president's address, by Senator C. G. Saunders of Council Bluffs, dealt with

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"The Judicial Recall." Senator William Berry of Indianola also read a paper on the opening day on "The Administration of the Indeterminate Sentence and Reformatory Law." The annual address was delivered by Mr. Justice William Renwick Riddell of the King's Bench of Ontario. His subject was, "Comparison of the Constitutions of the United States and Canada." Other papers read were: "The Juvenile Delinquent and His Treatment," by Judge Charles S. Bradshaw of Des Moines; "The State Law Library," by A. J. Small of Des Moines, and "Some Railroad Problems," by Hon. J. L. Parrish of Des Moines, general counsel of the Rock Island.

The report of the Committee on Law Reform excited considerable discussion. It favored the abolition of appeals based on purely technical errors, an increase in the number of Supreme judges and the division of the Supreme Court into two sections, limitation of the time permitted each side for trial in jury cases, three-fourths verdicts where the jury has deliberated not less than ten hours, and separate primary ballots for judicial officers. The proposal to limit the time for hearings was lost by a tie vote of the association. The plan for three-fourths verdicts was unanimously defeated after it had been amended to apply only to cases where not over $500 was in controversy. The association voted in favor of increasing the Supreme Court to at least nine members, but against the proposed division of the court.

A. T. Cooper of Cedar Rapids read the annual report of the committee on membership, and reported an increase of 125 in the past year, more than three times as many as were ever reported before.

Governor Hadley of Missouri received a great ovation at the banquet, and made an entertaining speech.

Justice H. E. Deemer of Des Moines was elected president; Major John F. Lacy, Oskaloosa, vice-president; Prof. H. C. Horak, Iowa City, secretary; Frank T. Nash, Washington, treasurer; A. J. Small, Des Moines, librarian. The next annual meeting will be held at Sioux City, on the last Thursday and Friday in June, 1913.

Miscellaneous

The national House on July 11 passed the Clayton contempt bill, 232 to 18. The measure provides for trial by jury for those accused of indirect contempt of a federal court. An attempt to pass a substitute prepared by Representative Sterling of Illinois was voted down.

The verdict in the Camorra trial at Viterbo, Italy, was rendered July 8, by a unanimous decision finding nine of the accused guilty of murder, and the remainder of the band guilty of belonging to a criminal association. This remarkable trial took almost a year and a half. Altogether over seven hundred witnesses were heard.

The annual meeting of the Chicago Bar Association was held June 4. The president, Edgar B. Tolman, delivered an address in which he discussed the work of the association on behalf of high standards of professional ethics, the separation of judicial elections from party politics by means of the recent bar primary, and other matters. The membership showed a substantial increase over that of the previous year.

The President forwarded to the Senate on July 10 the nomination of Frederic Dodge, Judge of the United States District Court at Boston, to be United States District Judge for the first judi-

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cial circuit, succeeding Judge Schofield, deceased. Mr. Dodge was born in April, 1847, and is sixty-five years old. He is a graduate of Harvard College and the Harvard Law School. His wide experience as an admiralty lawyer led to his being looked upon as the natural candidate for the vacancy left on the bench of the district court at the time of Judge Lowell's promotion from that branch to the first judicial circuit in 1905.

At the fourteenth annual meeting of the North Carolina Bar Association, held at Morehead City, N. C., early in July, the report of the committee on reform of procedure was adopted without amendment and the committee were given a vote of thanks. Four bills were approved for submission to the legislature, as follows: (1) to divide the state into new judicial circuits and districts, with an increase of judges from sixteen to twenty-four; (2) to fix the salaries of solicitors of the state; (3) to change the jury system; and (4) to expedite trials. A report on the Torrens system was also adopted. The following officers were elected: Hon. James S. Manning of Durham, president; Thomas W. Davis, secretary-treasurer; W. M. Bond, R. C. Dunn, C. R. Thomas, Henry A. Gillman, N. J. Rouse, W. S. O. B. Robinson, W. P. Bynum, Jr., J. B. Clark, Union L. Spence, Walter Murphy, S. Porter Graves, A. L. Quickel, W. B. Council, J. W. Pless, Thomas Settle, F. S. Johnson, vice-presidents.

Obituary

Arden, Henry, author of Banning and Arden's Patent Reports, an authority in patent law, of whom it was said, in 1892, that he was one of the eight greatest lawyers in New York, died at Los Angeles July 1. He was a graduate of the University of Cambridge. He not only had a wide knowledge of international law, but was an authority on chemistry, metallurgy, and electricity.

Butler, Hugh, a prominent lawyer of Colorado, died June 27. He had served as county attorney, and senator under the territorial regime. He had also, at one time, filled the chair of common law and code pleadings in the Colorado State University law school. He was formerly a law partner of Henry M. Teller, and was an expert on mining law, but had not been active in his profession for the past ten years.

Haralson, Jonathan, for sixteen years Associate Justice of the Alabama Supreme Court, died July 11. He retired to private life several years ago.

Herring, William, formerly an assistant district attorney of New York and member of the Legislature, died at his home in Tucson, Ariz., July 10, at the age of 79. In the legislature he introduced the first New York city consolidation bill. He moved to Arizona in 1880, where he became Chancellor of the University of Arizona and later Attorney-General of the state.

Marsh, Judge James K., a prominent southern Indiana lawyer, died July 6. He had been prosecuting attorney, representative to the legislature, and state circuit judge.

Oliver, Judge Addison, a pioneer and prominent philanthropist of Iowa, and formerly a Congressman for four years, died July 7 at his home in Onawa, Ia.

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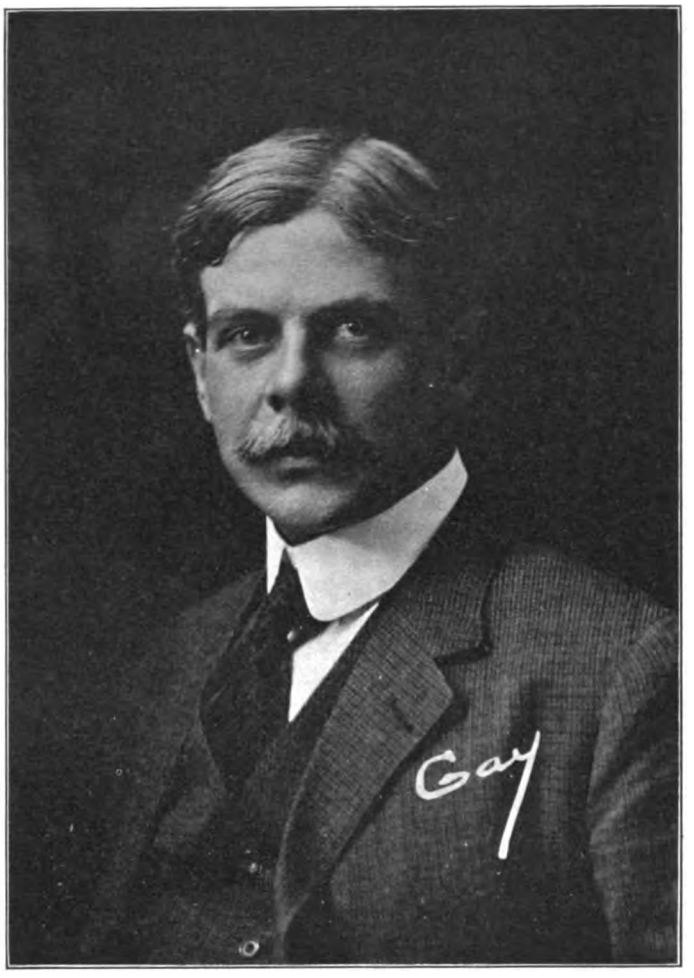

JAMES M. MORTON, JR.

APPOINTED UNITED STATES DISTRICT JUDGE FOR
DISTRICT OF MASSACHUSETTS

(*See p. 429*)

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The Green Bag

Volume XXIV September,. 1912 Number 9

The Bobbins Lexiphone

By Dan C. Rule, Jr.

EVANDER GUMSHEUGH BOBBINS was a man of modest mien,
Though his natural endowments were so admirably keen,
And his research so extensive, that it's worse than useless to
Attempt the briefest mention of the things Evander knew.
Yet years of pure devotion to the cause of science, which
Should have brought him ample income, left our hero far from rich;
But by way of compensation, he had two firm friends in town,
V-i-z, to-wit, and namely, Justice Byng and Lawyer Browne,
And in lieu of fame and fortune, had evolved a scheme sublime
That would rip the lath and plaster off the corridors of time.

Ah, the many difficulties under which Evander strove
Would have driven most inventors to the corkscrew and the clove!
But one morn his great invention stood completed, and he cried
From his natural emotions of excessive joy and pride.
Thought he, "Who'll be more happy than dear old Byng and Browne
To find that I am destined for great riches and renown?
I'll see that these two lawyers are first of all on earth
To examine my invention and to pass upon its worth."
So, in answer to his summons, putting by their own affairs,
His two devoted comrades came toiling up the stairs.

He greeted them with ardor, and said, "My faithful friends,
You have no premonition of what this hour portends,
But future epic poets shall sing this time and place
As marking mighty progress in the welfare of the race.
Yon wondrous mechanism, which weighs but sixty pounds,
Will increase the speed of lawcourts by prodigious leaps and bounds;
No more the crowded docket; no more the 'law's delays';
But lawyers, courts, and clients shall warble hymns of praise,
And every evil-doer his subtlest crimes must own
When haled into the presence of the Bobbins Lexiphone."

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"Upon this waxen roller and its two fragile mates
Is wrapped the Constitution of these United States,
Likewise the constitution of any given state,
And a digested transcript of its statutes up to date.
Then into this receiver the plain, unvarnished facts
Of any case are stated; the law-condenser acts,
And in calm judicial accents, by a process graphophonic,
My invention makes decision with a squareness so Masonic,
So fair, and so infallible, that men must list in awe
To thirty-minute justice in accordance with the law."

Then Browne regarded Bobbins as one who speaks in jest,
And said, "With your permission, I'll put it to the test."
Then into the receiver he talked at length, presenting
A Supreme Court decision, with Blanque, C. J., dissenting,
And listened with amusement the while the Lexiphone
Reversed that grave tribunal with a logic all its own.
But as he listened, laughter gave way to doubt, then wonder;
He shouted, "Browne, those judges have made an awful blunder!
This devilish law-box puts it in such a lucid light
That any sober layman could see that Blanque was right!"

Instead of praising Bobbins, as in good sooth they ought,
His legal friends stood spellbound by one appalling thought.
Then Byng's pale lips were parted as one who grasps in mirk:
"Old friend, by George we hate to — but must, or go to work!"
Then heedless of Evander's loud cry of wild despair.
They pounced upon the Lexiphone, and kicked it down the stair.
And as that great invention upon the pavement lay,
Browne stamped upon its ruins in a truly savage way,
While Byng knelt down beside it, endeavoring with his fist
To pulverize the pieces Browne's patent-leathers missed.

That night, in deep dejection, Evander thought, "I fear
That as a tactless genius I'll stand without a peer
Until, in future ages, some brilliant fool like me
Submits a plan to sailors for drying up the sea!"
Thus, with a noble fairness, Evander made his moan,
Amid the shattered fragments of the Bobbins Lexiphone.

Clyde, O.

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What are the Rights of the Bankrupt's Trustee to His Life Insurance Policies?

By Samuel Davis, LL.M.
of the Boston Bar

IN THE month of January, 1912, in the District Court of the United States for the District of Massachusetts, Dodge, J., overruled the finding of Referee Olmstead in the matter of Loveland, which finding denied the petition of the bankrupt Loveland's trustee that the bankrupt's life insurance policy be turned over to the trustee as part of the bankrupt estate. The referee's finding followed the case of *Bailey* v. *Wood*, 202 Mass. 562, and in the opinion of some careful students the District Court in reversing the referee left the law in an unsatisfactory condition, no appeal having been taken to a higher court.

An examination of the law as laid down in cases of this kind reveals a remarkable state of confusion, resulting from a large number of adjudications wholly irreconcilable with each other. The contradictory views announced by the courts may be attributed to a failure to properly appreciate the true nature of life insurance on the one hand and on the other, at least until the decision of *Holden* v. *Stratton*, 198 U. S. 202, in 1905, a misapprehension by many courts of the meaning of sec. 70*a* of the Bankruptcy Act of 1898. The baffling experience encountered in a search for principles is further due to the action of the courts in resting their decisions in similar problems on unlike factors, so that many times there is a comparison of unlike things if an attempt is made to reconcile cases. Courts have also assumed technically incorrect views of life insurance in attempting to distinguish between various kinds of policies.

Very early in the history of life insurance in this country the various states enacted legislation intended to put life insurance on a different footing from other financial transactions. In 1844, just one year after the incorporation of the New England Mutual Life Insurance Company, the General Court of Massachusetts enacted that "any policy of insurance made by any insurance company for the benefit of a married woman, whether the same be effected by herself or by her husband or by any other person on her behalf, shall insure to her separate use and benefit and that of her children, if any, independently of her husband and of his creditors and representatives" . . . . . (St. 1844, ch. 82). This statute, after having been several times broadened by amendment, is the law of the Commonwealth today.

Most if not all of the states of the Union have statutes of similar purport. The state of North Carolina has gone so far as to incorporate in its Constitution a provision that a husband may insure his own life for the sole use and benefit of his wife and children, and in the case of the death of the husband the amount thus insured shall be paid over to the wife and children free from all claims of the husband's creditors.[1] It has been held under this article

[1] Const. North Carolina, Art. X, sec. 7.

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that the proceeds of the insurance in such a case are no part of the estate of the insured, but are the absolute property of the wife and children.[2]

The peculiar nature of insurance which sets it apart from other incidents of economic life was well recognized in the case of *Central Bank of Washington* v. *Hume*, 128 U. S. 195, where Chief Justice Fuller, giving the unanimous opinion of the Court said:

> Conceding then in the case in hand that Hume paid the premiums out of his own money, when insolvent, yet as Mrs. Hume and the children survived him and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors or the administrators as representing them can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest secured was neither the debtor's nor the creditor's. In no sense was there any gift or transfer of the debtor's property unless the amounts paid as premiums are to be held to constitute such gift or transfer. But even if Hume paid this money out of his own funds when insolvent, and such payments were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies which belonged to the beneficiaries. . . . It seems to us that the same public policy which recognizes the support of wife and children as a positive obligation in law as well as in morals should be extended to protect them from destitution after the debtor's death by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already or which could thereby be lawfully obtained, at least to the extent of requiring that in such circumstances the fraudulent intent of both parties should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred in our judgment none of these premiums can be recovered.

This opinion of the United States Supreme Court states very satisfactorily the economic reason for the existence of state statutes exempting the proceeds of insurance policies from the creditors of the insured. It must be said, however, that the courts have found many pretexts for reasons for defeating the broad principle embodied in these statutes. After the decision in *Bank* v. *Hume* appeared, Professor Williston strongly criticised it, upholding the English view that the creditors of the bankrupt are entitled to the entire proceeds of his policies where they are settled upon the wife of the bankrupt while he is insolvent.[3] But in the English cases the point considered was the case where policies originally payable to the personal representatives of the insured were assigned by him to his wife after he was involvent. Nevertheless, adhering strictly to the peculiar nature of insurance and the true concept of insurable interest, the view of the Court in *Bank* v. *Hume* seems more nearly correct. Moreover, eight years later (1899) in a carefully studied opinion, the Court of Appeals of Colorado in a case of first impression followed *Bank* v. *Hume*,[4] Here again the Court held that the duty which the insured owes to his dependent family and to the state is of higher importance than that which he owes to his creditors. "We see no difference in principle between compelling the husband while living to support his wife and family and in permitting him to make some provision for their support after his death."

The increasing tendency to place the bankrupt's policies in the hands of his trustee is also in conflict with the true idea of insurable interest. One court has said of this, "We do not regard the right of the wife to insure the life of her husband as property. It is

[2] *Burwell* v. *Snow*, 107 N. C. 85.

[3] 25 Am. Law. Rev. 185.

[4] *Manufacturing Co.* v. *Platt*, 13 Col. App. 15.

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more in the nature of a power or privilege to make a valid contract. It is a status and not a property right. The common law upon motives of public policy held that there must be an insurable interest in the life which was insured. Who has such an insurable interest was frequently a matter of some discussion and possible doubt. *An interest which is insurable must be an interest in favor of the continuance of the life* and not an interest in its loss or destruction.[5] There is no insurable interest on the life of the bankrupt in the bankrupt's estate.[6]

Whatever rights the trustee in bankruptcy has to the bankrupt's life insurance policies are given to him by section 70 of the Bankruptcy Act of 1898, which reads in part as follows:

> The trustee of the estate of a bankrupt . . . shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except insofar as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; Provided, that when any bankrupt shall have any insurance policy which has a cash surrrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.

Until the case of *Holden* v. *Stratton*, 198 U. S. 202, was decided, the courts in many cases held that the presence of a cash value in a policy determined whether or not a policy passed to the trustee. That caes definitely fixed the law as up holding state exemptions and decided that the proviso in section 70*a* 5 did not enlarge the trustee's rights, but gave to the bankrupt the additional privilege of redeeming from the trustee a policy which would otherwise pass to him. There were two bankrupts, Daniel H. Holden and his wife, Lizzie Holden. J. A. Stratton was the trustee of both estates. There were two policies upon the life of Holden both payable to his wife if living at his death, otherwise to his personal representatives. The bankrupts claimed the policies by virtue of an exemption law of the state of Washington, while the trustee resisted this claim upon the ground that the policies had a cash surrender value of $2,200, which it was the duty of the bankrupts to pay the trustee as a condition precedent to the exemption of the policies. The referee sustained the position of the trustee, but was reversed by the District Court. The Circuit Court of Appeals again upheld the trustee and the referee, and the case finally reached the highest court. The bankrupts were residents of the state of Washington and claimed the benefit of the broad exemption law of that state, which provided "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt." The Circuit Court of Appeals held that the allowance of state exemptions secured to the bankrupt by section 6 of the Bankruptcy Act was modified by the proviso in section 70*a* of the Act. The United States Supreme Court took up this question and discussed it exhaustively, carefully considering the conflicting views in the Circuit Court decisions. As a result, the leading case of *Steele* v. *Bull*, 104 Fed. Rep. 968, was affirmed and the case of *Re Scheld*, 104 Fed. Rep.

[5] *Holmes* v. *Gilman*, 34 Northeastern 205; see also *In re Judson*, 192 Fed. Rep. 834.
[6] *Re Mc Kinney*, 15 Fed. Rep. 535.

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870 was overruled. The Court said that section 6 is quite apparently couched in unlimited terms and is accompanied with no qualifications whatever. The opening clause of the section declares that the trustee after his appointment shall be vested "by operation of law with the title of the bankrupt . . . except insofar as it is to property which is exempt," and this is followed by an enumeration under six headings of the various classes of property which pass to the trustee. Clearly the words "except insofar as it is to property which is exempt" make manifest that it was the intention to exclude from the enumeration property exempt by the act. This qualification necessarily controls all the enumerations, and therefore excludes exempt property from all the provisions contained in the respective enumerations. The purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate.

The attention of courts which seem disposed to narrow state exemptions wherever possible sould be given to the remarks of the United States Supreme Court generally, upon the subject of exemptions in this same case of *Holden* v. *Stratton*. The Court says: "It has always been the policy of Congress, both in general legislation and in bankruptcy acts, to recognize and give effect to the state exemption laws. This was cogently pointed out by Circuit Judge Caldwell in delivering the opinion in *Steele* v. *Buell*, where he said (104 Fed. Rep. 972):

> From the organization of the Federal Courts under the Judiciary Act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our Federal system should be made to appear by clear and unmistakable language.

Shortly after the decision in *Holden* v. *Stratton* was handed down, the meaning of section 70*a* was further clarified by the Court is *Hiscock* v. *Mertens*, 205 U. S. 202. In this case the question was whether the cash surrender value prescribed in section 70*a*, 5, must be one set forth or provided for in the policy or whether if the policy have a value by the concession or the practice of the company issuing it, such value would be sufficient. The Court held that it would. It pointed out that section 70*a*, 5, made no distinction between policies which stipulated for the payment of a cash surrender value and those which did not; if a policy provided for a surrender value or if the practice of the company was to allow such a value, then the Court said, the proviso in the section 70*a* could be availed of by the bankrupt who could redeem a policy which would otherwise pass to the trustee by paying him the amount fixed by the company issuing it as the cash value of the policy.

The policies which the trustee takes are those in which the bankrupt has an interest which is transferable. They must therefore be payble to his executors or administrators or assigns, and are subject to the right by the bankrupt to redeem as above set forth. It has been held that an endowment policy payable to the bankrupt if living at maturity passes to the trustee even if another person is named as beneficiary in the event that the in-

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sured does not survive the endowment period.[7]

This has been questioned, however. In *Atkins* v. *Equitable*, 132 Mass. 395, the court held that a paid up endowment policy did not pass to the trustee because the wife of the bankrupt had an interest in it of which she could not be deprived. The same result was reached in *Haskell* v. *Equitable*, 181 Mass. 341. In that case the bankrupt's policy provided for the payment of the insurance to him at the end of twenty years from its date; if he died within the period, payment was to be made to his mother if living otherwise to his estate. The court agreed with the federal courts' decisions in *Re Slinguff* 106, Fed. Rep. 154 and *Re Boardman* 103, Fed. Rep. 783, that the bankrupt had a valuable interest in the policy which passed to the trustee, but held that this could not deprive the beneficiary of her right, and that without her consent the trustee could not recover, the cash surrender value which he sued for.

In *Bailey* v. *Wood*, 202 Mass. 562, the policies in question were also of the endowment kind. After a careful review of the law the court upheld the Massachusetts statute exempting policies payable to a married woman. A third endowment policy on the life of the same bankrupt in which the death benefit had been assigned originally to his sister and on her decease to the daughter of the bankrupt was treated differently. The bankrupt was insolvent when he made the transfer to his daughter. He was furthermore the sole owner of the legal and beneficial interests in the policy, by virtue of his inheritance as heir of his sister, the first assignee. The daughter could not claim the benefit of the statute, and the transfer was held void against the creditors.

So also in *Re Boos*, 154 Fed. Rep. 494, the Pennsylvania statute which provided that "all policies of life insurance or annuities on the life of any person which may hereafter mature and which have been or shall be taken out for the benefit of or bona fide assigned to the wife or children or any relative, etc., shall be . . . free and clear from all claims of the creditors of such person," was held to include endowment policies, and the authority of *Holden* v. *Stratton*, *supra*, was made on the ground for the decision. A contrary view was taken by another Pennsylvania judge in *Re Herr*, 182 Fed. Rep 716 and the court claimed in that decision that the weight of authority was in favor of the trustee's taking where endowment policies were concerned. But it may be that the court was desirous of finding such authority, as the bankrupt Herr had been found in contempt only two days before on other issues. In *Re Herr*, 182 Fed. Rep. 715. On the insurance branch of the case the court said, "It is true that if the bankrupt died today the money due on the policy would belong to his wife. But it is also true that at once upon the discharge of the present rule, the bankrupt could eliminate her by the designation of a new beneficiary and get the surrender value of the policy which the trustee therefore by the terms of the statute is entitled to claim." The judge proceeds too rapidly. The trustee is not concerned with what the bankrupt may do with property or powers of appointment after the adjudication; his rights are fixed as of the time of adjudication, and the trustee's rights are not even sufficient to support an insurable interest.

If the technical structure of a life in-

[7] *Re Lange* 91 Fed. Rep. 361; *Re Welling*, 113 Fed. Rep. 189.

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surance premium were better understood the confusion over endowment policies, with the consent injustice to beneficiaries of the death benefit in such policies, would cease. In what is known as the ordinary or whole life policy, the term of insurance is for the entire lifetime of the insured and the proceeds are available only on the happening of the single contingency insured against. With the endowment policy, the term of insurance may be limited from one to eighty-five years and a double contingency is insured: (*a*) that the proceeds of the policy will be paid to the insured if he is alive at the maturity of the endowment period, and (*b*), that a beneficiary nominated by the insured shall receive the proceeds of the policy if the insured shall die before the policy matures. The change from a single to a double contingency does not alter the nature of insurance, and the term "investment" commonly applied to endowment and deferred dividend policies is clearly a misnomer.

The primary object of all life insurance is the protection of a beneficiary, even though it be for a limited time and accompanied by incidental advantages to the insured; if these collateral benefits to the insured cannot be reached without destroying the beneficiary's interest in the continued life of the insured then they should not on principle pass to the trustee. It is the right of the beneficiary and not the receipt of money which is involved. This right of the beneficiary may be vested and yet in accordance with the terms of the contract be liable to be defeated by the happening of some condition subsequent. Thus if the insured travels in latitudes prohibited by the policy, or takes his own life contrary to a stipulation therein, or ceases to pay premiums, the right of the beneficiary will be rendered nugatory.[8]

There is yet one phase of the subject introduced in *Re Herr, supra*, which is still to be considered, namely, the power reserved by the insured to change his beneficiary. This power has a very important influence in the decisions and its presence tends to nullify to a considerable extent the protection to the beneficiary sought to be obtained by the state statutes of exemption. The question seems to have arisen for the first time in Re Orear, 178 Fed. Rep. 632. In that case a number of policies issued to the bankrupt contained a power which might be exercised by him to appoint a different beneficiary from the one named in the policy. On this point the court said: —

> All of the policies in controversy contained this provision: "The insured may nominate a beneficiary or beneficiaries hereunder, and may also change any beneficiary or beneficiaries nominated by him or named in the policy." Under this provision the insured was unequivocally given the right and power to change the beneficiary in each policy without the concurrence of the beneficiary named in the policy and even against the will of such beneficiary. Not only so, but this power was one which he could exercise for his own benefit, and one which he could exercise to make the policy payable to his own estate. . . . This being so, the policies were property which under section 70a passed to the trustee upon the adjudication of Orear as a bankrupt.

This case has been followed in *Re Herr, supra*, in *Re Dolan*, 182 Fed. Rep. 949, and although not referred to in *Re Loveland*, 192 Fed. Rep. 1005, undoubtedly influenced the result reached in that case. The doctrine of *Re Orear* is the prevailing one, but it has been strongly criticised and on principle it does not seem to be in accord with the accepted views on powers. Pol-

[8] Vance on Insurance, 396; *United States Casualty Co. v. Kacer*, 169 Mo. 391.

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lock, J., dissented from the opinion of the majority of the court in *Re Orear, supra.* He questions: —

> Is the power reserved by the bankrupt in these insurance contracts of nominating and changing his beneficiaries such a power as he might have exercised for his own benefit but not such as he might have exercised for the benefit of some other person? The policies in dispute are life policies, payable only after the death of the insured. How therefore in the very nature of things could the bankrupt exercise this power for his own benefit, or by its exercise vest himself with an estate payable after his death? However it is quite clear the bankrupt could have exercised the power reserved for the benefit of anyone having an insurable interest in his life, and as he could thus exercise the power for the benefit of another, under the very terms of the act in question, it is clear that such power did not by operation of law as of the date of adjudication pass to the trustee to be by him exercised.

When the *Matter of Orear* came before the same court subsequently (189 Fed. Rep. 888) there was an issue the ownership of a policy payable to the wife of the bankrupt. The exemption secured to her by the state law was upheld notwithstanding that the insured had the power to change the beneficiary as in the earlier case. As before the trustee claimed that because of this power the policy was not expressed to be for the benefit of the wife of the insured within the meaning of the Missouri statute. The court replied that if this contention were allowed to be true it would practically nullify the statute for the reason that substantially all modern policies give the insured the right to change the beneficiary and confer upon him a right of surrender and of borrowing on the policy. "If these provisions which have for several years appeared in substantially every policy would preclude the operation of this statute, then," (the court said) "when last enacted it was a mere idle form of words and referred only to an obselete kind of policy."

But it seems that the rights of the beneficiary can be defended on the general doctrine of powers, which is that where a donee has an absolute power of appointment and the power is not executed, a court of equity will not subject the subject-matter of the power as assets for the payment of the donees' creditors.[9] In *Pingree* v. *National Life*, 144 Mass. 374, it was held that the reservation of the right of surrendering the policy would not prevent the policy from constituting a valid trust in favor of the beneficiary until the power was exercised; that an unrevoked trust is valid even though there is an express power of revocation. The leading case in this country, *Clapp* v. *Ingraham*, 126 Mass. 200, holds that where a person has a general power of appointment either by deed or by will *and executes this power* the property appointed is deemed in equity part of his assets and subject to the demand of his creditors in preference to the claims of his voluntary appointees. But a mere right to exercise a power cannot be reached by creditors.[10]

The case of *Blinn* v. *Dame*, 207 Mass. 159, was one where the holder of an endowment policy had reserved in it the power to surrender or assign the policy at any time. He executed a general assignment of all his property, and it was held that the assignees took this policy with his other property. It is apparent from the statement of the facts that the insured executed the power reserved to him. The court did not decide whether the beneficiaries' (his children) interests were vested or

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[9] 22 Am. & Eng. Ency. Law, 1146; *Sugden* v. *Powers*, 3d Am. Ed. 225; *Crawford* v. *Langmaid*, 171 Mass. 309;

[10] *Crawford* v. *Langmaid, supra.*

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contingent, but it is entirely reasonable to suppose that the interests were vested until divested by the operation of a condition subsequent, namely, the exercise of the power. Moreover, the decision was not unanimous and Mr. Justice Sheldon in pronouncing the opinion of the court observed there was no case exactly like the one decided; that decisions were not uniform in cases resembling more or less closely the one at bar. The court in deciding *Re Loveland, supra*, relied largely upon *Blinn* v. *Dame*, but it will be noticed that in the latter case the power reserved had been executed by the donee, while Loveland had not exercised the power at the time he was adjudged a bankrupt.

In a case decided by the supreme court of Wisconsin in 1910 (*Allen* v. *Central Wisconsin Trust Co.*, 143 Wis. 381) the power to change the beneficiary was not allowed to defeat the rights of the bankrupt's beneficiary in the policy. The bankrupt was receiving annual dividends on the policy and it had an admitted value of $1,159.83. The court said "conceding that he still has the right to change the beneficiary and assuming that he may do so, yet it is not easy to perceive upon *what grounds it can be claimed that the trustee is concerned with what may afterwards become of the exempt property.* The trustee is vested with the title to the property of the bankrupt if at all as of the date he was adjudged a bankrupt. At that time this policy was exempt and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do." And in a late Minnesota case, in *Re Johnson*, 176 Fed. Rep. 591, the statutory exemption was upheld although there was reserved in the bankrupt's policy a power to change the beneficiary.

The answer then to the question "What are the rights of a bankrupt's trustee to his life insurance policies?" so far as a general answer is possible is this: the trustee takes all policies payable to the bankrupt or to his executors, administrators or assigns. By weight of authority he also takes all endowment policies payable to the bankrupt at maturity, and in many jurisdictions he also takes endowment policies payable to a beneficiary other than the insured in event of his death, and this too occasionally where a state exemption statute exists for the protection of the wife and children. And by a still more general qualification, the trustee takes policies which he would not otherwise get because of the power to change the beneficiary reserved to the bankrupt. In all instances where the trustee takes the policies the bankrupt may redeem those of them having cash surrender values by paying the amount of the surrender value to the trustee.

Is this condition of the authorities what it ought to be? The law of insurance is not a mere application of contracts and agency but a separate subject having peculiar doctrines of its own, being of Continental birth and a part of the Law Merchant.[11]

On broad grounds of public policy it is desirable that those dependent upon the producer's continued ability to care for and educate his family, should be protected against the untimely loss through death of that care and support, by insurance. For more than sixty years, and contemporaneously with the beginning and wonderful development of insurance in this country, the states of the Union have sought to make insurance effective for its primary purpose by exempting the proceeds from the reach of creditors. Recent interpretation of the bankruptcy law in its rela-

[11] Introd. Wambaugh's Cases on Insurance.

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tion to insurance is overturning the settled purpose of the legislatures, except in instances where by great good fortune the insured has obtained a policy so prepared in its wording as to steer a successful course among the many difficulties presented by the decisions.

If we are to accept the purpose of the state exemptions as standing for the best good of the community as a whole, then every policy of whatever kind if payable to a specified beneficiary should be held free from the trustee except where there is fraud on creditors and excepting those instances where the insurance is payable to the bankrupt himself or to his estate or personal representatives and where the designation of a beneficiary is made in contemplation of bankruptcy. The reservation of a power to change the beneficiary should not affect the rule, the presence or absence of a cash surrender value ought not to qualify it and the kind of insurance should not be a factor in determining whether or not the policy passed to the trustee. Such a rule would be simple, equitable, easily understood and more in harmony with the principles of insurance and the United States Supreme Court's affirmance of them than the inconsistent and illogical rules now prevailing.

By way of suggestion, this result may be reached by substituting for the present "proviso" in section 70*a* of the Bankruptcy Act, the following:—

> ***Provided***, that when any bankrupt shall have an insurance policy in any way payable to or assigned to a beneficiary other than himself, his estate or his personal representatives, such policy shall not pass to the trustee as assets, unless it was originally made payable to the bankrupt, his estate or his personal representatives, and was by him assigned to another in fraud of creditors within four months of his adjudication as a bankrupt.

The Lawyer's Dream

By F. F. Perry

A LAWYER, one night (so the story doth run),
As lawyers do everywhere under the sun,
Retired to his couch at the hour of ten,
In search of escape from the trials of men.
Too often convictions where he has defended,
The stern hand of Justice no mercy extended;
The ghosts of his clients about him appear
And the lawyer is worried and quaking with fear.

With musings like these on his poor throbbing brain,
Sweet Nature's Restorer he courted in vain,
When at length came that boon every creature esteems,
His slumbers were haunted by visions and dreams.
He dreamed that this life, with its burdens, was o'er,
His naked soul stood by Eternity's shore;
Before him the beauty of Heaven appears,
Behind him, the World in its darkness and tears.

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He came to the Portal, the Gate he found barred.
He rang up the Porter and sent in his card
To St. Peter; he waited with patience outside,
He waited his turn to pass in and be tried.
A messenger came with the Bailiff's report
And ordered the lawyer to come into Court.
Then entered our hero of pleadings and writs,
To the High Court of Justice, where St. Peter sits.

The Judge gave the lawyer a quick, searching look:
He glanced at the card, and he opened the Book;
He turned to a page that was blotted and marred,
And the name was the same as the name on the card.
St. Peter grew thoughtful, in sorrowful notes
He said, "I'm afraid you must pass with the Goats.
But stay, every soul, be he saint, be he thief,
Is allowed to be heard; now, sir, make yourself brief."

The lawyer bowed law, as a lawyer knows how.
"I'm grateful, your Honor, that you do allow
A poor, insignificant lawyer like me
To enter this Court, and to offer a plea.
'Tis often, indeed, in the courts of the World,
I have struggled and fought, and my rhetoric hurled
'Gainst corruption and vice. I have stood for the Laws,
Have pleaded for Right, have been true to the Cause.

"My clients were legion, but many, I fear,
By the hand of the Law, have been laid on the bier.
I've suffered defeat in my struggles, but then
The justice of Earth is the justice of men.
'Tis only in this Court true Justice is found;
Here only Forgiveness and Mercy abound.
Your Honor, I trust, by such tenderness blest,
Will parole the poor weakling, who did but his best."

The lawyer spoke long and the lawyer spoke well,
Both Judge and the Jury came under his spell.
St. Peter sat silent, his head on his hand,
The close crowded courtroom he vacantly scanned:
Then, rousing himself, to the lawyer he turned:
"My eloquent friend, I perceive you have learned
To persuade men to think that the sable is white.
You garnish the wrong, 'til they think it is right.

"Your record on Earth was a poor one, indeed;
All failure and loss, yet I feel there is need

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Of your services here; there be many that come
In terror and trembling, all stricken and dumb,
To the High Court of Mercy. No refuge, no friend;
Cut off in their sins, unprepared for the End,
Not a word can they utter. For these might you speak,
Your eloquence in defense of the weak.

"You Prince of all Quibblers, whatever the blame
Attaches to you, at his own little game
Have you beaten St. Peter, yea, talked him to sleep.
First judgment reversed, pass along with the Sheep."
The lawyer bowed humbly and turned to obey;
Just then he awoke, and the broad shining day
Illumined his chamber with many a beam.
He wept, when he found it was *only a dream.*

Kiowa, Kans.

James M. Morton, Jr., to Succeed Judge Dodge

JAMES M. MORTON, Jr., son of Mr. Justice Morton of the Massachusetts Supreme Judicial Court, was appointed by President Taft Aug. 9, United States Judge for the district of of Massachusetts, succeeding District Judge Frederic Dodge, who has just been made federal Circuit Judge succeeding the late Judge Schofield. There was no doubt with regard to the expected confirmation by the Senate of this most acceptable nomination, which was made as the President's personal selection rather than at the request of the Massachusetts Senators.

Mr. Morton, who has held no public office except that of Chairman of the Police Board of Fall River, comes of the celebrated Morton family noted in Massachusetts for having supplied Governor Morton and other men eminent on the bench of Massachusetts, Mr. Morton's father having been on the state Supreme bench since 1890. The original ancestor in this country was George Morton, who came from England to Plymouth in 1623.

James Madison Morton, Jr., was born in Fall River on Aug. 24, 1869, a son of Justice James M. Morton of that city and Emily Frances (Canedy) Morton. He received his early education in the public schools and was graduated from the Fall River high school in 1886.

After spending a year at Phillips Exeter Academy, he entered Harvard and was graduated from that institution, *cum laude*, in 1891. He then took course in the Harvard Law School and on his graduation in 1894 received the degrees of A.M. and LL.B. He represented the law school and was the law orator at the Commencement exercises in 1894.

Mr. Morton was admitted to the state bar at the spring sitting of the Supreme Court in Taunton in 1894 and began the practice of his profession in Fall River in the following June, in partnership with Andrew J. Jennings, who had been his father's partner before the latter's appointment to the bench in 1890.

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The Freedom of the Air

By Denys P. Myers

Member Comité Juridique International de l' Aviation

THE advent of the air into the purview of law was heralded by the enunciation of the doctrine of the freedom of the air-space, a theory that has much basis in reason and is particularly appealing to the imagination. The high sea is No Man's domain; let the high air follow the analogy. Aërial traffic must not be hampered by a multiplicity of prohibitions of varying stringency which different ground-states shall find it desirable to put forth. These seem to be the underlying ideas which have appealed to the advocates of the freedom principle. I do not share this view, but shall try to present it without prejudice, stating the arguments as those who believe that way have done.

Unrestricted freedom for the air is not advocated seriously by any one as a practical thing. Count Zeppelin has a casual remark in *Die Eroberung der Luft* (1908) which, standing alone, might be interpreted that way, but even he admits the necessity of regulation, which would result in a servitude upon absolute freedom. He says[1]:

> Since fences high in the air are not imaginable, there can be no question of forbidding international air traffic, which must be regulated by treaties, by analogy with international maritime law.

Count Zeppelin is not a lawyer and is here speaking generally in a technical lecture. Ernest Nys, the well-known Belgian authority on international law, in the report he made to the Institute of International Law in 1902 made a statement that carries more weight because evidently uttered with greater appreciation of the circumstances. He commented:[2]

> On earth we are to such a high degree victims of laws and regulations, let us by all means take care not to spoil the air in the same way. Law must not be the enemy of progress.

This statement was called forth by the reading of Paul Fauchille's projected code and, by context, was simply the expression of opposition to what he considered a disposition to legislate in detail for a thing not yet in existence. The other writers who have given expression to opinions in favor of unrestricted air-freedom wrote much earlier and their words are *obiter dicta* not meant to have application to actual flight, nor did they contemplate the actual conquest of the air.

Absolute air-freedom being out of the question, advocates of the freedom principle have distinguished two systems of control based upon a fundamental idea of aërial freedom.

Historically, air-freedom restricted only by the institution of a territorial atmospheric zone was the first of these. It was followed five years later — in 1906 — by the enunciation of the principle that the air is free, but that its freedom is restricted by special rights of the ground-state not specifically bounded by height.

The first plan was fathered by Paul Fauchille, who published his book, *Le domaine aérien et le régime juridique des aérostats* in 1901 and developed the

[1] Page 28.

[2] Annuaire de l'Institut de Droit International, XIX, 108.

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principle, which he advocated in it, into the code which he presented to the Institute of International Law the following year. The second plan was suggested as a compromise by John Westlake in the session of the Institute of International Law in 1906 when the subject of wireless telegraphy was under discussion. It has proved the most popular theory of any of those proposed, whether based upon freedom or jurisdiction, and practically the phrasing of the statement voted, 14 to 9, by the Institute in 1906 was selected to represent the basic idea adopted by the International Juridic Committee on Aviation for the code which it is elaborating.

The idea of the territorial zone has met with considerable support, but those who accept the condition have not been agreed as to the extent of the zone itself. Fauchille himself started out by awarding the state jurisdiction up to a height of 1500 metres (1635 yards) and ended by agreeing with Capt. E. Ferber that a jurisdiction to the height of 500 metres (545 yards) was sufficient. Later, when the question was before the International Juridic Committee he was apparently willing to give up his contention in favor of the second solution based on a thesis of air-freedom. Fauchille writes:[3]

> Considering that aërial espionage is the greatest danger against which states should be guarded and that especially it may be realized by photography, which, applied to defensive works, at that time was serviceable up to 1500 metres, we should have forbidden the circulation of aërostats below that height. This opinion ought to be abandoned from this time forth, and for two reasons. The dirigibility of balloons, which in 1901 was only a hope, has become a reality, and for several years aëroplanes have taken their place in aërial navigation; for experience has shown that a mean altitude of 1500 metres will be excessive for dirigibles as well as for aëroplanes. On the other hand, aëronautic photography has made such progress in these later years that one can now take pictures easily well above 1500 metres, and at much greater heights over defensive works. But, this being so, how shall the states protect themselves against aërial photography? The only method is to prohibit balloons and aëroplanes, unless by special authorization, from carrying photographic apparatus into the air.

Having renunciated his former theory, Mr. Fauchille adopts the lesser zone which the late Captain Ferber thought sufficient:[4]

> It is important that the population of a state should be guaranteed against their indiscretions and the noise of their motors: it is therefore an altitude of 500 metres that should be fixed for them. It is this which Captain Ferber proposes, and it does not seem at all exaggerated.

A note adds:

> He, (Ferber) writes as follows in his book *L'Aviation, de crête à crête, de ville à ville, de continent à continent*, page 153: "The atmosphere will be free except for a zone called territorial, immediately above the ground. A learned congress of diplomats will fix its height. We hope that they will not make it too high. . . . Five hundred metres seems sufficient to us."

Mr. Fauchille as the foremost exponent of the air-freedom theory not only enunciated it first but has led in revising it. His most recent available pronouncements on the territorial zone idea are dated January, 1910, and March 28–April 2, 1910. The former is an article, *La circulation aérienne et les droits des Etats en temps de paix*, published in *La Revue générale de droit international public*, 1910, page 55, and in *La Revue juridique internationale de la Locomotion Aérienne*, page 9, and the latter is his report on the Juridic Regime of Aérostats (a word which he uses in its largest sense as including all aërial vehicles) to the Institute of Inter-

[3] *Revue juridique*, January, 1910, Vol. I, 14.

[4] *Ibid.*, page 14–15.

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national Law at its Paris session. Since the International Juridic Committee has adopted a rule for its International Code that omits any mention of a territorial zone, the effort to establish such a portion of the airspace may be definitely considered as abandoned, in so far as its inauguration by international agreement is concerned. Mr. Fauchille still thinks that such a zone should exist, but presumably is willing to leave its establishment to the individual countries affected.

If the air is to be free, the territorial zone seems to be a rational practical method to guarantee to the subjacent state its necessary rights. The consequences of the theory are described by Mr. Fauchille in *Revue juridique*, pages 14–16.

He finds that because the state is authorized to take the necessary measures to protect itself and its population, that, except in case of departure or either voluntary or forced landing, it should permit aërial vehicles only above a certain height, which he sets at 500 *metres*, although the figure is tentative.

The state, in order to protect itself against espionage, may close certain regions of the atmosphere, notably those which surround its fortified works, to aërial navigation.

The state protects itself in the air space by visits in respect to its economic and sanitary interests.

Public and private aircraft, in respect to acts committed on board, are subjected to the law of the flag they fly.

The right of conservation granted to the states enables them to prohibit the crossing of their territory by military aircraft.

These are the advantages which Mr. Fauchille cites for the system of regulation he advocated; but it does not seem logical to the writer to argue that they are restricted to that system. In fact, the system, like the following one, seems to the writer to be based upon a primary theory that the ground-state must give up all rights it possesses in favor of the new art of flying, except those which are absolutely essential to its existence as a political entity. The whole argument is based on the premise of what privileges shall a state enjoy in respect to aircraft rather than what rights the aircraft shall enjoy in relation to the state.

Air-freedom restricted by some special rights of the ground-state without these rights being bounded upward, which is the second theory based upon freedom of the atmosphere, has won a general approval, and at the present writing is the winning theory. Stated as it has been by the International Juridic Committee, which found it opposed in its own membership by the sovereignty contention, it has been modified into what is undoubtedly a working thesis, and the only objection that can be made to the statement made of it by the Committee must, in the writer's opinion, be based upon the correctness of the underlying principle. The phrasing adopted by the Committee is a fair compromise. It reads:[5]

> Art. 1 — Aërial circulation is free. States have in the space situated above their territory, and comprising their coastal waters, only the rights necessary to guarantee the national security and the exercise of private rights.

Previous editions of the text in its prototypes in the Institute of International Law and the Fauchille projects begin with the statement: "The air is free." Freedom it will be noticed, is restricted in the Committee's text to aërial circulation, really quite a different matter.

[5] *Revue juridique*, Vol. I., May, 1910, 144.

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From 1901 — when Fauchille first drew attention to specific regulation of aërial traffic — until 1906 — when jurisdiction over the airspace came up in practical form in relation to the control of wireless telegraphy at the session of the Institute of International Law — the territorial zone idea, coupled with the air-freedom theory, was generally accepted. At that session, which occurred just before the diplomatic conference of Berlin which enunciated the present radiotelegraphic convention, Prof. John Westlake of Cambridge University introduced the sovereignty theory in opposition to the air-freedom one, and since that time the two have been in conflict. The indefinitely restricted air-freedom theory was adopted there, and secured for its chief advocate Prof. Friedrich Meili of Zurich, an indefatigable pamphleteer on legal subjects, who was early in the field with studies of the effect of wireless telegraphy and the opening of the aërial domain to aircraft upon current legal theory.

January 16, 1910, the International Juridic Committee unanimously approved the outline of the Code of the Air which G. Delayen of Paris, international delegate, had drawn up, and the national committees began work on elaborating the code as soon as the skeleton plan was distributed.

German savants produced two projects, both in accordance with the air-freedom theory, in part at least. The first secured the votes of seven national delegates[6] and read:

> The space above the high sea and territories belonging to no one is free. The space situated above territory of a state, and comprising its coastal waters, is viewed as part of the territory of that state. — (Or, as Herr H. Erithropel of Berlin proposes: Over the space above this territory — and comprising its coastal waters — the state has a right of sovereignty.)

The second project polled 14 votes of delegates and, in its first edition, read:

> The space above the high sea and territories belonging to no one is free. The space situated above the territory of a state (and comprising its coastal waters) is viewed as a part of the territory of this state. No state, however, in time of peace, may forbid the inoffensive passage of foreign aërostats. Events which occur aboard a foreign aërostat in the space above the territory of another state and which do not interest it are adjudicated according to the law of the state to which the aërostat belongs.

The French Doctrinal Committee agreed upon this text:[7]

> Art. 1. — Aërial circulation is free. Nevertheless the states preserve the rights necessary to their defense, that is to say, to their own security and that of the persons and goods of their inhabitants
>
> Art. 2. — The space above the open sea and uninhabited territories remains absolutely free.

The Directive Committee held meetings on April 17 and May 1, 1910, to adopt a final text.[8] At the second session a text proposed by the English delegate was introduced, reading as follows:[9]

> Art. 1. — The airspace, including coastal waters, situated above the territory capable of use by the inhabitants, is free with this restriction that the states shall always have, in the space above their territory, the rights necessary to their national conservation and to the protection of their inhabitants.
>
> Art. 2. — The space above the open sea belonging to no one remains forever free.

In the session of May 1 the reports of the balloting were read, and the result was in favor of the French text. The delegates of France, Belgium, Italy, Monaco, (by a vote of 5 to 2), Turkey

[6] *Revue juridique*, March, 1910, Vol. I, 75.

[7] *Ibid.*, 76.

[8] *Revue juridique*, May, 1910, 133–144.

[9] *Ibid.*, 138.

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and the United States upheld the French point of view. Germany, Austria and Denmark rallied to the German proposition. Mr. Perowne, the English delegate, alone stood for his own proposition.

After the voting showed which project was the choice of the International Committee, the selected text was submitted to the acid test of revision, and it finally emerged from the ordeal in this form:[10]

> Art. 1. — Aërial circulation is free.
>
> States have over the space situated above their territory, and including the territorial seas, only the rights necessary for the guaranty of national security and the exercise of private rights.
>
> The International Committee held its first congress at Paris, May 31–June 1, 1911, and in the third session the wording was simplified to the following, which remains the final pronouncement of this body on the subject.[11]
>
> Art. 1. — Aërial circulation is free, except for the right of subjacent states to take certain measures, to be determined, with a view to their own security and that of the persons and goods of their inhabitants.
>
> The Institute of International Law in 1911 adopted an article[12] almost identic in wording and wholly so in meaning.

It may be said that it is a safe and workable text, so far as practicability goes. The objection to it, from the point of view of the sovereign theory, is that it is pusillanimous, weakly trying to set up an air-freedom that cannot exist. It asserts that aërial circulation — not the air-space itself — is free, and then immediately tones that statement down by giving the ground-state in general terms rights of control, which it admits are necessary, over circulation.

Existence on the ground is, and will continue to be, the norm. Why not, then, treat the question frankly from that point of view? The attitude of the jurists evidently has been that every state is going to treat aviation under the principles of criminal law, where the defendant must have his proper rights guaranteed to him so as to prevent his getting the worst of it. Without reviewing history, it is safe to say that at no time has any new development in civilization come within the purview of the law and been given such paramount privileges, as the jurists have decided to be necessary for the aëronaut.

Even with machines that can exist in the air for weeks at a time, which many of us who have followed the progress of aviation believe will be things of the future, man will still spend a very small portion of his life in the air. He does not need a domain free from all earthly trammels, with the ground-state able to exert only a minimum of control over him. I do not believe he wants it. Certainly those airmen with whom I have talked do not want any special privileges. Free aërial circulation puts the airman into the position of having to give up privileges at every effort to legislate in his behalf or in behalf of the ground-state. No nation in the known world is so blind to progress as to make such a procedure necessary or desirable. Moreover, there will in time be sufficient legislation to regulate aërial traffic to render free circulation illusory in fact. It will not be prohibitive legislation, only regulatory, but every word of it will cast a servitude upon free aërial circulation, until that term will be a myth.

It is notable that the Institute of International Law at its Madrid meeting in April, 1911, disregarded this circumstance, which, to the writer at

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[10] 1 *ibid.*, 144.

[11] 2 *ibid.*, 201; stenographic report of discussion, 3 *ibid.*, 133–145.

[12] 2 *ibid.*, 207, and *Annuaire del'Ins titut*, etc., 1911, 107, with comment at 43–44.

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least, is self-evident, and again spoke for free aërial criculation, after due consideration, it must be hoped.

It may be added that, as law has always been administered from a coign of vantage on *terra firma*, that the bulk of legal decisions is found to favor the other theory, that of sovereignty.

Cambridge, Mass.

Fifteen Minutes

By Edgar White

THE arguments in the matter of the Commonwealth *vs.* "Pug" Kennedy for murder were concluded and the case submitted to the jury at 11.45 p.m. "Pug" offered the rather plausible defense that it would be impossible for him to have shot Mine Superintendent O'Donnell at Camp 44 at 6 p.m., and fifteen minutes later be over in Jack Cardigan's "Hole-in-the-Wall," drinking ten-cent red eye. Cardigan's oasis was was in the heart of Tiffton, a mile from Camp 44. Witness after witness swore so positively that they had seen "Pug" drinking there at 6.15 that finally the Commonwealth admitted it. Its own evidence had proved the killing occurred at six. So that fifteen minutes had become a controlling feature of the case. The defense had shown that on the mile between the town and camp were numerous high hills to climb, barbed wire fences to crosss and that there was always more or less difficulty in getting over the tracks in the yards, because of the constant switching of coal cars.

While the jury was out the lawyers seated about the tables fell to discussing the general misapprehension as to what might be done in a limited time. Captain William Greer said he was convoying a flock of recruits to the Union army upon one occasion when he was attacked by guerillas, who rode through and all around his men. The regular soldiers held together and by their coolness and precision of aim finally beat the enemy off. The fight was so fierce, and so many things were happening that the Captain said his guess was that the engagement had lasted an hour. On consulting with the men who had looked at their watches, however, the affair was over inside of fifteen minutes.

The Judge told of a lawyer who had won a big case by stopping in the middle of his argument and letting a juryman hold his watch. This was to show how long a time fifteen minutes was under suspension. It easily convinced the jury that the railroad engine had ample time for its sparks to set fire to the destroyed building, and they brought in a verdict for the plaintiff for all he claimed.

A man who had come near being drowned said that were he to have written what he saw and felt while unconscious it would have taken an hour to read it. From the time he had tumbled out of the boat until resuscitated the hands on the dial had traveled just a quarter way round.

There was a knock on the jury room

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door. A bailiff hastened to answer the summons. The twelve men filed slowly and solemnly in and stood in front of the Judge's desk.

The clerk took the poll of the jury.

"Have you agreed on a verdict, gentlemen?" asked the Judge.

The foreman nodded and passed up a paper. The Judge's face became grave. He read the paper.

"We, the jury, find the defendant guilty as charged."

"That will do, gentlemen," remarked the Judge. "You are discharged. The sheriff — where is the sheriff?"

In the distance two quick shots were heard. Two or three men, near the main door passed out into the corridor. Some one noticed the prisoner was not in the room. In a moment there was a scene of wild disorder. Bailiffs rushed here and there, doing nothing. The Judge pounded heavily with his gavel.

"The prisoner has escaped!" cried a man excitedly.

"Come here, Jenkins," said the Judge to one of the worried deputies. "Arrest that man for disturbing this court!"

This had the effect of stopping the uproar. Men settled back in their seats and looked at each other with questioning eyes. The big sheriff entered, leading by the arm a man who was limping.

"I got him, Judge," said the sheriff.

"Put him in irons, and see that you hold him," remarked the Judge. "Now adjourn court."

The clock in the Court House tower boomed the hour of midnight.

Macon, Mo.

Reviews of Books

SMITH'S INTERNATIONAL LAW

International Law. By F. E. Smith, K.C., M.P., formerly Fellow of Merton College, Oxford, and Vinerian Scholar in the University. 4th ed., revised and enlarged by J. Wylie, of the Inner Temple, Barrister-at-Law, formerly Classical Scholar of Wadham College, Oxford. Little, Brown & Co., Boston; J. M. Dent & Sons, Ltd., London. Pp. xxxii, 334 + 57 appendices and index. ($2.50 *net.*)

THIS work was first issued in 1900 as a small volume of 184 pages. In spite of its modest pretensions it was well received as a well-written and accurate survey of the subject. At that time important recent treatises of Hall, Walker, Westlake, and Lawrence were in the field. Since then Professor Westlake has issued a later treatise, and works by Baty, Holland, and Oppenheim have appeared to say nothing of American writers. With so many good treatises already in existence, we have no means of judging what circumstances led Mr. Smith to undertake an enlarged version of his work, unless it had been steadily growing in favor as an elementary text-book, which is a plausible supposition. In its new form, the book has the merit of being up-to-date, treating of developments as recent as the *Savarkar* case, and of offering a larger if not extended treatment, but on the whole it does not acquire intrinsic importance merely because of its timeliness and greater thoroughness of detail. There are other English works that exhibit greater animation of style and freshness of thought, and in our own country it is necessary only to mention the recent treatise of Professor George Grafton Wilson, as to all practical intents not less timely, and superior in

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qualities of symmetry and completeness.

The book puts perhaps greater emphasis on British positions than some other recent English treatises, the writer concerning himself to a large extent with British objections to provisions of the Declaration of London, and adhering steadfastly to the British position with regard to the capture of private property at sea. On deeper problems of international relations little is attempted in the line of constructive discussion. But the tone of the book will in the main be approved by those who believe in the progressive tendency inspiring the Hague Conferences and recent proposals aiming at a closer international solidarity. The authors are also likely to be commended for maintaining a level of sound scholarship.

ADVOCACY IN GERMANY

Die Advokatur unserer Zeit. By Dr. Edmund Benedikt, Hof- und Gerichtsadvokat, Vienna. 4th ed., revised and enlarged. Otto Liebmann, Berlin. Pp. 228. (3 M. paper, 4 M. bound.)

WRITTEN by an Austrian exceptionally well informed with regard to conditions of professional practice in Germany and Austria, this book has won a popularity evidently due not only to its high moral tone but to the mass of interesting facts presented, and to the mellowness of the writer's apt observations on questions which bear directly on the lawyer's earning capacity and the higher rewards of his career. The relations of the lawyer to the government, to his client, to his brother practitioners, and to the community in general receive attention. Advice such as would prove useful to a young man debating the choice of a career is abundant, but the book also appeals to the maturer interest of those interested in the realization of high standards of professional ethics, and in various proposals for reform. As the evils of an overcrowded and underpaid profession are evidently not less familiar abroad than here, the views expressed are likely to arouse a sympathetic interest on the part of American readers. We wish there were a work of similar scope and quality on the profession of the law in the United States. Such a book would attain great popularity and accomplish a great deal of good.

THE ENGLISH CONSTITUTION

The Corporate Nature of English Sovereignty; a dissertation. By W. W. Lucas, B.A., of Trinity Hall, Cambridge, and of the Inner Temple, Barrister-at-Law. Submitted to and accepted by the University of Cambridge as a work of original research for the degree of Bachelor of Arts. Jordan & Sons, Ltd., London, W.C. Pp. 91. (2*s.* 6*d. net.*)

The Origin of the English Constitution. By George Burton Adams, Professor of History in Yale College. Yale University Press, New Haven; Oxford University Press, London. Pp. 341 + appendices and index 36. ($2 *net.*)

The Making of the English Constitution, 449–1485. By Albert Beebe White, Professor of History in the University of Minnesota. G. P. Putnam's Sons, New York and London. (1908.) Pp. 401 + index 8. ($2.)

MR. LUCAS'S discussion, which will be recalled by readers of the *Law Quarterly Review*, having appeared in the pages of that journal, is written to develop the thesis that England has never been a real monarchy, but that the various powers of government have always been exercised by separate agencies co-operating now in one way, now in another. The political history of England, viewed in this light, presents few sharp contrasts, but exhibits in the main continuity of development. The reader is thus made to feel that England has been true from the period antedating the Conquest to a type of modified or incomplete democracy, conforming to current ideas of Germanic origins and leading without abrupt

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transition to the limited constitutional monarchy of the present time. It is not to be inferred from this, however, that Mr. Lucas adopts the idea of Professor Freeman regarding the unbroken continuity of Saxon institutions. That view has lost its vogue, because investigation has shown the importance of the effects of the Conquest and what came after. Freeman, moreover, was no lawyer, and for this reason was handicapped in making a close study of the deeper significance of some of his materials. Mr. Lucas supplies the point of view of the lawyer rather than of the historian simply, and his study is carried out in so philosophical a spirit that he is able to detach the substance from the form of the Constitution, and to give due weight to the customary and unformulated elements of a constitutional system. If in some respects the author may be inclined to take too much for granted, the general treatment is undeniably instructive and helpful.

Whether Professor Adams may not attach too great importance to the influence of the Norman Conquest on the political future of England is a question raised by his learned study of the bearings of the feudal system in general, and of Magna Carta, which he deems its natural outgrowth, in particular, on constitutional development. The assertion that the trend of Anglo-Saxon development, before the Conquest, was in the direction of such a Carolingian monarchy as existed on the Continent, is not substantiated by direct proof on his part, and though the principle of contract involved in the feudal system did supply the barons of King John's reign with a weapon of defense against royal encroachment, it is difficult to see how their resistance would not have been equally successful if no such weapon had been at hand. At the same time, the feudal system here receives searching scrutiny, directed at the discovery of its effects on the growth of the Constitution, and no future investigator cannot afford to neglect Professor Adams's researches in so important a field, of which his mastery is unsurpassed.

A very useful and at the same time thoroughly competent résumé, of an uncontroversial sort, is found in Professor White's more elementary work designed for use as a college text-book. Following a less intensive method of treatment than either of the two foregoing works, it supplies more information regarding the important sub-topics of local government and the functions of Parliament. It is marked by a breadth of view that makes it an admirable introduction to the studies of more creative writers like Maitland, Vinogradoff, Holdsworth, and Adams.

AN INDIANA VILLAGE

A Hoosier Village; A Sociological Study, with special reference to Social Causation. By Newell LeRoy Sims. Columbia University Studies in History, Economics and Public Law, v. 46, no. 4 (whole number 117). Columbia University; Longmans, Green & Co., New York, and P. S. King & Son, London, agents. Pp. 181. ($1.50, paper covers.)

A DESCRIPTION of the life of a provincial community which treats minutely of its distinguishing features can be made as interesting as a novel. One puts aside Dr. Sims' study with as vivid sensations as if one had visited the locality in person. This interest comes largely from the obvious necessity of viewing "Aton," the village studied under a disguised name, as typical of a class of communities situated in the backwaters of the normally progressive current of American life. The class to which Aton belongs may not be large. Towns so completely stationary through

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a long period — "decadent" is hardly the word — sharing the same unusual combination of traits, represent an anomalous phase of development. But as the tendencies analyzed, disentangled from one another, are broadly distributed throughout the country, parallels more or less remote to numerous other places are suggested.

The book is striking as a portrayal of the unyielding survival of an "ideo-emotional" type of mind, which was transmitted from the religious enthusiasts who were the original settlers, and has steadily persisted as the dominant characteristic of the inhabitants. In this we find the explanation of the attachment of the village to dogmatic religion, narrow political partisanship, and a severe morality which frowns upon worldly amusements, and it also explains the irrational pride of the citizens in their village as superior to every other, and their inability to enter with intelligence and success into industrial enterprises led by outsiders. Even the establishment of a college in Aton has not visibly altered this habit of mind, nor brought the place into closer communication with the intellectual movements of the times. The type has persisted because of the isolation and quiescence of the place, its uneventful, monotonous existence, and the absence of anything to occasion economic development and a large influx of population.

The economic interests of the place have been mainly agricultural, the soil not being especially fertile, and there has also been some manufacturing. No one has amassed wealth, everyone being satisfied with a simple livelihood on a limited income. All the citizens associate on a basis of social equality, which is the consequence of any sharp differentiation into economic classes. Moreover, the village belongs to that primitive stage of economic development marked by little subdivision of labor and organization of industry, in which each inhabitant relies more upon his own labor than upon associative effort to provide himself with the means of subsistence. Little capacity for teamwork is shown, and even among the youth of the village athletic games calling for teamwork were till recently unpopular. The author lays stress on the manner in which these conditions are supposed to develop individuality, and emphasizes the self-reliance and versatility of the townspeople, but in view of the confusion commonly attending the use of the word "individualism," it might be better to avoid a term which suggests a tendency to oppose the will of the individual to that of the society. In those matters which make for real individualism the individual here is clearly in a relation of servile imitation to the social group, and one would look long to find a place where individual action is more completely socialized in the group sense. What does need emphasizing is the economic system which makes every citizen an independent worker though at the same time lacking in personal force.

Considered as a scientific study, the book is well enough so far as it goes, but one cannot help feeling that a more thoroughgoing and instructive study might have been made of the interesting facts collected. The economic side of the community might have received fuller attention. Sociological conclusions might also have been worked out in a manner doing fuller justice to the complexities which a subject of this kind presents, and treating the subject-matter with less of broad generalization and with more attention to the functions of sub-groups and family units.

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THE BRITISH POST OFFICE

The History of the British Post Office. By J. C. Hemmeon, Ph.D., Assistant Professor of Economics in McGill University. v. 7, Harvard Economic Studies. Harvard University, Cambridge. Pp. 239 + 17 (appendix) + 5 (index). ($2.00 *net*.)

THIS carefully executed history of the Britishpost-office is mainly a collection of facts. The author surely cannot be accused of partisanship, for he advances few sweeping generalizations and draws few conclusions save those that appear inevitable. In the first four chapters he treats the subject by periods, down to contemporary times, and the remaining chapters deal with special topics. The transportation of the mails having resulted in a substantial profit, there is really no room for the question whether government ownership has been advantageous to the country or the reverse. With regard to the telegraph and telephone enterprises, there is more chance for a difference of opinion. The writer's judgment as regards mistakes of policy is likely to be accepted as sound. This survey should assist our own country to profit by British experience.

Index to Periodicals

Baseball. "Baseball and the Law." By L. A. Wilder. 19 *Case and Comment* 151 (Aug.).

"Coming to the adjudications on matters pertaining to baseball, it is found that, with a few exceptions, the decisions involve either the contract relation of club and player, or the application of the nuisance or Sunday laws to baseball. As early as 1882 a case involving the former matter came before the United States circuit court for the western district of Pennsylvania, wherein it was held that a baseball player who had signed an agreement to execute, between certain future dates, a formal contract to play baseball for a certain club during its season, could not, by a bill in equity, be compelled to execute the formal contract, or enjoined from contracting with or playing for another club. *Alleghany Baseball Club* v. *Bennett*, 14 Fed. 257."

Biography. "Henry Erskine." By J. A. Lovat Fraser. 24 *Juridical Review* 51 (June).

"Romilly, the Law Reformer." From the *Law Times* (London). 46 *American Law Review* 558 (July–Aug.).

Corporations. "Commercial Registration in Japan." By John Gadsby. 28 *Law Quarterly Review* 305 (July).

Criminal Law. "The Immigrant in the New York County Criminal Courts." By Robert Ferrari. 3 *Journal of Criminal Law and Criminology* 194 (July).

"My suggestions? First, Public Defenders, who will much better represent defendants, both because they would be more competent than defenders now are and because of their capacity as public officers to be of invaluable service in setting the power of the County in motion to aid defendants in the collection of evidence, and with witnesses. Second: Larger staffs of District Attorneys and of Public Defenders. Third: Public Prosecutors and Public Defenders who understand the languages of the people who are brought before the courts. Fourth: Interpreters Fifth: More and better judges."

See Criminology.

Criminal Procedure. "Procedure in Criminal Courts." By William N. Gemmill, Judge of Chicago Municipal Court. 3 *Journal of Criminal Law and Criminology* 175 (July).

"Such legislation is urged as will effectuate the following changes in the criminal laws of this state: —

"First: The abolition of the grand jury,

"Second: The designation of certain appellate courts as courts for criminal appeals whose duty it shall be to remain in continuous session until all appeals are disposed of.

"Third: Instructions to juries should be oral and exceptions should be allowed only when objection is made and exception taken before the jury has retired from the bar.

"Fourth: Some method should be provided by which the original record of the trial court may be transferred at once to the court of criminal appeals.

"Fifth: All courts of criminal appeals should have the right to summon and hear the evidence of additional witnesses, when newly discovered evidence is urged as the ground of appeal.

"Sixth: Courts of criminal appeals should have the right to compel the presence of appellant and his counsel upon the call of the calendar, to examine appellant under oath if desired and to require his counsel to state the points relied upon to sustain the appeal.

"Seventh: Such courts of appeal should announce in court at the close of the hearing, if they choose to do so, their decision and the reasons which led to it. Such reasons so stated should be taken down in shorthand and when

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afterwards revised by the court, filed as the written opinion of the court.

"Eighth: Opinions should be very short.

"Ninth: The distinction between felonies and misdemeanors should be abolished.

"Tenth: Section 279 of Chapter 38 defining infamous crimes should be repealed.

"Eleventh: The line between petit and grand larcency should be raised from fifteen dollars to one hundred dollars."

See Criminal Law.

Criminal Statistics. "The Unit in Criminal Statistics." By Louis N. Robinson. 3 *Journal of Criminal Law and Criminology* 245 (July).

"The three units are: (1) the affair or case, (2) the infraction of the law, (3) the delinquent. These units yield somewhat similar results and the casual observer ofttimes sees no difference among them. . . . Perhaps the best scheme is the one that Italy is now following out, which is to use all three of the units. Certainly the information which they individually yield is not the same and there is no question but that we need it all."

Criminology. "A Contribution to the Catamnestic Study of the Juvenile Offender." By Bernard Glueck, M.D. 3 *Journal of Criminal Law and Criminology* 220 (July).

"It is my opinion that these (pyschopathic) individuals forming as they do a distinct species of humanity, shall be segregated into colonies especially designed for them, where under proper *medical* supervision they should be made to earn their existence by means of some useful occupation. It is very obvious that an indeterminate sentence is the only rational way of approach to this problem and this should be supplemented by the vesting of the parole power in the hands of a board composed not exclusively of members of the legal profession, but largely of physicians and particularly those trained in psychopathology."

See Criminal Law, Criminal Statistics.

Dred Scott Case. "The *Dred Scott* Case in the Light of Later Events." By Morris M. Cohn. 46 *American Law Review* 548 (July–Aug.).

"The decision in the *Dred Scott* case was sound in principle. When the tumult of anger and outrage engendered by the slavery question had passed away, and judges were confronted with the principles announced by that decision, they did not disregard it. The tribute which Mr. Justice Brown (in the *Slaughter House* cases) paid to the ruling, that as to property rights the decision was impregnable, shows that there was lasting quality in that decision, which, when occasion should compel, would come out."

Equity. See Legal History, Trusts.

Federal and State Powers. See Dred Scott case.

General Jurisprudence. See Legal Encyclopedia, Trusts.

Government. "Constitutional Morality. By William D. Guthrie. *North American Review*, v. 196, p. 154 (Aug.).

A paper read before the Pennsylvania Bar Association at its annual meeting last June.

"The truth is that our constitutions, national and state, do not stand in the way of any fair and just exercise of what is called the police power; that they do not prevent reasonable regulations tending to protect the health of the community; and that they certainly do not prevent the enactment of proper and reasonable factory. Acts or proper and reasonable workmen's compensation Acts. The trouble mostly is that the statutes which the courts are compelled to set aside are crudely and hastily drawn and are inherently unreasonable, unfair, and unjust."

"The Judicial Method of Making and Unmaking Laws." By W. A. Coutts. 75 *Central Law Journal* 54 (July 19).

"To attack an act of Congress or of a state legislature as void, should always be regarded as a serious undertaking, but when the act represents the matured and deliberate expression of popular opinion, to attack it is very much like attacking the principle of popular government itself."

"Legislative Sovereignty." By James Scott. 24 *Juridical Review* 31 (June).

"The inter-relation of the component parts of the Parliament of the Realm is undergoing change to a certain extent, but at the most it is merely a slight shifting of the centre of gravity. The stability of the ultimate sovereignty is not shaken, but its will may, as a result of the constitutional change, be more accurately or promptly reflected."

Immigration. See Criminal Law.

International Arbitration. "The Hague Court — Its Functions and History." By Jackson H. Ralston. 46 *American Law Review* 517 (July–Aug.).

"Review, for a moment, the principles involved in the causes decided by the Hague Court. Questions of boundary have been settled, as in the *Grisbadarna* case. Interpretations of treaties have been given affecting national rights and national susceptibilities, as in the *Venezuelan Preferential*, the *Japanese House Tax*, the *Muscat* and the *North Atlantic Fisheries* cases. National insults have been resolved into their true unimportance, as in the *Casablanca* case. The effect of arbitral awards has been discussed and the limitations of powers of arbitrators considered, as in the *Pious Fund* case and the *Orinoco* case. Rules of action and control over industries have been furnished or provided for, as in the *North Atlantic Fisheries* case Extent of national rights over subjects found within foreign jurisdictions was given consideration in the *Savarkar* case, and in a way in the *Casablanca* case. When England and Russi

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stood ready to let loose upon each other the dogs of [war in the Hull incident], the Hague Convention furnished an instrumentality for the fair and careful examination of the facts, and led to reparation, so far as reparation was possible, for the injurious act of Russia."

International Law. See Panama Canal.

Inventions. See Literary and Artistic Property.

Juvenile Delinquency. See Criminology.

Law Reporting. "The Revised Reports." By A. E. Randall. 28 *Law Quarterly Review* 276 (July).

"The publication of the Revised Reports has led to one result for which the profession has every reason to be thankful, and that is that a sufficient law library can be purchased for a reasonable sum of money. I remember the time anterior to 1892, when the eleven volumes of Clark's House of Lords Cases cost £80, and the four volumes of Kay and Johnson £16."

Legal Classification. See Legal Encyclopedia.

Legal Encyclopedia. "A Juristic Survey." By H. J. Randall. 28 *Law Quarterly Review* 298 (July).

"There is a remarkable poverty in English legal literature of works dealing with the subject of classification at all. Austin certainly recognized its importance, but only dealt with it in the fragmentary lectures that were never published during his lifetime, and most later writers are agreed that his system of classification suffers from grave defects. . . . The only modern essays of importance are the General Introduction to the Encyclopedia of the Laws of England by the Editor of this *Review*, and an appendix to Professor Salmond's Jurisprudence, and both suffer from the rather rare defect of excessive brevity.

"We venture to say that a really adequate book on the subject, illustrated chiefly from English and Roman law, as the German encyclopædias are illustrated from the German Code, would fill a very distinct gap in our legal literature."

Legal History. "The Reception of Roman Law in the Sixteenth Century, IV." By Prof. W. S. Holdsworth. 28 *Law Quarterly Review* 236 (July).

In this concluding paper Dr. Holdsworth deals particularly with the development of the chancery courts, and with their struggle with the common law courts for supremacy in which struggle the victory was with the common law and Parliament. We have received Roman law, but only "in small homeopathic doses at different periods, and as when required." When received, it has never been continuously developed on Roman lines."

"Hoke-Day." By Hugh H. L. Bellot. 28 *Law Quarterly Review* 283 (July).

"Hoke-Day" was the great spring law festival of the Pre-Roman British, observed by the judges with impressive ceremonial.

"The Forcible Recaption of Chattels." By C. A. Branston. 28 *Law Quarterly Review* 262 (July).

Mainly a study of thirteenth century common law principles.

See Dred Scott Case.

Literary and Artistic Property. "Common Law 'Property in Notion.'" By George E. Brand. 1 *Bench and Bar* n. s. 100 (July).

Literature. "The Law and Lawyers of Balzac." By Judge John Marshall Gest. 46 *American Law Review* 481 (July–Aug.).

A notable paper read before the Pennsylvania Bar Association. See 23 *Green Bag* 456.

Negotiable Instruments. "Holder in Due Course." By A. M. Hamilton. 24 *Juridical Review* 41 (June).

"The question whether an original party to a bill or promissory note can be a holder in due course recurs through various English cases. The point appears to be an evasive one."

Panama Canal. Panama Canal Traffic and Tolls." By Professor Emory R. Johnson. *North American Review*, v. 196, p. 174 (Aug.).

"The ships engaged in the trade of which the Panama route has a monopoly will comprise the larger share of the canal's tonnage, but the marginal traffic is a prize so well worth competing for that it should be given careful consideration in fixing the tolls to be charged at Panama. The volume of traffic and the commercial usefulness of the canal, as well as the revenue obtained from its operation, are dependent upon the transit dues."

Pleadings. "On the Logical Structure of Pleadings." By Mortimore Sandford. 46 *American Law Review* 572 (July–Aug.).

"Whenever any remedy or any kind of redress is sought in a court of justice, it is the predicate of a syllogism, which must, in some shape, be brought to the notice of the court; and unless relief can be predicated of a right or duty, and such right or duty can be made a constituent part of a syllogism recognized at law (or in equity, where the jurisdictions are separate) as valid, such right or duty as between parties does not legally exist. *Ubi jus, ibi remedium.* Until the syllogism is constructed, neither the court nor the party can proceed in that behalf. A contention at law, generally and in all its parts, from its commencement to its close, is a contention by syllogism, and it is this fact that gives a meaning to rules which otherwise would be unnecessary or be merely arbitrary."

Procedure. See Criminal Procedure, Pleadings.

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Recall of Decisions. "The Recall of Decisions: A Fallacy." By James B. McDonough. 75 *Central Law Journal* 35 (July 12).

"Philosophically considered, the recall of decisions is unwise because it is the making of a law by the exercise of the judicial power in government. Conceding that the people have the absolute right to lodge the judicial power wherever they please, yet the experience of all great nations teaches that it is unwise to *make* laws by the exercise of the judicial power. No great nation has ever existed for long in which the judicial power made the laws. Under such a system the ruling power soon absorbs every other, and despotism follows."

See Government.

Recall of Judges. See Government.

Taxation. "Tax Administration in New Jersey." By John M. Mathews. *Journal of Political Economy*, v. 20, p. 716 (July).

Trade-Marks. "The Constitution and Trade-Marks." By Arthur William Barber. *Bulletin of United States Trade-Mark Association*, v. 8, p. 119 (Apr.).

"Congress can have no power to regulate trade-marks, except as a part of its power to regulate the traffic in the goods to which those marks are attached. Its right to regulate or control the use of those marks must begin only when the goods to which the marks are attached come within its control, that is, when they become the subject of interstate or foreign commerce, and must cease when those goods pass beyond its control, that is, when they cease to be the subject of such commerce."

Trade Secrets. See Literary and Artistic Property.

Trusts. "The Place of Trust in Jurisprudence." By Walter G. Hart. 28 *Law Quarterly Review* 290 (July).

"It seems, then, when we examine the matter, that those who maintain that a *cestui que* trust has *jus in rem* are confuted by their own explanations of that term; that the view expressed by Holland, Langdell, and Maitland is the true gospel, namely, that his right ought to be regarded as *jus in personam*, since, although it can be enforced against a great many people, it cannot be enforced against everybody.

"It is therefore submitted that in classifying the law or framing an ideal code trust ought to be placed, not under the law of property, but as Professor Holland places it, under the law of obligations and in the same subdivision as rights *quasi ex contractu*."

Uniformity of Laws. "The Commission on Uniform State Laws — What It Is, What It Has Done and What It Needs." By Walter George Smith. 75 *Central Law Journal* 6 (July 5).

"Our great difficulty is lack of the necessary money to pay the expenses of printing, expert fees and for the meetings of committees. A very small appropriation by each of the states for the traveling expenses of their commissioners and a proportion of those of the Conference would give us the few thousands of dollars a year that we need, but only a very small number of the states makes any contribution for any of these purposes. Were it not for the generous support of a few of the states, especially New York, Pennsylvania and Connecticut and of the American Bar Association and of certain of the State Bar Associations, notably that of New York and of Illinois, our work could not have been of great significance.

"Busy members of our profession are giving of their time to matters of vital interest to the community at large. It would seem that it needs but a proper appeal to the different legislatures when in session, by lawyers in each state, who know of the value of this effort for uniformity of legislation, to obtain for our treasury the relief it sorely needs."

Wagering Contracts. "Horse Racing and the Courts." By Almond G. Shepard. 19 *Case and Comment* 176 (Aug.).

Workmen's Compensation. "Compensation for Accidents to Minor Workmen." By G. D. Valentine. 24 *Juridical Review* 1 (June).

"Under the (British) Act of 1897 great hardship often arose owing to the insufficiency of half the average weekly earnings at the time of an accident as compensation in a case where a minor had received serious injury."

Latest Important Cases

Conspiracy. *Can Venue of the Crime be Laid at any Place Where an Obert Act was Performed? —Effect of Federal Statute on Jurisdiction at Common Law.* U. S.

There was a strong dissent in the decision of the United States Supreme Court in the cases of *Hyde* v. *U. S.* (L. ed. adv. sheets p. 793) and *Brown* v. *Elliott* (L. ed. adv. sheets p. 812), both decided June 10. In both cases, dealing with crimes of conspiracy to defraud, the majority opinion was written by Mr. Justice McKenna, with Mr. Justice Holmes dissenting, Justices Lurton, Hughes and Lamar concurring in the dissent.

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In the former case, it appeared that the conspiracy originated in California, and the question was whether the Supreme Court of the District of Columbia could claim jurisdiction on the ground that certain of the overt acts were committed in the District. The court answered this question in the affirmative: —

"It must be said that the cases abound with statements that the conspiracy is the 'gist' of the offense or the 'gravamen' of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy and does not give effect to the change made in it by § 5440, U. S. Comp. Stat. 1901, p. 3676. It is true that the conspiracy — the unlawful combination — has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but § 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in *Hyde* v. *Shine*, 199 U. S. 72, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760, that an overt act is necessary to complete the offense. And so it was said in *United States* v. *Hirsch*, 100 U. S. 34, 25 L. ed. 540, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor-General, 'can be a crime of which no court can take cognizance.' The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

Mr. Justice Holmes, dissenting, said: —

"When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not. . . .

"Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the Constitution that the trial of crimes shall be held in the state and district where the crimes shall have been committed. Art. 3, § 2, cl. 3. Amendments, art. 6. With the country extending from ocean to ocean, this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it, of course, is attributed to the conspirators; and if that means that the conspiracy is present as such wherever any overt act is done, it might be at the choice of the government to prosecute in any one of twenty states in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy the opening to oppression thus made is very wide indeed."

A similar question of jurisdiction was treated in a similar way by Mr. Justice Holmes in his dissent in *Brown* v. *Elliott*.

Criminal Insanity. *Thaw Still Insane.* N. Y.

Harry K. Thaw, in the eyes of the law, is still insane and must remain in the asylum where he was placed on February 1, 1908, after he had killed Stanford White. Justice Martin J. Keogh of the New York Supreme Court on July 26 denied Thaw's application for freedom. The court in dismissing the writ of habea corpus took the ground that Thaw's release would be dangerous to public safety.

Justice Keogh said there would be no useful purpose in reviewing the legal history of the case.

"My whole duty is fully performed when I decide the single question presented for decision, namely — is Harry K. Thaw at present sane or insane, and would his release be dangerous to the public peace and safety?

"Having listened to all the testimony, I am of the opinion that Harry K. Thaw is still insane and that his discharge would be dangerous to the public peace and safety."

Criminal Law. *Severe Punishments for Habitual Criminals — Constitutionality.* U. S.

The Supreme Court of the United States, has recently, in an elaborate opinion by Mr. Justice Hughes, gone into an extended review of the history, policy and constitutionality of laws providing for the inflicting of severer punish-

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ment upon habitual criminals. *Graham* v. *West Virginia*, 224 U. S. 616, 32 Sup. Ct. 583.

Mr. Justice Hughes says: "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt, and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishments were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts."

The opinion also shows that this legislation by states was sustained by the federal Supreme Court in two cases. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Mass.*, 180 U. S. 311.

Jurisdiction. See Conspiracy.

Marriage and Divorce. *Limited Powers of Dominion of Canada Parliament — Unconstitutional Laws — Marriages of Catholics by Protestant Clergyman.* British Empire.

The Judicial Committee of the Privy Council decided the Quebec marriage question July 29 in favor of the Province of Quebec and against the recent proposed legislation of the Dominion Parliament, which undertook to provide that no law or canonical decree or custom of any province should have force or effect to invalidate any marriage performed by any person authorized to perform any ceremony of marriage by the laws of the place of celebration, notwithstanding any differences in the religious faith of the persons so married, and notwithstanding the religion of the person performing the ceremony.

This proposed legislation, contained in what was known as the Lancaster bill, was desired by the Dominion Parliament as a means to a uniform system of marriage and divorce throughout the provinces, and also to prevent any interference on the part of any religious body with the application of civil law to those subjects. The Papal *ne temere* decree, which had had influence in the Province of Quebec, declared that the marriage of two Catholics or of a Catholic with a Protestant must be performed before or with the sanction of the Catholic parish priest.

The Lord Chancellor in giving judgment said that the proposed bill, the Lancaster bill, would be unconstitutional, as beyond the powers of the Dominion Parliament. The Canadian Parliament was declared to be without power to act in such a case without concurrent legislation by the province or provinces concerned. The Privy Council followed the ruling of the Supreme Court of Canada.

The question in this case was similar to that which the Supreme Court has to face in construing the distribution of powers between the federal Government and the states in our own Constitution. In the division of legislative functions made by the British North America Act, marriage and divorce are assigned to the exclusive authority of the federal Parliament, and the solemnization of marriage and civil rights in the several Provinces to the exclusive authority of the provincial legislature. The Judicial Commiteee, following the Supreme Court of the Dominion, upheld the objections of the Provinces and declared the Bill *ultra vires*. We would say, in the event of a similar decision in the United States, that strict construction and state rights had triumphed over liberal construction and federal sovereignty.

The Canadian court, however, while it denied the right to the Dominion Parliament to legislate, at the same time upheld a lower court decision that a marriage of two Catholics by a Protestant clergyman, or a marriage of a Catholic and a Protestant under the same conditions, was valid in the province of Quebec. In the lower court Judge Charbonneau refused to annul a marriage in accordance with a decision of the archbishop's court, on the ground that it had been performed between two Catholics by a Protestant minister. In the eye of the law, Judge Charbonneau declared, the clergyman acted as a civil officer, one authorized to keep registers of marriages. A marriage performed by a clergyman was really teo ceremonies, one — the registering of the marriage, etc. — civil; the other religious. It was the civil ceremony alone that the law was concerned with. This view the Supreme Court of Canada affirmed.

Race Distinctions. *Arizona Segregation Act Sustained.* Ariz.

By reversing the decision of the lower courts in the case of S. A. Bayless, negro, against the Phœnix Board of Education, the Supreme Court of Arizona on July 16 upheld the constitutionality of the recently enacted state law to segregate negroes from white children in the public schools. In his suit, Bayless contended that under the Constitution of the United States, his children had the right to attend school with white children.

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The Editor's Bag

THE PANAMA CANAL AND NATIONAL SECURITY

THE Monroe Doctrine has now an uncertain status in the realm of international law. While it cannot be said to have been expressly repudiated by the Powers, and it would therefore be erroneous to declare it absolutely without validity, neither can it be said to have received that sanction of general assent from which all principles of international law derive their force and authority.

This indefinite condition cannot continue forever. Questions must arise involving the interpretation of the Monroe Doctrine, and even though such questions fail to reach the Hague tribunal and are settled by diplomacy, the acquiesence of other nations, if it is accorded, cannot fail to strengthen the Doctrine in its purely juridical aspect in a manner that will make it more binding upon the Powers. It is thus within the bounds of possibility that the Monroe Doctrine may come to be recognized as a valid rule of international equity long before it is formulated by treaty or otherwise as a definite principle of law.

The adoption of the Monroe Doctrine by general consent will depend chiefly upon the reasonableness of the interpretation the United States places upon it. Originally designed to enable this country to avoid entanglement or collision with European powers, and to justify measures of national security rather than of aggression, a defensive rather than an offensive Doctrine, it can consistently be interpreted only in a liberal spirit, with full recognition of the rights of other nations. Only under this liberal interpretation can we hope to realize the benefits contemplated by the statesmen who formulated the Doctrine. For a less reasonable and liberal interpretation would compel a policy which could be successfully maintained only by means of those costly armaments and burdensome European alliances which the Doctrine sought to avoid.

The opening of the Panama canal cannot fail to bring up questions of the greatest importance, on the wise solution of which will depend the peace of the world and in which the existence of the Monroe Doctrine itself may be involved. Those who favor too rigorous a construction of the Doctrine may easily precipitate a situation leading to its being challenged by the leading Powers, and challenged successfully. It is only too easy for statesmen impelled by an inordinate zeal to promote American commerce, to force our country to take up a position entailing the maintenance of costly armaments and offering a constant menace to our national well-being. On the contrary a moderate application of the Doctrine, in harmony with the spirit of its framers cannot fail to command the approval of other nations and to strengthen not only the Doctrine itself, but through it our own position as a world power.

By the Hay-Pauncefote treaty we

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bound ourselves to police the canal and to keep it open on a basis of equality to all the nations observing its neutrality. From this position it is not in our power to recede. We cannot discriminate in favor of American shipping by releasing our own vessels from the payment of tolls, though there is nothing to prevent the maintenance of maximum and minimum tolls to put unsubsidized shipping on an equality with the shipping of subsidizing countries. So clearly is the character of the canal as an international waterway determined by the Hay-Pauncefote treaty, that it is astonishing to find the proposal that it be treated as a "domestic canal" seriously advanced. It is one thing to urge fortification of the canal in order that it may adequately be policed, and another to urge that it be fortified on account of its strategical importance, to maintain our military supremacy in the Western hemisphere. There is nothing in the Monroe Doctrine, soundly construed, which justifies the exploitation of the canal for military objects.

The precedent of the Suez Canal Convention would doubtless justify the United States in demanding that it have undisputed command of the approaches of the canal, so far as police protection may make it necessary. On this ground, a claim of the right to prevent any foreign power from getting a foothold in Magdalena Bay, for example, might receive favorable consideration from the Hague court, and the rights conferred on this nation by the Hay-Pauncefote treaty might in that event strengthen the Monroe Doctrine *pro tanto*. On the other hand, the exclusion of a foreign company from establishing itself in Magdalena Bay for legitimate trading purposes could with propriety be condemned by the other Powers as an unreasonable act, and would be one of the very things that would endanger the Monroe Doctrine.

The obligations which this country assumed when it undertook to police the canal did not place this nation in a position inviting collision with other Powers or entailing any serious burden on our Government. If we remember that we are in the Isthmus of Panama for purposes of police rather than for purposes of exploitation, it will be in our power to give the world an example of the peaceable and beneficent activity of a great nation whose policy in Central and South America is not determined by love of conquest, and the indirect consequence of this kind of activity cannot fail to be a strengthening of the Monroe Doctrine as a legitimate policy of national defense. We shall reap the fruits of that policy in the readier admission by the nations of both hemispheres, of all reasonable claims based upon that Doctrine in the growing authority of the Doctrine as a principle of international law, and in the increased possibility of the settlement of controversies by arbitration and diplomacy rather than by resort to arms. If the Monroe Doctrine cannot be so applied as to relieve the United States of the burden of maintaining costly armaments, it is difficult to see how it can longer be of much practical use to us.

OUR UNDERPAID JUDICIARY

THAT a judge of the Supreme Court of the United States should die without having been able on the salary he receives to make adequate provision for his family is not merely painful, it is scandalous. If Congress is not disposed to alter this most unjust situation, certainly the bar cannot be accused of a failure to perceive the duty of the

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community to pay for what it gets. The subscription which has been started on the initiative of Mr. Joseph H. Choate and others for the relief of the widow and daughters if the late Justice Harlan can count on generous support from the bar at least.

WHAT HE WANTED TO KNOW

IN a certain case tried in Missouri where the charge was theft of a watch, the evidence was most conflicting, and, as the jury retired, the judge observed that he would be glad to assist in the adjustment of any difficulties that might present themselves to the mind of the jury.

All but one of the jurors had filed out of the box. There was on the expression of the one who remained an expression betokening the extremest perplexity.

Observing this hesitancy, his Honor said: "Is there any question you'd like to ask me?"

At this the twelfth juror's face brightened. "Yes, your Honor," was his eager response. "I'd be awful glad if you'd tell me whether the prisoner really stole the watch."

TWO COURT INCIDENTS IN SPOKANE

A CORRESPONDENT kindly informs us of two incidents which occurred recently in the courts of Spokane.

Judge Henry L. Kennan of the Superior Court for Spokane County is somewhat noted for his repartee. A short time ago a young lawyer argued a motion before him. The judge was making his ruling and it appeared to be against the contention of the young lawyer. "If your honor please," he interrupted, "I do not like to argue with the court, but — " "Well, you can stop any time you like," the judge replied. The argument thereupon closed.

A man engaged in painting a paper mill received an injury by reason of falling off a scaffold. Suit for damages was brought against the mill. The plaintiff relied upon the doctrine of *res ipsa loquitur*. An extended argument was made on the applicability of the doctrine to the case. The manager of the mill patiently listened to the arguments. He knew nothing about *res ipsa loquitur*. It was a strange phrase to him. After the jury brought in a verdict for $30,000 he gravely remarked: "Well, I do not know what this thing is that you lawyers have been talking so much about. It sounds like 'Liz slipt in the slop bucket,' but it is hell on paper mills."

LAWYERS' PUNS

THERE have been many lawyern who were fond of punning. Is the trial of a mercantile case before an Irish judge, one of the counsel used a common phrase of the streets "flying kites."

"What do you mean, sir?" asked the judge. "I recollect flying kites when I was a boy."

"Oh, my Lord," answered the lawyer, "the difference is very great. The wind raised those kites your lordship speaks of, but our kites are intended to 'raise the wind.' "

A person named Day was on trial for burglary. His counsel wittily suggested that a burglary could not be committed by Day. He was, however, convicted. Judge King, who sat on the bench with Judge Knight, said: —

"Prisoner, though your crime was committed by Day, you shall be sentenced by Knight."

Thereupon Judge Knight sent the man to prison for several years.

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An English judge named Day was not noted for the clearness of his intellect. "If a cause were tried before Day it would be tried in the dark."

JUDICIAL CREDIT

IN trying to collect a small claim recently in a distant state, the *Green Bag* received the following report from its local correspondent: —

"This man is county judge here but is absolutely worthless for his debts. The saloon element keeps him in office to serve their interests. He owes everybody who will credit him. I therefore return claim."

P. S. — County judges reading this will please not think we mean anything personal.

A STRANGER IN THE SUPREME COURT

"THE apparel oft proclaims the man," said Polonius. He was judicious in not substituting always for "oft." For, not unfrequently, it has been found that the finest bird is not the one that wears the finest feathers.

Years ago, the staid citizens of Washington were astonished one morning at the appearance of a strange figure in their streets. He was dressed in an old pair of corduroys, ripped at the ankle for convenience in rolling up, a drab overcoat much the worse for wear and furnished with several capes, hung at his heels. Worn-out, untied, unbuckled shoes, and a queer-looking old hat completed his costume.

Solemnly he stalked through the streets, six feet in height, leading a little black, rough-haired filly, her tail matted with burs. A pair of small saddle-bags hung over the saddle, in which were stuffed papers, and gingerbread, and cheese. Stopping at an obscure tavern, he put up his mare and relieved himself of his big coat. Into one of the pockets of a short gray linsey roundabout he stuffed some bread and cheese, and into the other a bundle of law-papers, tied with a yarn string.

Inquiring the way to the Supreme Court, he walked forth, the wonder of the negroes and idle boys. Arriving at the court, he sauntered within the bar, took a seat, and began munching bread and cheese. The lawyers and spectators smiled at the awkward countryman on his first visit to the capital.

Soon a case was called which seemed to interest the countryman. It involved the title to a large tract of land lying in the "Green River country" of Kentucky.

A Mr. Taylor of Virginia, a leading lawyer, began his argument by a statement of facts. All at once the countryman stopped munching, and tapping the counsel on the back, corrected one of his "facts."

The lawyer paused, frowned at the busybody, and continued. The countryman resumed his munching, and in a few minutes again corrected the counsel. "I beg the court to protect me from the impertinence of that person," said Taylor, with much irritation.

Taylor finished his argument, an able one, and then, to the amazement of the judges, the bar, and the spectators, the stranger rose to reply. His manner was wholly changed. He stood as if he had practised in that Court all his professional life. His argument was so clear and forcible, and his reply to the opposition so masterly, that the Court and bar looked as if they doubted their eyes and ears.

Mr. Taylor seemed paralyzed. The perspiration rolled from his brow. The rustic he had sneered at seemed a legal giant. Everyone asked, "Who is he?"

It was Joe Daviess, one of the best

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lawyers and most eloquent orators of Kentucky, as eccentric as he was gifted. Scarcely one present knew him personally, but all had heard of his brilliant qualities.

BISMARCK ON ELOQUENCE

BISMARCK was no orator. His speech was simple and plain. He thought that the gift of eloquence did a great deal of mischief, both in the courts and in Parliament. He used to tell a story to illustrate what he deemed the distracting effect of eloquence. Frederick William I., the despotic king who publicly whipped his son, subsequently Frederick the Great, once listened to the pleadings of two lawyers. After the first one had finished his speech, the King, greatly moved by the advocate's eloquence, exclaimed: —

"This fellow is in the right!"

The second lawyer then spoke, and with such effect that the King said, "This mans has the right of it!"

Then, recalling that he had contradicted himself, he fell into a furious passion and sent both orators to jail!

SUSPICIOUS CIRCUMSTANCES

ANY competent lawyer can tell one that it is a good rule never to tell more than one knows. Not so long ago there was afforded in England an instance wherein a lawyer carried the rule to an extreme.

One of the agents in a Midland Revision Court objected to a person whose name was on the register, on the ground that he was dead. The revision attorney declined to accept the assurance, however, and demanded conclusive testimony on this point.

The agent on the other side arose and gave corroborative evidence as to the decease of the man in question.

"But," persisted the barrister, "how do you know the man is dead?"

"I don't know," was the response. "It's very difficult to prove."

"As I suspected," returned the barrister. "You don't know whether he is dead or not."

"I was saying, sir," continued the witness, with the utmost gravity, "that I don't know whether he is dead or not; but I do know this: they buried him about a month ago on suspicion."

PREJUDICED

NOT exactly the right word, but a most impressive one, was that used by a dilatory witness, brought by the sheriff before a district judge in Pennsylvania.

"What reason, madam," said the judge, severely, "have you for not obeying the summons of the court?"

"I ai't got none, Mr. Judge, only we have smallpox down at our house, and I thought you might be kinder prejudiced against it."

The judge was "kinder prejudiced," and the spectators appeared to be even more so, judging by the rapidity with which the court-room was thereupon emptied.

A LEGAL NAPOLEON

THE following, minus the name of the lawyer and of his town, is a letterhead put out by an Iowa legal light:

> "Love not sleep, lest thou come to poverty." — *Judge Solomon.*
>
> *Lawyer.*
>
> Office over FIRST NATIONAL BANK
>
> Am the red-headed, smooth-faced, freckle-wounded Legal Napoleon, always in the stirrups. Practice in every court on earth except that of Judge Lynch. Quick as a hippopotamus and gentle as a sunstroke. Refer to my friends and likewise to my enemies.
>
> "Fees are the sinews of war."

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USELESS BUT ENTERTAINING

Willie. — "Was Jonah a high-priced lawyer, pa?'

Father. — "What a question! Why?"

Willie. — "It seems the whale couldn't retain him."

— *Boston Transcript.*

In an Ohio case the judge had sentenced the prisoner, convicted of murder in the second degree, to thirty years' imprisonment.

Counsel jumped up with the cry: "But, your Honor, my client is an aged man. He won't live thirty years."

"In that case," responded the judge, imperturbably, "I'll shorten his sentence to life imprisonment, if you prefer it."

The Legal World

Monthly Analysis of Leading Legal Events

The month seems to have offered few significant developments outside the field of party politics, in which too great importance must not be attributed the views expressed by political leaders. If however it is proper to assume that political speeches represent the actual attitude of political parties, it may be inferred from the moderate tone of Mr. Wilson's nomination speech on political questions such as those of the initiative, referendum, and recall, to which topics scant attention was given, that most of the obstructive political radicalism from now on will be supplied by the National Progressive party. The questions of the recall of judges and of judicial decisions are giving lawyers throughout the country more profound concern than the social or economic proposals of the Democratic and Progressive platforms. Just how much support Mr. Roosevelt may be able to count on, for his proposal that the people be given the right to overturn court decisions, remains to be seen. Apart from political speechmaking, it is pretty safe to say that there are few evidences of definite leanings toward the recall. The bar of the country continues, however, to denounce the recall with undiminished zeal even though few forceful protagonists of it come forward.

The work of Congress as it approaches the close of the session affords little occasion for congratulation. We seem to be no nearer than we were some time ago to an unqualified acceptance of the soundness of the interpretation of the Hay-Pauncefote treaty advocated by Senator Root, or to a positive determination that the Commerce Court shall not be abolished. The failure of the Stanley Committee to agree on a broad, constructive scheme for the regulation of monopoly is likewise unfortunate.

Judiciary reform has received an impetus in Ohio in view of the endorsement of the Ohio State Bar Association, and the constitutional amendment to be voted on by the people this fall will have an influential backing. By relieving the Supreme Court, it will if passed accomplish much for the removal of the law's delays.

New and Proposed Legislation.

Announcement is made of the appointment of a special committee by the American Bar Association to propose legislation to Congress for an increase

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in the salaries of federal judges. The committee is composed of Edward A. Sumner of New York, Jacob M. Dickinson of Tennessee, former Secretary of War George R. Peck of Chicago, John Hinckley of Baltimore and Chapin Brown of Washington.

The Coal Mines act went into effect in Great Britain July 1, its purpose being to increase the safety of miners. It provides for daily personal supervision of mine by the managers, government inspection, certification of firemen who are found qualified to make accurate tests of the air of a mine, compulsory ventilating precautions, and other safeguards.

Senator La Follette offered a resolution in the United States Senate Aug. 5 which proposed a radical change in the method of amending the Constitution of the United States. By its terms a majority of the two Houses of Congress, or ten States, acting through their Legislatures or through popular vote, would have authority to propose amendments. An amendment to be adopted must be approved by a "majority of the electors in a majority of the States," and "a majority of all electors," voting on the question.

The new British Copyright Act (1 and 2 Geo. V., ch. 46) went into effect July 1. It makes registration at Stationers Hall no longer necessary, a copyright running from the time of the making of any work, whether published or not. A uniform term, of life and fifty years, is established for all literary and artistic productions, even architectural works receiving this protection. The "compulsory license" principle is introduced by the provision that during the second half of the fifty-year term any person may reproduce a work without consent, on payment of a small fixed royalty. Rights of performance and reproduction are merged in the author's copyright, the provision being especially advantageous to musical composers.

The British Insurance Act

The British National Insurance Act, which went into effect July 15, provides for government relief to persons sick or out of employment, and is probably the most visionary and advanced piece of social legislation which has ever been adopted in Great Britain or the United States. The six benefit provisions apply to every working person between the ages of 16 and 70 in Great Britain and Ireland who earns not more than $800 yearly, with certain exceptions, and thus places the bruden of caring for many million persons on the state. Employers must even insure their domestic servants. The insured are given the advantages of free medical attendance, hospital treatment, and relief in special establishments in the case of consumption.

The burden of this insurance is borne chiefly by the employer, but partly by by employee. The employer of every workman who receives an ordinary wage must pay 14 cents daily to the general fund, deducting 8 cents from the wages. The state also contributes, paying 4 cents toward every 18 cents expended on benefits and the administration of benefits. If the workman earns less than an ordinary wage, the employer must pay in larger proportion, and must also pay in larger proportion in the case of women employees. The sickness benefit for men is $2.40 a week for 26 weeks, to which a disablement benefit of $1.40 is added so long as the person is still incapable of work. The benefits are distributed by approved societies, and everyone to get full the benefits of

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insurance must join a society. Those who do not join are mere "deposit contributors," entitled to draw relief only on the basis of their actual contributions to the general fund.

In addition to insurance against sickness, a system of insurance against employment is also provided. For the present it will apply only to seven enumerated trades, but the Board of Trade has the power to add others from time to time. The unemployment insurance fund will be raised by weekly contributions from employer and employee of five cents each for each period of a week or less. The state contribution to the fund will be one-third of the total contributions from workmen and employers. No contribution is required while the workman is unemployed for any cause. The benefits provided consist of weekly payments to the workmen while unemployed of $1.75 a week up to a maximum of fifteen weeks in any twelve months. A workman will not receive this benefit if he has been employed in an insured trade for less than twenty-six weeks in the last five years, or if he is capable of work and able to get it. Nor will he receive benefit if he has lost employment through a strike or lockout or through misconduct, or has voluntarily thrown up his job without just cause, or is in receipt of sickness benefit.

The Stanley Report

The Stanley Committee which investigated the affairs of the United States Steel Corporation submitted its report to the House of Representatives Aug. 2. In addition to the regular report of the Committee, signed by the Democratic members, four dissenting reports were filed.

The majority report disapproves of the proposed control of corporations by the federal Government as "semi-socialistic" and unconstitutional, and urges the remedies of publicity, strict enforcement of the laws, and examination of corporate affairs by the Bureau of Corporations. The interesting statement is made that the enormous earnings of the Steel Corporation are due not to its superior economic efficiency, but to its ownership of ore reserves out of all proportion to its requirements and to its control and operation of common carriers and terminals from which it secures an inequitable division of rates.

The legislation proposed is in the form of three bills. The first bill, commonly known as the Brandeis bill, would give an injured party the right to institute suit to prevent the organization of a combination in restraint of trade. It also transfers the burden of proof to the defendant, to show that its restraint of trade is "reasonable," in view of a presumption that every corporation controlling more than 30 per cent of its particular line of business is engaged in unreasonable restraint of trade.

The second bill is designed to prevent indirect control of common carriers by corporations engaged in the manufactures of railroad cars, rails, or structural steel. The third bill is likewise intended to hit at the system of interlocking directorates and to separate industrial and railroad business.

From this report Representative Littleton dissented with regard to the provision fixing the burden of proof on the defendant corporation. He also charged that the chief bill reported would perpetuate the chief fault of the Sherman act by dealing with symptoms and ignoring the disease.

A minority report signed by two Republican members recommended a federal incorporation law, further government regulation, publicity, and gov-

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ernment fixing of maximum prices in accordance with the Gary-Morgan plan.

Another minority report was signed by Representative Young of Michigan, adopting some features of the Gardner-Danforth minority report just mentioned, but repudiating price-fixing.

The last of the minority reports, signed by Representative Sterling of Illinois, dissented from the proposed government control and regulation of prices.

Bar Associations.

American Bar Association. — The American Bar Association, holds its thirty-fifth annual meeting Aug. 27–29 in Milwaukee, has instituted a nation-wide movement for more general observance of the code of legal ethics and for protection of the public against unworthy lawyers. The association is considering the advisability of appointing grievance committees to hear complaints and see to the enforcement of laws providing proper remedies for wrongs committed by members of the profession.

Alabama. — A program for the reform of criminal procedure was outlined in some detail by Governor Emmet O'Neal of Alabama, at the session of the Alabama State Bar Association in Montgomery July 13. Among Governor O'Neal's recommendations, which were numerous and valuable, were the following: (1) That the common law powers of the judges be restored; (2) that the rule be adopted which now exists in England, and which now prevails in several states of the union, and which has been indorsed by the American Bar association, which is in substance that the legislature shall enact a law that no judgment shall be reversed and no new trial shall be granted on the ground of a misdirection of the jury or other insubstantial error; (3) that the practice, both civil and criminal, be governed by a legislative practice act, as brief as possible, covering the substance of procedure and supplemented by suitable rulings of the court, the courts being clothed with ample power to make rules for the orderly and expeditions dispatch of causes.

Michigan. — The Michigan State Bar Association will hold its annual meeting at Saginaw, Mich., Sept. 4–5. The matters to be discussed will include procedural reform in Michigan and home rule for Michigan municipalities.

New Hampshire. — The annual outing and meeting of the New Hampshire Bar Association will take place at the Hotel Wentworth, New Castle, Saturday, Sept. 7. Hon. Herbert Parker, former Attorney-General of Massachusetts, who will give the afternoon address. The principal speaker of the evening will be Hon. F. M. Parsons of New Hampshire.

Ohio. — At the 33d meeting of the Ohio State Bar Association at Cedar Point July 9–11, Frank B. Kellogg made an address opposing the recall of judges. The proposed Peck amendment affecting the judiciary, as proposed by the recent Ohio constitutional convention, was approved by a vote of 63 to 21, and recommended for popular adoption at the polls in September. This amendment provides for a new judicial system for the state, limiting the work of the Supreme Court and increasing the importance of the Court of Appeals. Delays appeal will be greatly reduced if it becomes effective. The proposed system complies with the rule that each suitor is entitled to one trial and to one appeal.

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The constitutional amendment approved also provides that "no law shall be held unconstitutional without the concurrence of at least all but one of the judges" of the supreme court, "except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." Under the old constitution a law may be declared invalid by a mere majority vote of the supreme judges.

The three-fourths verdict proposal was also approved after some debate.

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The annual address was deliveered by by President Fred L. Taft of Cleveland. The following officers were elected: president, Simeon H. Johnson of Cincinnati; secretary, Charles M. Buss of Cleveland; treasurer, C. R. Gilmore of Dayton.

Miscellaneous

There have been one hundred and fifty-five men put to death in the electric chair in New York state since the law went into effect some twenty-two years ago. Nine men awaited execution of sentence during the week of August 12, making the total one hundred and sixty-four.

John Mitchell, vice-president of the American Federation of Labor, who with President Gompers and Secretary Morrison was adjudged guilty of contempt of court in renewed proceedings several weeks ago, was on July 23 sentenced by Justice Wright of the Supreme Court of the District of Columbia to serve nine months in jail. Mitchell's counsel immediately noted an appeal. Gompers and Morrison, who had both been sentenced June 25 to one year and nine months in jail, had already filed an appeal.

More than 90 per cent of the employers of industrial labor in New Jersey have virtually subscribed to the provisions of the elective workmen's compensation act now in operation. The disfavor of manufacturers, intense when the law was in the throes of enactment, has been practically eliminated after studying the operation for the last twelve months. It is said that there are now only two large manufacturing concerns in the state not operating under the provisions of the compensation schedule of the act. Of these one has a compensation rate of its own, in excess, in most classes of accidents, of the state's schedule.

The facilities for arbitration of commercial disputes furnished by the New York Chamber of Commerce, through its Committee on Arbitration, of which Charles L. Bernheimer is chairman, are open to every business man in this country, or doing business with it abroad. The fee paid to the arbitrators is purposely restricted to that of a referee, ten dollars a day. The *New York Times* said recently in an editorial: "Two of the biggest merchants of this city this year selected an arbitrator of the Chamber and submitted papers.

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Before the action could come to an issue they found that the points of difference were not great, and settled the dispute themselves. In this case the Committee on Arbitration served really as a Committee of Conciliation. Above all, resort to it overcame a disagreeable incident quickly, and at practically no expense."

The eighteenth annual convention of the Commercial Law League of America met at Colorado Springs, Colo., beginning July 23, with an attendance of four hundred from all parts of the United States and Canada. J. Howard Reber of Philadelphia presided. Gov. John F. Shafroth of Colorado made the address of welcome, and in addition to important committee, reports which occupied much of the time of the convention on three successive days, interesting papers were presented, among which were the annual address, delivered by Justice Rosseau A. Burch of the Kansas Supreme Court, on "Constitutions and Courts," "The Ideal Lawyer," by S. T. Bledsoe, Oklahoma City, and "Impossibilities of the Law," by P. G. Dedmon, Fort Worth, Tex. At the banquet Judge Ben B. Lindsey spoke on "Politics and Reform," Earl W. Evans of Wichita, Kan., on "Recall and Recollections," and Wade Millis of Detroit on "The Eclipse of the Lawyer."

Obituary

Alexander, Thomas, United States Commissioner and Clerk of the United States District Court in New York City, died July 24, at the age of fifty-eight. As the fourth incumbent of the office, Mr. Alexander succeeded Samuel H. Lyman as Chief Clerk of the District Court eleven years ago.

Hansfield, Judge W. W., died July 27, at Ozark, Ark., aged eighty-two. He had served as prosecuting attorney circuit judge, member of the legislature and after serving on the Supreme Court many years was forced by ill health to resign. He was one of the four or five surviving members of the convention that voted Arkansas out of the Union into the Confederacy. He was also a member of the convention which in 1874 drafted the present state constitution.

James, John H., Chief Justice of the Texas Court of Civil Appeals for the fourth district, died at San Antonio, Tex., in July. His position has been filled by the promotion of Judge W. S. Fly of the same court.

Page, Charles H., who had served three terms as a Congressman from Rhode Island, died in Providence, R. I., July 21. He was for many years a prominent lawyer of his state.

Scruggs, William Lindsey, former Minister to Colombia and Venezuela, died at Atlanta, Ga., July 18, at the age of seventy. In 1894 he acted as the legal adviser and special agent of the Venezuelan Government, charged with the settlement of the Anglo-Venezuelan boundary dispute. He succeeded in bringing this to arbitration in 1897.

Washburn, William D., formerly United States Senator from Minnesota, died at Minneapolis July 29, aged eighty-one. A native of Maine, he removed to Minneapolis just after his admission to the bar at Bangor in 1852. He became a leader in the business upbuilding of Minnesota. He served in the national House for six or eight years, and afterwards in the Senate, from 1889 to 1895.

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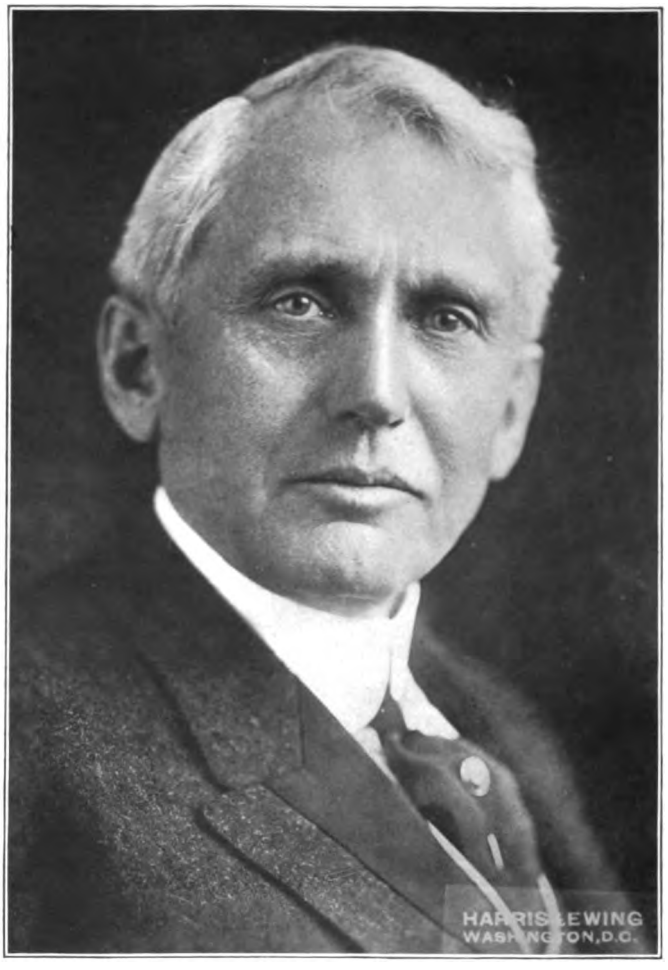

FRANK B. KELLOGG, OF ST. PAUL, MINN.

PRESIDENT OF THE AMERICAN BAR ASSOCIATION, 1912-13

Photo. by Harris & Ewing

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The Green Bag

Volume XXIV October, 1912 Number 10

The Progress of Uniform Legislation, 1911-12*

By Walter George Smith

ELEVEN legislatures have held regular sessions during the past year,[1] another will meet in October,[2] and one legislature has held an extra session.[3] Uniform acts were passed in Maryland, Massachusetts, Louisiana, Mississippi and Rhode Island.

As will appear from the report of the Executive Committee, the reports of the Commissioners show that in all or nearly all of the states in which sessions were held efforts were made by them to secure uniform legislation, and in only one did they fail by reason of the Governor's veto. In New York the Uniform Stock Transfer Act was passed for a second time, and for a second time it was vetoed by the Governor for undisclosed reasons without according a hearing to the Commissioners.

Committees of the Conference, charged with the responsibility for pending business, have held meetings from time to time, some of which have been attended by the President as an *ex officio* member. An undiminished zeal and steady progress in solving the problems before them distinguished all of these meetings. It is gratifying to know that in the comparatively few states that have not yet passed any of the Uniform Acts, especially Vermont, Indiana and Georgia, there is evidence of an aroused sentiment that will doubtless bring about satisfactory results.

In his report to the Governor of one of the states that has persistently ignored the work of the Conference, a Commissioner expresses his mortification because his state has made no appropriation for the general expenses of the Conference. While sympathizing strongly with his feeling, most of us will realize that some of the states that have availed themselves of the work of the Conference by adopting its measures are much less consistent than those which have not yet recognized their value. We have all been embarrassed because of the inadequate financial support we have received. Had it not been for the generous devotion of very many of the Commissioners who have paid their own travelling, hotel and other expenses, our work could hardly have made as much progress as it has. The recent appropriations by the states of Wisconsin and Minnesota have been most timely, and it seems reasonably certain that

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* President's address delivered at twenty-second annual meeting of Commissioners on Uniform State Laws, Milwaukee, August 21, 1912.

[1] Kentucky, Maryland, Massachusetts, Mississippi, New Jersey, New York, Rhode Island, S. Carolina, Virginia, Louisiana, Georgia.

[2] Vermont.

[3] Michigan.

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our financial situation will steadily improve.

Commenting upon the Treasurer's report for the year 1911, an editor notes that

> Last year six states paid the expenses of a Commission which is drafting the laws of forty-seven states who have representation on the Commission. These states are New York, $500; Connecticut, $300; Pennsylvania, $300; Massachusetts, $100; Utah, $100; Rhode Island, $100. This, together with special contributions from the American, Illinois and New York Bar Association represent an income of little over $2,000.

As Mr. Terry justly says: —

> The time and energies which many of the Commissioners have been giving to this work are beyond price. There remains, however, this consideration: That there are many things which this Conference must have and which it must pay for. There are expenses connected with the administration of this body. Those expenses, if we are to maintain our independence and individuality, must come from the states which have appointed us as their representatives. From time to time suggestions have been made of ways and means for procuring action on the part of the respective states along these lines, and from time to time such action has been had.

Mr. Terry then calls attention to the good work done by one of our Commissioners from Illinois,[4] who

> Finding that the legislature of Illinois was not in a mood to make its contribution, in such form as to enable the Commission to avail itself of it, he went to his State Bar Association and stated the purposes of the Commission and the work it was doing, and it contributed to the fund for the general work of this Conference. If we are to maintain our independence and our disinterested action we must have a continuance of that kind of work and we must have ample funds.[5]

It is gratifying to find that the legal journals and magazines are not oblivious of the importance of our purposes. Two of them have issued special numbers devoted to an exposition of the history and accomplishments of this Conference.[6] I think it may be apposite to quote from the comments of the editors. One says: —

> The evils of diversity in state laws are obvious. It is particularly to be desired that the commercial laws of the country be uniform, to obviate confusion, and the hope that this end will be realized finds its encouragement in those powerful tendencies which make for uniformity of commercial usage, not only in this country but throughout the world. Uniformity of commercial law is more than a theory, it is actual conquest of the citadel of law by the forces of commercial usage. All that legal conservatism which resists the progress of this movement is foredoomed to defeat, and its triumph is so certain that it stands not so much in need of champions as of henchmen. The work which is in the hands of the Committee on Commercial Law of the Uniform State Laws Conference is thus one which does not call for an active propaganda, but rather for intelligent co-operation of existing active agencies in the labors which this body has under way. . . .
>
> In other fields than that of commercial law, the forces which make for uniformity are less powerful. In some subjects, indeed, uniformity may be unattainable because of fundamental differences between the institutions of various sections. The Conference . . . wisely keeps within bounds in advocating only that uniformity which seems consistent with due recognition of local exigencies. Scarcely any subject more imperatively demands uniform legislation than that of divorce, not that differences in the way this subject is regarded in different states may be reconciled, but chiefly that confusing questions of jurisdiction may be resolved, and that the decrees of one state may be enforcible in another. This subject, like that of the taxation of property outside a state, and that of the probate of foreign wills, is of concern not to one state alone but to the entire community of states. . . .
>
> In another group of subjects, falling possibly within the classification of social legislation, *e.g.*, child labor and workmen's compensation, the necessity for uniformity may be less clearly evident, but the advantages of model uniform acts drawn with the best legal skill obtainable, such

[4] Commissioner MacChesney.
[5] *Central Law Journal*, p. 10.
[6] *Green Bag*, vol. 23, no. 12; *Central Law Journal*, vol. 74, no. 1.

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as that afforded by the Conference, are sufficiently plain. . . .[7]

Another says: —

It is true that, although commissioned by the governor or the legislature of their respective states, the Commissioners do not work under pressure of any kind, and, by disposition and training are not men who are impatient for quick results. . . .

In drawing up a code of laws that is expected to abide the test of time and intense controversy, the important thing is not haste, but accuracy, careful phrasing and the exact use of words to avoid confusion and reduce the necessity for construction on the part of the courts to a minimum. The most noticeable characteristic of much modern legislation is the haste with which it is enacted, as if the most important thing about a proposed bill was to get it on the statute books as quickly as possible. . . . If all proposed laws of a general nature were first submitted to the careful consideration of a body of experts like the Commissioners on Uniform State Laws, they would seldom fail of their purpose and would give rise to very few serious problems for courts to unravel. . . .

The desire for uniformity . . . is still a beacon light of hope to those interested in the work of the Commission. . . . The variance in the decisions . . . which construe such acts as the Negotiable Instruments Law, is comparatively slight and not sufficient to occasion any discouragement. Moreover, the courts are showing an increasing tendency to be governed by the weight of authority in other states in construing Uniform Laws and the Commission has the opportunity at intervals of correcting discrepancies or variances by suggesting uniform amendments which serve the double purpose of perfecting the law itself and adapting it to some changed situation as well as of maintaining the desired uniformity.[8]

It will be seen that appreciation of the purposes and accomplishments of this Conference is widening and, however slowly, results are being achieved that are well worthy of the efforts they cost.

The Negotiable Instruments Law

The report of the Committee on Commercial Law will deal with proposed amendments to this the first and probably the most important of what have been properly called the American Uniform Commercial Acts. Without waiting for the action of the Committee, an act was passed in Massachusetts relative to the liability of a bank for the payment of forged negotiable instruments. This act provides that unless within one year after the return of a negotiable instrument to a depositor he shall notify the bank in writing that it is forged, or was made or endorsed without authority, or that it has been materially altered, the bank shall not be liable to the depositor on account of the payment of such instrument.[9]

A number of decisions have been rendered by the various state courts making reference to sections of the Negotiable Instruments Law, as will appear by the citations given in the notes.[10]

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[7] 23 *Green Bag*, p. 654.

[8] 74 *Central Law Journal*, pp. 1, 2.

[9] Acts Mass. 1912, ch. 277.

[10] Nebraska (from Commissioner R. W. Breckenridge): *Hartington Nat'l Bank* v. *Breslin*, 88 Neb. 47, interpreting sec. 14 (blanks when they may be filled); *Aurora State Bank* v. *Hayes-Ames Elevator Co.*, 88 Neb. 187, interpreting sec. 30 (what constitutes negotiation?); *Gruenther* v. *Bank of Monroe*, 90 Neb. 280, interpreting sec. 188 (effect where the holder of check procures it to be certified).

Missouri (from Commissioner Seneca N. Taylor): *Stephenson* v. *Joplin State Bank*, 160 Mo. App. 47 (where a note shows on its face that a party executed it as principal, he cannot contradict his written obligation by parol); *Lehnhard* v. *Sidway*, 160 Mo. App. 83 (question of acceptance by separate writing).

Washington (from Commissioners W. B. Tanner and Charles E. Shepard): *Barker* v. *Sartori*, 66 Wash. 260 (the sum payable is a sum certain within the meaning of the act, although it is to be paid by stated installments); *First Nat'l Bank* v. *Sullivan*, 66 Wash. 375 (defining an unqualified promise to pay though coupled with an indication of a particular fund); *Am. Saving Bank & T. Co.* v. *Hilgesen*, 64 Wash. 54 (usury is not available as a defense to the maker of a note to an innocent holder for value before maturity); *Citizens Savings Bank* v. *Houtchins*, 64 Wash. 275 (whether party plaintiff was a *bona fide* holder for value before maturity, the title of the original payees having been defective); *Ekre* v. *Cain*, 66 Wash. 659 (an oral guarantee of a note turned over in payment of the guarantor's indebtedness is sufficient guarantee for subsequent written guarantee of its payment); *State* v. *Garland*, 65 Wash. 666 (a certificate of deposit endorsed and delivered to defendant answers all the requirements

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An interesting quotation is furnished from a Massachusetts case on the proper method of interpreting the act: —

It is a matter of common knowledge that the Negotiable Instruments Act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through the adoption by the legislatures of the several states and by the Congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several states, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded in uniformity. This act in substance has been adopted by many states. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficent design of the legislature in passing an act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had heretofore been the law of this commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states. Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections.

This appears to be the view taken wothout exception by the courts of other jurisdictions which have considered the point. In the interpretation of a statute widely adopted by the states to the end of securing uniformity in a department of commercial law, we should be inclined to give weight to harmonious decisions of courts of other states, even if we were less

of a check and became in law and was in fact a check).

Idaho (from Commissioner James E. Babb): *Sheffield* v. *Cleland*, 115 Pac. Rep. 21 (sec. 7, a reasonable time within which to present a promissory note endorsed after maturity); *Smith* v. *Field*, 114 Pac. Rep. 668 (sec. 12, effect of certification of check is to fix the liability of the bank from the time of certification, irrespective of the date which the check bore); *Shellenberger* v. *Nourse*, 118 Pac. Rep. 508 (sec. 52 where a note was shown to have been obtained by fraud, the burden of proof shifted to the holder to show *bona fides*); *Frost* v. *Harbert*, 118 Pac. Rep. 1095 (a contract of guarantee that a note is good is a separate obligation of the guarantor and becomes absolute on the default of the maker of the note).

Florida (from Commissioner Simonton): *Taylor* v. *American Nat'l Bank*, 57 So. Rep. 678 (a note is negotiable, though bearing interest and accompanied by a mortgage on real estate, which contains provision that upon default of payment of any installment of interest the whole amount of the note shall then be due).

Virginia (from Commissioner Massie): *City Nat'l Bank* v. *Hundley*, 112 Va. 57 (touching sec. 56 on notice of defect); *Reid's Adm'r* v. *Windsor*, 17 Va. L. R. (touching sec. 24 on presumption of consideration).

New York (from Commissioner Terry): *Pavenstedt* v. *New York Life Ins. Co.*, 203 N. Y. 91; *Nat'l Park Bank* v. *Koehler*, 204 N. Y. 174; *Maris* v. *State Nat'l Bank*, 131 N. Y. Supp. 1045; *Muller* v. *Kling*, 149 App. Div. 176 (the N. I. L. is declaratory of the common law rules as they existed before its enactment); *St. Lawrence Co. Bank* v. *Watkins*, 135 N. Y. Supp., 461 (as regards presumption of consideration for every negotiable instrument); *Riddle* v. *Bank of Montreal*, 130 N. Y. Supp. 15 (a bill of exchange payable on demand and drawn upon a bank is a check); *Springs* v. *Hanover Nat'l Bank*, 130 N. Y. Supp. 87 (case of genuine draft with forged bill of lading attached); *National Bank* v. *Kennedy*, 45 App. Div. 669 (oral request over telephone not a presentment); *Dumbrow* v. *Gelb*, 130 N. Y. Supp. 182 (addition of words "with interest" not permitted in filling up blank); *Pavenstedt* v. *N. Y. Life Ins. Co.*, *supra* (discusses doctrine of re-exchange as being damages); *Maris* v. *State Nat'l Bank*, *supra* (question of endorsement by joint payees and transfer of instrument where one payee dies); *Nat'l Park Bank* v. *Koehler*, *supra* (test as to discharge of an endorser by granting of an indulgence to the party primarily liable); *Shattuck* v. *Guardian Trust Co.*, 204 N. Y. 200 (discusses sec. 326, providing that no bank shall be liable on a forged check unless notified of the forgery within one year after return to depositor); *Stein* v. *Empire Trust Co.*, 133 N. Y. Supp. 517 (right of bank to cancel credit of check on discovering payee's name was forged); *Hodgens* v. *Jennings* 133 N. Y. Supp. 584 (as to joint and several liability); *Muller* v. *Kling*, *supra* (discusses facts necessary to make a draft an equitable assignment of funds against which draft is drawn); *Baer* v. *Hoffman*, 135 N. Y. Supp. 28 (waiver of notice of dishonor is not waiver of presentment for payment); *Lyons* v. *Union Exchange Nat'l Bank*, 135 N. Y. Supp. 121 (question of certification of check); *Columbia Distilling Co.* v. *Rech*, 135 N. Y. Supp. 206 (question of material alteration).

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clear than we are in this instance as to the soundness of our conclusion.[11]

A case in Louisiana[12] to which passing reference was made in the President's address of 1911, may be noted in connection with this decision. The Supreme Court of that state, apparently overlooking section 63 of the Negotiable Instruments Law as adopted in Louisiana, holds that a person not originally a party to a note, who puts his name thereon, is presumed to do so as surety. This and another case,[13] without mentioning previous authorities, follow the former jurisprudence in Louisiana.[14] The point is in litigation and may come before the court for consideration again. It is an interesting fact, which was forcibly commented upon by my predecessor, that a number of decisions have been rendered since the adoption of the act by the courts of various states seemingly overlooking its existence. Such omissions will become rarer as the writers on the subjects of the acts make them better known.

The Warehouse Receipts Act

I have been furnished with a number of cases bearing upon this act, which are given in a footnote.[14½]

The Sales Act

The New Jersey Court of Errors in a case [15] construing section 67 [16] of the Sales Act, observes that

> The primary purpose of the codification as expressed in its title was to make uniform the law concerning the sale of goods. Any construction of the statute, therefore, which would throw it out of harmony with rules of law generally prevailing, relating to that subject, would be in direct violation of its expressed object. It is consequently necessary to ascertain whether there is any generally accepted rule existing in other jurisdictions prescribing the measure of damages in actions by the vendee, for failure to deliver the goods, where he has made a contract for the resale thereof.

This is a significant utterance. It is really the keynote to the proper construction of all of the commercial acts, excepting in the very few instances where new definitions have changed the accepted law.

The Bill of Lading Act

Hearings were held before the Committee on Interstate Commerce of the United States Senate at intervals during the past winter on the relative merits of two proposed acts of Congress, one known as the Stevens–Clapp Bill and the other as the Pomerene Bill. The Stevens-Clapp Bill, which was urged for passage by various commercial bodies, deals with the definition of bills of lading and contains certain matters deemed most vital in the uniform act, but does not attempt to cover the whole subject. It has the prestige of having been passed by the House at a previous session. It seeks to deal only with certain specific evils. In substance, first, it aims to make carriers liable on interstate bills even if they have not received the goods. Second, to make carriers liable on order bills which they leave outstanding after delivering all or

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[11] (From Commissioner E. A. Krauthoff): *Union Trust Co.* v. *McGinty*, 98 Northeast. Rep. 680.

[12] (From Commissioner W. O. Hart); *Hackley* v. *Magee*, 55 So. Rep. 656 (128 La. Ann. Rep.).

[13] *Parker* v. *Guillott*, 118 La. 223.

[14] *Claflin* v. *Feibleman*, 44 La. Ann. 518. See *Pugh* v. *Sample*, 123 La. 791.

[14½] (From Commissioner Terry): *Ballston Refrigerating Co.* v. *Eastern Refrigerating Co.*, 142 App. Div. 135; *Herrman* v. *New England Navigation Co.*, 143 App. Div. 551; *Belzer* v. *Daub Storage Warehouse Co.*, 130 N. Y. Supp. 153; *Rapp* v. *Washington Storage Co.*, 134 N. Y. Supp. 855.

[15] *Pope* v. *Ferguson*, 33 Atl. Rep. 353 (from Commissioner Hardin).

[16] Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times they ought to have been delivered, or, if no time be fixed, then at the time of the refusal to deliver.

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part of the goods. The vital question is the proposition of the bill to make the carrier liable even if he does not receive the goods for bills of lading which have been issued by an agent of the railroad authorized to issue such bills.[17]

In this connection the sentiment among shippers has been expressed as follows:—

> The practice by agents of railroads of issuing bills of lading for cotton not in hand and as acts of accommodation to favored shippers, conjoined with the denial by said railroads of responsibility for the acts of their agents, has been largely instrumental in producing conditions from which great frauds have grown, with resultant loss to individuals and reproach to the American cotton trade. . . . The logical remedy for the abuses in the through cotton billing system lies . . . in compelling the carriers to assume the responsibility which under every consideration of justice, equity and fair dealing they should bear.[18]

A modification of the Stevens–Clapp Bill was reported by the Senate Committee. It was strenuously opposed as being inadequate and containing defects and ambiguities.[19]

Many of the advocates of the Stevens–Clapp Bill supported it because they thought it had a better chance of passage by reason of its brevity and also because doubts were cast upon the constitutionality of certain criminal provisions of the Pomerene Bill, and those sections (28–43) relating to dealings in bills of lading between third parties. Competent opinion supports them, however.[20]

Although nine states have passed the Bill of Lading Act, it is obvious that for interstate commerce, which means the great bulk of the commerce of the country, a law is needed to cover the whole subject of interstate and foreign bills. Such a law is the uniform act drawn by this Conference, which was introduced by Senator Pomerene of Ohio, and is known in Congress by his name. At the present writing neither of the bills has been passed, but it is hoped the uniform act will be accepted, inasmuch as it presents a complete code on the subject and is already the law of many of the states. It imposes all the liability on the carriers sought to be imposed by the other bill.

A pertinent decision was rendered in Kansas during 1911[21] interpreting the Missouri act and declaring that negotiability of bills of lading gave them full negotiability. This is a contrary view to that expressed by the Supreme Court of the United States.[22] The opinion makes reference to the uniform act.

The Uniform Desertion Act

This act was amended in Massachusetts[23] making provision for the payment of a probation officer.

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[17] Argument of Prof. Samuel Williston, Hearings before Senate Committee, p. 17.

[18] Edmund J. Glenny, President N. O. Cotton Exchange to Senator Clapp.

[19] Counsel for shippers in their brief, after pointing out its various defects, say that "The Pomerene Senate Substitute Bill No. 6810 has now been enacted in nine states and has worked admirably as clearly defining the terms therein used, and has been conducive to the merchants clearly understanding their rights and therefore preventing litigation. The shippers are unalterably opposed to the Bill as reported and in favor of the Pomerene Substitute Senate Bill No. 6810." (Brief of Francis B. James, Esq., of counsel for shippers.)

[20] "This national and international instrument of credit; this national instrument of national and international trade and commerce is more than a mere document of title. It is more than a mere symbolical representative of the goods. It is itself an instrument, with rights attaching to the instrument itself and embodied in its terms. Once Congress assumes to regulate that instrument of commerce, to fully protect it and the rights of persons dealing with such Federal instrument of interstate commerce, it would have a right to carry such regulation to its logical conclusion." Argument of Francis B. James (Hearings before Senate, Feb. 17, 1912). See also opinion of Henry W. Taft, Esq., on constitutionality of Clapp-Stevens Bill (Hearings, etc., pp. 20 and 22).

[21] *Sealy* v. *Missouri &c. Ry. Co.*, 114 Pac. Rep. 1077.

[22] *Shaw* v. *Railroad Co.*, 101 U. S. 562.

[23] Acts of 1912, ch. 264.

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The Uniform Divorce Act

Beyond an occasional outcropping of the proposition to amend the federal Constitution so as to take away the states' jurisdiction, there seems to have been no change of public sentiment on this subject. Commissioners are recmended to have the act introduced in their respective states where legislative sessions are to be held during the coming year, and where objection to other portions of the act cannot be overcome, it is believed that insistence on the jurisdictional provisions will secure support at least for them. Matters of procedure as well as causes may remain as they now are without affecting the status of citizens of other states, the evil of their faults being confined to residents; but the lack of uniformity as regards jurisdictional laws is so far-reaching that no effort should be relaxed to obtain uniformity in them.

PROPOSED NEW ACTS

Cold Storage

The National League of Commission Merchants have approved the findings of the Massachusetts State Commission appointed to investigate the cold storage conditions in that state as "reasonable in construction, sensible in conclusion and free of drastic provisions." The bill proposed by this Commission has been recommended as a suitable basis for enactment in the various states, to the end that cold storage laws may become uniform. The bill provides for the supervision of all public cold storage warehouse and refrigerating plants by the State Board of Health, and compels the operators of such warehouses to maintain complete records as to the dates of receipts and withdrawal of produce lodged therein.[24]

[24] From Commissioner W. O. Hart.

I recommend that the Committee on Purity of Articles of Commerce be instructed to take this matter into consideration, bearing in mind Congressional legislation on the subject, and to report whether it is desirable for this Conference to consider the subject of a uniform cold storage law, with authority to submit the draft of an act.

Vital Statistics

My attention has been called again to the resolution of Congress approved February 11, 1905,[25] expressing approval of the movement of the American Public Health Association and the United States Census Office in an effort to extend the benefits of registration and to promote its efficiency by indicating the essential requirements of legislative enactments designed to secure the proper registration of all deaths and births and the collection of accurate vital statistics in non-registration states, with the suggestion that such legislation be adopted. A model act, patterned in the main after the Pennsylvania law, has been drafted and is in actual operation in that state and in Ohio, Missouri and Kentucky.

It would seem well for the Committee on Vital Statistics to examine this law and, if approved by the Commission it may be added to those recommended by this Conference.

Boiler Inspection

At a meeting held in New Orleans during the month of March, the American Boiler Makers' Association appointed a special committee on the subject of a Uniform Boiler Inspection Law. It was stated that at present there are but five states having laws governing boiler specifications and inspections, Massachusetts leading.

[25] The American Medical Ass'n Bulletin, Chicago, May 15, 1912.

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I recommend that the Executive Committee consider whether or not it would be within the purview of the Conference and expedient to examine the subject with a view to the preparation of a uniform law by the proper committee.

Computation of Time

Suggestion has also been made to have drafted a uniform law as to computation of time. There is no uniform rule at present among the various states. It has been suggested that

> In computing the time for giving notice or doing any act, the day of serving the notice, if served personally, or the day that it is first published, if published in a newspaper, shall be counted. For example, a three days' notice served on May first will be good for any purpose at any time on May fourth after the usual morning business hour. However, when the last day of such time falls on Sunday or a legal holiday, such Sunday or legal holiday shall not be considered; but the following day shall be considered instead of such Sunday or legal holiday.[26]

This also is a subject that I recommend for the consideration of the Executive Committee.

Expert Draftsmen

Where acts of major importance and of considerable length have been prepared by the Conference, in a majority of cases the work has been entrusted by the committees in the first instance to an expert draftsman. I recommend to all committees hereafter the advisability of following this precedent. It has an undoubted tendency to hasten the completion of the work and presents other advantages that are of equal or greater moment. Of course, the expense must be provided for by the Conference.

Social and Political Conditions

In one of a series of articles by Roscoe Pound,[27] he deals with the various schools of thought on the nature of law and of the point of view from which the science of law should be approached. He divides these groups into the Philosophical, the Historical, and the Analytical. He says that in the United States

> the basis of all deduction is the classical common law, the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. . . . Thus the leading conceptions of our traditional case law come to be regarded as fundamental conceptions of legal science, and not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even as in the case of our corporation law, the business man must reckon with them. In consequence, when the Commissioners on Uniform State Laws, in drafting a uniform commercial law, propose changes of existing rules incidentally. we are told they are "codifying in the air and will probably do more harm than good to commerce and mercantile law."

He shows that

> The tendency of practising lawyers to regard the doctrines of the system in which they have been trained as parts of the legal order of nature "is reinforced by our legal training and education."

He quotes: —

> The critical examination of the past is necessary in order to discover the grounds upon which we rest, but the consideration of the future is none the less necessary in order to determine whither we are going. All law is truly of the present; the past is no more, except in so far as its forces operate in the present; and the future is not yet, except in so far as it is already a condition in the present; the present is, therefore, a union of the past and the future. It alone is real. There is something that is often not sufficiently recognized by the Historical School.[28]

The principles upon which this Conference has proceeded, I think it fair to say, have been based upon the doctrine so well stated by the observant

[26] See 38 Cyc. 317; *Ward* v. *Walters*, 63 Wis., 39, 43; *Pittelkow* v. *Milwaukee*, 94 Wis. 651; *Minard* v. *Burtis*, 83 Wis. 267. *In re Babcock's Will*, 133 N. Y. S. 655.

[27] The Scope and Purpose of Sociological Jurisprudence, 24 & 25 *Harvard Law Review*, nos. 8, 2 & 6.

[28] Bluntschli's Critique of Savigny.

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critic, the quotation from whose works I have borrowed from Professor Pound. We have endeavored to put into statutory form the well settled conclusions of the best and weightiest authorities on those subjects that have been selected for reduction to statutory form. But under pressure of the sentiment of the business community we have made some advances in conservative and careful fashion on the rules of existing law in recognition of that common sense of justice, which we may hope becomes clearer as the years go on.

Modern social and political conditions have in recent years caused a general re-examination of the basic concepts of all of our institutions. It could not be expected that municipal law would be overlooked in the general criticism to which all institutions have been compelled to submit. In the midst of an unparalleled industrial prosperity more widely diffused than has ever been known, so far as recorded history can tell us, our American communities have been almost suddenly brought face to face with a spirit of unrest that insists upon demonstration that our frame of government and our system of common and statutory law and legal procedure are the best for our day and generation. Lawyers and professors of the inexact science of the law must justify existing systems or the insistent sense of justice, too often blinded by passion and diverted into selfish channels by demagogues, conscious and unconscious, will shatter them without reverence for tradition or fear of future consequence. Naturally the philosophical lawyer, who is wont frequently to withdraw himself from the incessant demands of immediate duty to his client, to reflect upon the aim and purport of human laws, must take a cautious and conservative view of any proposal of change or reform; but it does not bespeak unselfishness if he resists such change because it may lay upon him the burden of learning a new system, when an old one has become a second nature to him; and it does not bespeak intelligence if he thinks that any system that has shown itself inadequate to meet the ends of enlightened justice can be preserved in the face of a thoroughly convinced public opinion against it.

The end of all human law is to approach as nearly as may be possible by reason, aided by Revelation, to those immutable principles of justice which are of the essence of the Creator's will. To use the well worn words of Blackstone:

> These are the immutable laws of good and evil, to which the Creator Himself, in all His dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly [honorably], should hurt nobody, and should render to every one his due; to which three general principles Justinian has reduced the whole doctrine of law.[20]

Never, perhaps, in the history of mankind has there been such an opportunity to construct a perfect political constitution, so far as human endeavor could avail, as was afforded the gifted and patriotic men who formed the convention that met in Philadelphia in 1787; and never, we may believe, was such statesmanship crowned with more brilliant success. Imperfect as the federal Constitution necessarily was, when compared with an ideal, excepting as it left open the question of slavery, it provided a system under which the American people have flourished beyond all precedent. Interpreted in a broad and tolerant spirit by the great court for which it made provision, it has proved

[20] 1 Bl. Com. 39.

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itself so elastic as to require but few amendments, and stands today as probably the oldest written instrument of government in effective operation. All about us we have seen the fall of ancient systems, until the spirit of unrest has invaded the remote Orient, and even there the experiment of democracy is under trial, but as yet our constitution has survived.

It is a commonplace that conditions of life have been revolutionized since the adoption of the federal Constitution. The slight bonds that held the states together while the slavery question remained unsettled have been indissolubly welded by the Civil War, by steam and electricity. No one, however fanciful may be his political dreams, now suggests that any part of the Republic could flourish dissevered from the Union; but the restless discontent with existing conditions does not hesitate to attack the constitutional system of representative government, offering in its stead some vague suggestions of a pure democracy or a socialized state. The old time devotion to our dual government, Nation and State, has given place in many quarters to a spirit of skepticism that may be the forerunner of disaster. Men forget that government is a reflex image of their own ideals, and no governmental device can of itself make the morality of a people higher than that of the individuals who compose it. For reasons far removed from our political constitutions, which may be traced to the loss of religious faith, to the enervation of luxury and to the whole train of temptations that follow in the wake of material prosperity, the average morality of our people may have fallen below the standard of other days, but not yet so low, we may thank God, that the popular conscience is not quickened by the revelation of dishonesty, whether in personal or corporate affairs. Indeed, it is from an aroused indignation that is blindly striking at this dishonesty, wherever it may have been found or suspected, that our institutions are endangered.

The extraordinary attempts to undermine the popular confidence in the judiciary of the state and nation, we may well hope and believe will fail before the sober reflection of the great masses of the people, but that self-seeking men should have found it possible to obtain consideration for their revolutionary vagaries is proof enough that even the belief in courts as the best machinery for the administration of justice between men is not so widespread but that it needs to be strengthened.

> As a matter of fact [says the editor of a leading law journal [20]] we are living in a transitional period of our country's history, when the people, repudiating the idea of government by representation, are demanding the right to directly interfere in all the processes of government.

And he continues: —

> To our mind, it would be wiser on the part of our various bar associations to recognize this tendency as being deep-rooted and permanent, and seek to direct it in right channels than to ignore it as the work of demagogues, from the effects of which the people will soon recover.

While not accepting the pessimistic conclusion, but devoutly hoping that the movement away from representative government and towards a pure democracy is not "deep-rooted and permanent," but is partly because of a justifiable indignation against wrong-doing that has not arisen entirely from defects in our system, but from the neglect and ultra-partisanship of the people themselves, and recognizing the obvious fact that it has been fanned by the unscrupulous for their own selfish purposes, it behooves lawyers to justify the existing system as essentially the best, to meet

[20] 75 *Central Law Journal*, p. 25.

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with candor the objections brought against it, and to give their hearty aid in bringing about amendment when changed social conditions make amendment imperative. The patriotic wisdom of the people's representatives has enabled us to survive the trials of the past, and we may well believe that they will correct existing evils without surrendering any one of the principles upon which our democratic republic is founded.

These observations upon political and social conditions may not be out of place to a body composed of commissioners from all of the states and possessions of the Union met to perfect uniform legislation, which will have no greater sanction than as it appeals to the sense of justice and expediency of those separate political entities.

Not the least, nay probably the greatest, of the acknowledged abuses of power have had their root in the differing laws, especially the corporation laws, of the states, and the obvious remedy in the minds of superficial thinkers is to accelerate the centralizing tendency and to minimize still further the dwindling importance of the states themselves. The business world is wearied with the harassing taxation of different jurisdictions upon the same subjects; the conflict of jurisdiction has become accentuated in many directions; and unless the people can be convinced that the breaking down of our theory of state and federal legislation will in the end prove disastrous to well ordered liberty, the end of state jurisdiction on many matters of social and business importance will not be long delayed.

In surrendering the dignity of President of the Conference of Commissioners on Uniform State Laws, and taking place for a further time among the ranks, I feel no discouragement either because of the work done or the prospects for the future. To my mind, it is remarkable that so much has been accomplished with so little means to work with. The spirit of devotion to the best interests of the community, of sacrifice of personal ease and well earned leisure during the vacation months of the year by busy lawyers and judges, ought to be, and no doubt is, to the members of our profession and to at least some observant members of the legislatures, a spectacle of high patriotism. For myself, I shall always retain it among the privileges of my life that your confidence has found expression in thinking me in some sort worthy to preside at your conferences. A long, nay unending, vista of beneficent work stretches before us and our successors. In the language of an admired American poet and philosopher,[31] as we look about on existing tendencies and deplore their possible consequences,—

> Let us be of good cheer . . . remembering that the misfortunes hardest to bear are those which never come. The world has outlived much, and will outlive a great deal more, and men have continued to be happy in it. It has shown the strength of its constitution in nothing more than in surviving the quack medicines it has tried. In the scales of the destinies brawn will never weigh so much as brain. Our healing is not in the storm or in the whirlwind, it is not in monarchies, or aristocracies, or democracies, but will be revealed by the still, small voice that speaks to the conscience and the heart, prompting us to a wider and wiser humanity.

[31] James Russell Lowell, "Democracy."

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A Hypothetical Question

By a Contributor Who Prefers Anonymity

DOCTOR, assume that this defendant here
Had lived like any other normal boy
For twenty years and nothing queer
Had shown itself. He found his greatest joy
In baseball, hunting, fishing and the like,
Until one moonlight night he rowed a girl
Across the lake. Her father's name is Mike.
Her hair is red and innocent of curl.
Her nose is freckled like a turkey's egg
And pug to boot. Her figure we dismiss
With one remark — 'twas like a young beer keg.
And then he took to writing verse like this.
Now in the light of modern theory,
Could moonshine have brought on such lunacy?

Meetings of the American Bar Association and Affiliated Bodies

THE thirty-fifth annual meeting of the American Bar Association was held at Milwaukee, Wis., Aug. 27–29. Governor Francis E. McGovern of Wisconsin made the address of welcome, in which he spoke of the popular dissatisfaction with the tendency of courts of law to subordinate the merits of a case to technicalities of procedure, and with what he termed judicial usurpation of legislative power, particularly in questions of the constitutionality of sorid legislation. He also maintained that the recall of decisions was not revolutionary.

MR. GREGORY'S ADDRESS

Stephen S. Gregory of Chicago, president of the Association, discussed the most important developments of federal and state statute law. He said that this is an era of political change. "If I may venture," he continued, "to interpret this wonderful awakening I should say it was inspired by the profound conviction that what the framers of our institutions, state and national, sought, the rule of the people, has not been achieved; and its aim and high purposes are not to destroy these institutions, but so to recreate and reconstitute them as to restore to the hands of the people what seems in a measure to have been lost the actual control of government and its agencies."

Mr. Gregory declared that the most significant action of the last session of Congress was perhaps the adoption of a joint resolution proposing to the states an amendment to the Constitu-

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tion providing for the popular election of members of the Senate. He referred to the Lorimer case as strengthening the popular sentiment in favor of this step.

Speaking of the failure of the peace treaties between the United States, Great Britain and France, he said: "For my part, I feel sincere regret that these treaties were not ratified by the Senate and I think the members of this association, as well as the people at large, are deeply indebted to the President for his sincere and earnest efforts thus to promote the great cause of international peace.

Referring to the action of certain States in extending the suffrage to women, Mr. Gregory said: "It certainly seems as if women were entitled to self-government as well as men."

"THE NEW NATIONALISM"

Frank B. Kellogg of Minnesota, in his annual address, said, in part: —

There is a world movement to liberal democracy. The individual is rising in the scale of importance. More and more he is participating in public affairs. This new idea, this new conception of government, is bursting the bonds of traditional forms and is sweeping away many of our cherished ideals. Its cause we know not. Its ultimate goal we but dimly see. These movements are not the work of demagogues, nor flotsam and jetsam upon the tides of human history. They are deep-seated. They spring from the great mass of the people. They are movements of the public conscience, and never have been and never will be checked or stopped.

[Mr. Kellogg, whose subject was "The New Nationalism," discussed among the great movements affecting the government and the laws of the country, the popular demand for direct participation in the affairs of government, the initiative, the referendum and the recall. Of the new nationalism Mr. Kellogg said] — This movement toward a higher education and more liberal democracy has undoubtedly been largely caused by a general public demand for legislation and control in our industrial life.

We cannot give free rein to human desires, and passions or to the powers of wealth, without endangering the moral and physical condition of the great majority of the people. Such legislation is therefore bound to come. Shall we nationalize it? Shall we make it uniform? Shall it be the movement of the whole people? Shall we guide it into wise channels? Or shall we blindly oppose it, throw obstacles in the way, let it be sectional, and ineffectual?

It is my opinion that the time is coming when the regulation of the transportation lines will of necessity be exclusively in the hands of the federal government. Congress can, through a system of license and incorporation, limit the size, capital and manner of doing business of corporations engaged in interstate commerce. I believe Congress has power either by federal charter or federal license to incorporate and control industrial combinations. I believe the hope of uniform action among the states is an idle dream. It is perfectly hopeless to expect that the forty-eight states, with varying interests, conditions of industry and people, will ever agree to a uniform system of corporation laws which shall properly limit and control corporations engaged in interstate commerce.

FEDERAL INCORPORATION

Congress should pass a permissive incorporation act. It should not be compulsory, because it would be difficult for many corporations now organized under the state laws to change their organization; but with such a statute many corporations would avail themselves of the privilege and would thereby bring themselves completely within the regulative power of Congress or of a commission created under authority of federal law.

There should, however, be a compulsory license, which should be the alternative of federal incorporation, and large corporations engaged in interstate commerce, other than railways and purely transportation companies, should be required to take out a license containing substantially the same restrictions and provisions contained in a federal incorporation act.

I would make this applicable only to corporations whose size gives them the power so to injure and suppress individual enterprise.

Congress should, therefore, in my opinion, provide for such a system of federal license involving control by a corporation commission. Such license should be issued upon condition that the corporation make report and submit its affairs to examination, thereby insuring that

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healthy publicity necessary to large corporations.

I would provide also that any corporation engaged in interstate commerce, after it has acquired a certain percentage of the country (which easily be determined by a corporation commission), should not thereafter further consolidate with its competitors without first having the consent of the corporation commission.

The government should not undertake to regulate prices of products. For the government to do this would be to introduce in to the competitive conditions of a great country all the agitations and selfishness of political parties.

Mr. Kellogg discussed the intitiative and referendum, which he favors under certain conditions, and the recall, to which, when applied to judges, he is opposed.

THE IDEAL OF SELF-LIMITED DEMOCRACY

The address of United States Senator George Sutherland of Utah showed less sympathy with recent popular tendencies than had the remarks of previous speakers.

Senator Sutherland referred ironically to the new political progaganda whose teaching suggests that the written Constitution is binding only upon the minority and that its meaning may be ascertained more accurately by inspecting the casual contents of the ballot box than by invoking the trained and deliberate judgment of the bench. He combated the view that the Constitution is outworn or is a dead wall in the path of progress; he contended that its principles are living forces as vital now as ever. He considered that the over-shadowing and sinister menace to the American social structure is the breaking down of the organic consciousness of the people, and the lessening of the old sense of loyalty to our institutions.

Senator Sutherland called attention to the fact that the framers of the federal Constitution were deeply learned in the science and history of government, and knew both the advantages and weaknesses of democracy, and that a pure democracy was a beautiful but barren and deceptive ideal which has never survived the test of practical experience, because it attempts to carry on a social organism without appropriate organs. While the voice of the people may be the voice of God, neither God nor the people always speak through the majority. This representative republic is a self-limited democracy. He did not question the good faith of the people in seeking the radical changes which are now advocated, but their wisdom in lending ear to the professional demagogue. The speaker considered that the chief value of the Constitution is that it affords a period of sober reflection, and the Constitution rarely presents any obstruction to real progress; when it does the desired result may be reached by amendment rather than violation.

"A JUDGE HAS NO CONSTITUENTS"

He disagreed with those who, in spite of a judicial doctrine recognized for more than a century, now assert that the courts have usurped the power of declaring legislation unconstitutional, and showed by argument that their position is untenable. In respect to the recall of judicial decisions he said that the mischievous unwisdom of such a suggestion is so apparent that its distinguished author does not seem to have pressed it with his customary vigor. He considered that the demand that the courts shall automatically accept the impressions of the multitude proceeds upon a misconception of the judicial office; he insisted that a judge has no constituents; he administers not the edicts of the people, but their laws and statutes; and he is not concerned with anybody's wishes, but with rights; and the poised and balanced scales of justice are the insignia of his office, and not the ballot box.

He recognized the liability of judges to err, but did not think this could be corrected at the ballot box, where men are counted and not measured. He thought that if judges cannot be persuaded by the general voice of reason, they will eventually be supplanted and in the long run the popular view will prevail, if founded on sound premise, otherwise it should not.

SOUND CONSTITUTIONAL DOCTRINE

He emphasized that every provision of the Constitution has a history, and that voters could not act intelligently in ignorance of this history. He urged the need of the steadying influence of the legal profession at this time; and showed that the demand for progressive legislation must be met only upon the sound and enduring basis of private rights and distributive justice. He declared that this could be done better through representative agencies than by direct vote of the people, among whom responsibility cannot be fixed. In his opinion society advances by utilizing services, and not by doing everything itself.

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In his opinion if constitutional and orderly government is to endure, the courts must set their faces against palpable violation of the Constitution, notwithstanding popular sentiment and seeming necessity, for the door once opened cannot then be closed to expediency and mere convenience. The provisions of the Constitution are not as casual as New Year's resolutions, but as old as the struggle for human liberty, and as eternal as anything in this mutable world; we do not outgrow them. The Constitution did not make the Union, but saved it from destruction; the states are the body of the Union, but the Constitution is its soul.

A SYMPOSIUM

The other papers presented at the convention were three in number, making up a symposium on the general topic, "The American Judicial System," divided into three sub-topics, "The Judges," by Henry D. Estabrook, New York; "The Lawyers," Joseph C. France, Maryland, and "The Procedure," Frederick N. Judson, Missouri.

Mr. Estabrook's address was full of humor, but had some serious reflections on the recall of judges, and contained a warning to lawyers and judges to heed the fact that the people are clamoring for their rights and not technicalities in courts of justice.

Joseph C. France of Baltimore in his address said: "In popular speech and literature the lawyer is standing at the bar of public opinion — on the defensive. The season's crop of addresses touching our ethical obligations is already large, and the situation demands respectful attention." He favored raising the standard of admission to the bar and thus helping to keep unworthy men out of the profession.

DEMOCRATIZATION OF THE COURTS

In the third paper of this symposium, Mr. Judson, discussing procedure, said in part: —

This deplorable inadequacy of our judicial system, which is so sharply contrasted with that of other countries, has been developed, at least in the state courts of the United States, during a period of legislative activity which has been directed against the common law independence of the judges and has resulted in effectively limiting their power. It has been a period of a progressive democratization of the courts, which apparently has not yet ended. In the great majority of the states, judges of the state courts are nominated and elected by the people.

Three of the states have adopted the principle of direct judicial recall, so that the judges who make unpopular decisions can be summarily removed from office by popular vote. In many states, the judges are subject to a recall hardly less effective, by the short judicial terms which require them to submit to the judgment of the voters at frequent intervals.

This is the judicial procedure which has proven inadequate for the demands of a busy commercial age, and has resulted in congestion in the appellate courts of many of the states, which has caused delays which are in effect a practical denial of justice. The instructive and impressive conclusion which we must draw from this consideration is that the only effective remedy for this deplorable situation is the vesting of a larger discretion in the judges, so that they may disregard technicalities, regulate the rules of procedure, and inaugurate a reform of the anomalies of our archaic rules of evidence. We must, therefore, retrace our steps, and vest not less, but more independence in our judges.

COMMITTEE REPORTS

Important reports were received from the committees on Remedies for the Law's Delays, Jurisprudence and Law Reform, Patents and Trademarks, Judicial Salaries, Government Liens on Real Estate, Workmen's Compensation, Law Reporting and Digesting, Commercial Law, Insurance, and Uniform State Laws. To show at a glance what was done this year the action on these matters and the other business transacted, are summarized below under separate headings.

The Comparative Law Bureau reported that the translation of the Swiss Civil Code of January 1, 1912, by Robert P. Schick and Charles Wetherill, of the edi-

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torial staff, had progressed so far toward publication that complete proofs had been received, one of which had been forwarded to Professor Huber, the draftsman of the code, at Geneva, who had promised to prepare the introduction of the American edition.

JUDICIAL RECALL REPUDIATED

The members of the American Bar Association, placing their organization on record in opposition to the judicial recall, approved the extended report of a committee headed by Frank B. Kellogg on this subject. This passage is selected as worthy of especial attention: —

> For more than three hundred years the greatest bulwark for the protection of the mass of the people has been the courts. There never was a time in our country when any man, however poor or humble, could not apply to the court and be assured of protection. Is it any reproach upon the courts that they have extended the same protection to the rich and powerful, when assailed by popular prejudice?
>
> The same law which would deny protection to the rich or confiscate the property of corporations, might take the cottage or the liberty of the humblest citizen. You can not attack the courts, and take from them the independence of judges, without endangering the foundations of personal security. We have enjoyed for so many years the protection of wise and liberal constitutional government that we cannot realize there is any danger of ever losing it, but history should admonish us that the moments of self-satisfaction and confident feeling of perfect security are the times of greatest danger. The breaking down of constitutional safeguards does not come by open attack upon free institutions, but under the guise of the popular will. Such encroachments of power in the assumed interests of popular reform are the most subtle and dangerous of all. Do not let the courts become the subject of attack by every disappointed litigant, envious lawyer or domineering political boss. We call upon the lawyers of this country to use their influence to counteract a movement which we believe to be dangerous to the permanency of the government and to the liberty of the citizen.

Seneca M. Taylor of St. Louis brought from the Commissioners on Uniform State Laws a proposed uniform act which will prohibit the marriage in other states of divorced persons who have been prohibited from marrying in any one state. (See p. 474 *infra*.)

Col. J. Ham Lewis of Chicago presented a resolution providing for popular election of all United States District Judges, appointment of judges of the federal Circuit Court of Appeals for terms of seven years, and the right of impeachment of all federal judges by majority report of the House of Representatives. This resolution is to be acted upon by the committee on law reform before the national association reports to Congress.

EXCLUSION OF COLORED MEMBERS

The dispute with regard to the exclusion of colored members was settled in a manner savoring of compromise, a resolution introduced by Hon. Jacob M. Dickinson of Tennessee being adopted. This resolution in effect retained as members the three negroes who had been admitted, but directed local councils in future to certify the race and color of applicants. This means that in future the organization will either be opposed to negroes, or if their names come up members will know the color of the man they are voting for.

The resolution was as follows: —

> *Resolved*, That as it has never been contemplated that members of the colored race should become members of this association, the several local councils are instructed, if at any time any of them shall recommend a person of the colored race for membership, to accompany the recommendation with the statement that he is of the colored race.

There was a heated debate on the adoption of this resolution, which was

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finally carried by an overwhelming majority.

Attorney-General Wickersham, who led the action to effect the continuance of William H. Lewis's membership, was thus successful, the association refusing the proposed action of the executive committee, which attempted to rescind the admittance of the three colored lawyers. On the heels of this action W. R. Morris of Minneapolis, one of the three negroes, resigned from the association, declaring that he did so "because of my sincere respect and unselfish consideration of the best interests of the leading organization of lawyers in the land. My action is intended as that of a lawyer towards lawyers for whose success and progress in their work of advancement I most earnestly and sincerely pray."

The meeting closed with a banquet, the speakers including M. Le Grand of the French bar, Mr. Archambeault, representing the Canadian bar, Frank B. Kellogg, Charles A. Boston, S. S. Gregory, P. J. Allen, Judge Orrin N. Carter. W. U. Hensel of Philadelphia acted as toastmaster.

The following officers were elected: president, Frank B. Kellogg, St. Paul; secretary, George Whitelock, Baltimore (re-elected); treasurer, Fred E. Wadhams, Albany (re-elected); executive committee, Hollis R. Bailey, Boston, Aldis B. Browne, Washington, D. C.; William H. Burgess, El Paso, Tex.; U. S. G. Cherry, Sioux Falls, S. D.; Judge William H. Staake, Philadelphia.

President Kellogg was born in Potsdam, N. Y., Dec. 22, 1856. He moved to Minnesota with his parents in 1865 and in 1877 was admitted to the bar. In 1896 he was married to Miss Clara M. Cook, Rochester, Minn. He was city attorney of Rochester for three years and county attorney of Olmstead county for five years. In 1887 he moved to St. Paul and engaged in practice there. He was counsel for several large corporations until engaged by the Government in trust prosecutions.

Cincinnati was chosen as the meeting place of the Association next year.

SECTION ON LEGAL EDUCATION

The Section of Legal Education of the American Bar Association met August 28–29, papers being read by the Chairman, Hollis R. Bailey of Massachusetts, on "The Work and Aims of the Section"; Chief Justice John B. Winslow of Wisconsin, on "The Relation of Legal Education to Simplicity in Procedure"; Dean Harlan F. Stone, Columbia Law School, on "The Importance of Actual Experience at the Bar as a Preparation for Teaching Law"; and Charles A. Boston of New York, on "The Recent Movement toward the Realization of High Ideals in the Legal Profession."

COMPARATIVE LAW BUREAU

At the meeting of the Comparative Law Bureau of the American Bar Association, held August 26, Governor Simeon E. Baldwin of Connecticut, in his annual address as Director, declared that in its dealings with trusts the United States is far ahead of other countries, exercising vigilance over them while other countries are coddling and fostering them and in some instances supporting them with public funds. He cited numerous instances.

The Bureau chose these officers: Director, Gov. Simeon E. Baldwin; secretary, W. W. Smithers; treasurer, Eugene C. Massie; Frederick W. Lehmann, St. Louis, Andrew A. Bruce, Justice of North Dakota Supreme Court, William Draper Lewis, Dean of the Penn-

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sylvania University law school, Roscoe Pound, John H. Wigmore, directors.

PATENT AND TRADE-MARK SECTION

The Section of Patent, Trade-Mark and Copyright Law of the American Bar Association, meeting August 28, was addressed by its chairman, Robert S. Taylor of Fort Wayne, Ind., and discussed papers by W. A. Redding, New York, A. L. Morsell of Wisconsin, and G. Nota McGill of the District of Columbia.

THE CONFERENCE OF UNIFORM STATE LAWS

The twenty-second national Conference on Uniform State Laws met Aug. 21–26. President Walter George Smith in his annual address spoke hopefully of the progress of the movement for uniformity of state laws, notwithstanding some of the financial handicaps undergone by the Commission. After commenting on judicial decisions bearing upon the uniform acts, he referred to the suggestions that new proposed acts be drafted covering certain topics, such as, for example, cold storage, vital statistics, boiler inspection, and computation of time.

Statements presented at the Conference show that the Negotiable Instruments Act is now in force in forty states, territories, possessions and the District of Columbia; the Warehouse Receipts Act, in twenty-four; the Sales Act, in ten; the Stock Transfer Act, in five; the Bill of Lading Act, in nine the Foreign Wills Act, in six; the Divorce Act, in three; the Family Desertion Act, in four; Child Labor Act, in one. All the states, territories and possessions of the United States are now represented in the Conference either by virtue of legislative action or by the exercise of the Governor's discretion.

One of the most important matters to be acted upon by the Conference was the report of the Committee on Marriage and Divorce, with a draft of an act on the subject of marriage in another state or country in evasion or violation of the laws of the state of domicile. This act, submitted by Walter George Smith, chairman of the committee, after full discussion, was approved by a vote of 19 to 12, but was later recommitted for further consideration. The proposed act is as follows, the title being purposely meagre and the penalty clause incomplete, the omissions to be supplied upon submission to the several states:

AN ACT TO PREVENT THE EVASION OF LAWS PROHIBITING MARRIAGE

Section 1. Be it enacted, etc., that if any person residing and intending to continue to reside in this state, who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

Section 2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction, and every marriage celebrated in this state in violation of this provision shall be null and void.

Section 3. Before issuing a license to marry to a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from marrying by the laws of the jurisdiction where he or she resides.

Section 4. Any official issuing a license with knowledge that the parties are thus prohibited from intermarrying, and any person authorized to celebrate marriage who shall knowingly celebrate such a marriage shall be guilty of a misdemeanor.

The action of the Conference on the

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various committee reports is summarized below (see especially "Uniformity of Laws").

Charles Thaddeus Terry of New York was elected president to succeed Walter George Smith of Philadelphia, the latter having served for three successive years, the maximum allowed by the constitution. John Hinkley of Maryland was elected vice-president, Talcott H. Russell of Connecticut, treasurer, and Clarence M. Woolley of Rhode Island, secretary. The following is the new Executive Committee: William H. Staake, Pennsylvania, Chairman; James R. Caton, Virginia; Nathan William MacChesney, Illinois; Seneca N. Taylor, Missouri; C. A. Severance, Minnesota; Charles Thaddeus Terry, New York, *ex-officio*; John Hinkley, Maryland, *ex officio*; Talcott H. Russell, Connecticut, *ex officio*; Clarence M. Woolley, Rhode Island, *ex officio*; Walter George Smith, Pennsylvania, *ex officio*.

THE ASSOCIATION OF LAW SCHOOLS

The Association of American Law Schools held its twelfth annual meeting August 26–27. President Roscoe Pound of Harvard University delivered an address on "Taught Law," while "The Place of Equity in Our Legal System" was the subject of a paper by Prof. Walter W. Cook, University of Chicago, Prof. Wesley Newcomb Hohfeld of Stanford University opened the discussion. Dean William G. Hastings of the University of Nebraska offered a paper on "Moot and Practice Courts." The Association voted to admit to membership the law departments of the University of Kentucky, University of California, Dickinson, University of Tennessee, and Marquette University.

SUMMARY OF BUSINESS TRANSACTED

Admiralty. The committee in charge of bills relating to admiralty reported to the American Bar Association that it had asked Congress to enact measures relating to the maintenance of suits for death upon the high seas and other navigable waters. The report was approved.

Bill Drafting. The American Bar Association, on motion of Dean William Draper Lewis, adopted a resolution for the appointment of a committee of seven to devise an agency for effectively and scientifically assisting Congress in the drafting of its laws. The motion was carried and the committee will be appointed by the president and report at the next meeting. The motion practically means that the committee is to study and investigate the proposition of a bill drafting department for Congress, like that which is in vogue in Wisconsin.

Bankruptcy. Adopting the recommendations of its Committee on Commercial Law, the American Bar Association approved of efforts to prevent repeal of the national bankruptcy act.

Bills of Lading. The American Bar Association approved of the attitude of its Committee on Commercial Law, in preferring Pomerene Senate Substitute Bill No. 6810, as in substantial harmony with the uniform act now in force in nine states.

Child Labor. Uniform Child Labor Act Law Approved by American Bar Association.

Cold Storage. Question of a uniform act referred to a Committee on Purity of Articles of Commerce by Uniform State Laws Conference.

Corporations. Third tentative draft of Uniform Business Corporation Act received by Commissioners on Uniform State Laws from Committee on Uniform Incorporation Laws. Authority given the committee to employ an expert and submit a new draft.

Expert Testimony. The question of a uniform law concerning expert testimony, based upon the Maine statute, was presented to the Uniform State Laws Conference, and a special committee on co-operation was directed to bring the matter before the Institute of Criminal Law and Criminology so far as such an act would have a bearing on criminal procedure. The Conference deemed it inexpedient to take further action at the present time, or to consider the question in its relation to procedure in civil cases.

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Government Liens on Real Estate. American Bar Association approved amendments to the federal statute as drafted by the special committee.

Incorporation. See Corporations.

Insurance. Committee on Insurance Law of American Bar Association again submitted its proposal for a commission to prepare an insurance code for the District of Columbia with the aim of securing a model law suitable for adoption by the several states. This proposal was approved for the third time.

Judicial Salaries. A resolution was adopted by the American Bar Association requesting President Taft to send a message to Congress recommending an increase in the salaries of federal judges. Later there was heated debate as to whether the resolution should be amended to read "President of the United States," and the matter was tabled.

Law Reporting. Report of Committee on Law Reporting and Digesting approved by American Bar Association. It suggests the desirability of having the statutes of all the states arranged according to a uniform plan in future compilations and revisions. It also favors the preparation of a digest which should group together the provisions of the statutes of all the states upon important subjects, and indicate the judicial construction which they had received in state and federal courts. It would add greatly to the value of such a work if it should indicate what has been the course of legislation and judicial decision on important topics in England, Canada, Australia and New Zealand.

Marriage and Divorce. Uniform Act to prevent evasion of marriage laws of state of domicile by marriage in another state approved by Commissioners on Uniform State Laws. (See p. 474 *supra*.)

The American Bar Association approved of the Uniform Act Relating to and Regulating Marriage and Marriage Licenses.

Negotiable Instruments. Proposed Amendments to Uniform Act referred back to Committee on Commercial Law of Uniform State Laws Conference for further consideration.

Partnership. Sixth tentative draft of Uniform Partnership Act referred back to Committee on Commercial Law by Commissioners on Uniform State Laws.

Procedure. The American Bar Association appointed a committee to ask Congress "to empower the United States Supreme Court to prepare and put into effect a complete correlated system of pleading and procedure for the common law side of the federal courts, as is now being done for the equity side."

The Uniform State Laws Conference approve the proposition for a Uniform Act, but deems it inexpedient to enter upon the task at present.

Pure Food and Drugs Act. American Bar Association approved of conclusions of Commissioners on Uniform State Laws that provisions of the federal act of 1906 should be copied by the states.

Recall of Judges. Resolution again adopted by American Bar Association denouncing the recall.

Taxation. Uniform State Laws Conference referred proposed act back to Committee on Situs of Real and Personal Property for Purposes of Taxation, authority being given to confer with the National Tax Association.

"Third Degree." The Committee on Jurisprudence and Law Reform reported to the American Bar Association that the so-called "third degree" abuse existed, but that, as it was local, the Association was not called upon to act; that the law as to the admissibility of confessions was well settled, and, if enforced, it was perhaps all that could be desired; that the committee was afraid that the safeguards thrown around the prisoner could not well be extended without seriously hampering the administration of justice. The Association referred this matter back to the committee for further consideration.

Torrens System. Committee of Uniform State Laws Conference recommended that the Conference should not act till more light has been thrown on the subject. John H. Wigmore presented dissenting report. Majority report approved by the Conference.

Uniformity of State Laws. See Child Labor, Cold Storage, Corporations, Expert Testimony, Marriage and Divorce, Partnership, Procedure, Pure Food and Drugs Act, Taxation, Torrens System, Workmen's Compensation.

Workmen's Compensation. The American Bar Association approved the report of the Committee on Compensation for Industrial Accidents and their Prevention. This committee reported that it had held several meetings, co-operating as much as possible with the committees on the same subject of the National

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Civic Federation and the Commissioners on Uniform State Laws.

The committee had carefully examined many of the compensation laws adopted or proposed in the various states, but was not prepared to recommend any particular form for the approval of the Association. The consensus of opinion was that uniform laws for compensation for industrial accidents should be enacted by all the states and by the United States within its jurisdiction, and such a law should be based on the following principles:

1. It should be compulsory and exclusive of other remedies for injuries sustained in course of industrial employment.
2. It should apply to all industrial operations or at least to all industrial organizations above a certain limit of size.
3. It should apply to all accidents occurring in the course of industrial operations, regardless of the fault of any one, self-inflicted injuries not being counted as accidents.
4. The compensation should be adjudicated by a prompt, simple and inexpensive procedure.
5. The compensation should be paid in regular instalments, continuing during the disability, or in case of death, during dependent period of beneficiaries.
6. The compensation should be properly proportioned to the wages received before injury.
7. The compensation should be paid with as nearly absolute certainty as possible, in the most convenient manner, and there should be adequate security for deferred payments.

The committee reported that it was not prepared to say to what extent the state should "control or participate in, insure and adjust liability for industrial accidents." It would be "better prepared to report on this branch of the subject after some of the laws have been enacted, and those which have been enacted shall have been more fully tested." Finally, the committee expressed the opinion that a very important branch of the subject was the prevention of industrial accidents, and that every effort should be made to procure the adoption of uniform laws for the proper safeguarding of industrial employees from accident. This element should always be considered in connection with any scheme for compensation for industrial accidents.

The Uniform State Laws Conference also considered the subject, tentatively approving the draft of a compulsory act, with certain amendments, in preference to an elective one.

Newspaper Comment on "Color at the Bar"

THE controversy which unfortunately arose in the American Bar Association with regard to the exclusion of colored members provoked comment in the press throughout the country. The New York papers for example showed unanimity in their criticisms. The *Tribune* called the action of the Bar Association "unworthy of a body of such fine purpose and personnel. The *Times* called it an exhibition of narrowness that will harm the association. The *Mail* thought it "not very civilized." It was termed "a sneaking settlement" by the *Globe*. The *Evening Post* considered that, while the association had harmed itself, it had "rendered a positive service to the cause of democracy" by calling forth such vigorous expressions of protest.

Other typical opinions are as follows: —

New York Sun

Is it in this way that prosperous lawyers, many of them having enjoyed every advantage of birth and education and social environment, many of them having worked their way against every obstacle of iron fortune, except the indelible and unpardonable matter of pigment — is it thus that they encourage a race to rise? Thus, when there is much distrust of their profession, does it prove its broad sympathies, its humane and popular instincts, its freedom from prejudice, snobbery and "class" feeling?

Boston Herald

As regards Mr. Lewis, the deeper question is whether membership in the American Bar Association shall be restricted to lily-whites or extended to men.

Chicago Tribune

The effect of the association's action is to raise the color bar. No quibbling can obscure that. The association thereby is placed in a different light. The social element of all or-

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ganizations is now made a primary consideration. A private club has a perfect right to bar black men or yellow, red-haired men, or any other men.

But the American Bar Association has been accepted as a public institution, broadly representative of the profession of the law, and primarily if not exclusively concerned with the responsibilities, problems, and interests of that profession. . . .

The association's action will be interpreted as a declaration that negroes should not enter the profession, and when addmitted should not be accepted as honorable and useful participants in its professional public concerns. This is deplorable. While there is a belief that race mixture means race deterioration, there is reason for the objection to the social intercourse of whites and blacks. But there are 10,000,000 negroes in the American rebublic, one-ninth of our whole population, and they cannot and will not be kept indefinitely in a condition of isolation. Those who prove themselves fit for the learned professions or fit to serve society's need in any capacity should be given encouragement and recognition in that work.

The American Bar Association has set a bad precedent.

Omaha Bee

This squabble over negro members we have referred to as a tempest in the teapot. Everybody knows that color is but skin deep, and that a lot of people with white exteriors are blacker underneath than the darkest Senegambian who ever came out of Africa. . . . We repeat that a man need not have a black skin to have a black record, and the graduations of the one should demand as much, at least, attention as the gradations of the other in conferring the Bar Association patent of legal nobility.

Philadelphia Public Ledger

If the American Bar Association is to set the example of closing the door of hope and of opportunity in the face of the Negro, what reasonable expectation has he of establishing his claim to be something better than a menial and an artisan, and demonstrating the possession of intellectual capacities that fit him for employment calling for the exercises of the thinking faculities? In these days we have much to say of social regeneration of the "uplift" of the down-trodden, of the doctrine of human equality, of the evolution of character, however handicapped by environment and heredity. Are these mere phrases of buncombe and rhodomontade? Do we mean what we say, or do we idly, insincerely prate of a social creed we have no intention of carrying into execution? In view of the cold and selfish policy of exclusion pursued by the Executive Committee in the name of the Bar Association it professes to represent, the Negro would be justified in presuming that his dream of recognition of his merit, independent of his color, it but a fond delusion and a cruel mocking.

Boston Post

This solution of a very awkward complication must be regarded as satisfactory, even while recognizing the compelling conditions as ridiculous. There is absolutely no question as to the qualification of the three members who have been admitted, as regards professional attainments; but never again must it occur through lack of information as to the color of the skin, which counts for more than the texture of the brain.

Springfield (Mass.) Republican

The American Bar Association by such action seems to transform itself into a kind of social club, which is inherently absurd.

Rochester (N. Y.) Democrat

In the manner in which it disposed of the mooted question of the admission of three negroes to membership, the American Bar Association at its convention in Milwaukee showed what scant pride it took in its course. Cutting off all opportunity for discussion, it devoted ten minutes to passing a resolution providing that hereafter when a negro was nominated for membership in the association his race must be given. . . . The action of the association was irrational and ungenerous; the members undoubtedly felt that it was, and that part of the public not wholly swayed by prejudice knows that it was.

Council Bluffs (Ia.) Nonpareil

This is not drawing the color line, is it? No, no! It is merely polite notice to all colored lawyers that the gun behind the door is loaded. But how lawyerlike the whole thing turned out! The A. B. A. certainly has "the punch."

Jacksonville (Fla.) Times-Union

When the American Bar Association declared that negroes who had been admitted might stay but no more should come, they must have realized that they had plunged into hot water, but they are probably finding the temperature pretty high. However, their troubles are not ours; the South long since admitted the claim

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advanced by those negroes who could stand the tests proposed, and there is not a Southern state in which negroes may not practice the profession in the courts. . . .

Because three colored men or three thousand have duly qualified under the rules for admission to the American Bar Association, does it follow that the mental and psychical equality of the negro must be admitted? Because colored men have proved themselves good soldiers, able captains, logical speakers, learned scholars, acceptable writers, preachers, statesmen and citizens of repute, does it follow that the negro race is to be accepted as equal, even in its possibilities, to the Caucasian brotherhood? The question should answer itself, but it is well to repeat that answer as long as there is need of its iteration.

The Meeting of the American Institute of Criminal Law and Criminology

THE fourth annual meeting of the American Institute of Criminal Law and Criminology was held jointly with the Wisconsin branch of the same organization in Milwaukee Aug. 29–31, with Chief Justice John B. Winslow of Wisconsin, president of the Institute, in the chair. The chief papers presented were the president's address, the annual address, delivered by Hon. Franklin L. Randall of Minnesota, and the address of Judge Alexander H. Reid, president of the Wisconsin branch. The committee reports received were more numerous than those presented at the preceding sessions of the American Bar Association, and the six sessions were largely given up to discussion of these significant reports.

In opening the meeting, Governor McGovern of Wisconsin referred to the failure of the price received by the state from contractors for the convict labor at Waupun to pay the expenses to which the state is subjected for the maintenance of the convicts. The best feature of the system, he said, is that it gives the convicts employment; but he felt confident that their labors should produce a greater revenue to the state and should be diverted to a direction in which convicts might acquire skill that would enable them to find employment outside the prison after the expiration of their terms.

Chief Justice Winslow emphasized the fact that the most significant characteristics of modern civilization are the great movements for universal education, for more complete democracy in government and for more perfect social service. He classed the work of the Institute as social service of the highest type.

The hopes of the Institute regarding the social service it should render he described as follows: —

It hopes to make the administration of the law simple, the results certain, prompt and just, and mere useless delays impossible, remembering at the same time that speed is only desirable when it is accompanied by justice; it hopes to permanently remove from contact with society the confirmed criminal and the moral degenerate, and ultimately to eliminate the criminal class; it hopes to abolish the practical seminaries of crime now existing in the penal institutions where all classes of criminals are indiscriminately massed together; it hopes by the wise use of the parole and probation system to make reform of first offenders the rule and not the exception; it hopes to apply scientific methods to abnormal

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offenders and to provide for such offenders such therapeutic, disciplinary or segregative treatment as expert advice shall indicate is the best means of restoring them to a normal condition; it hopes to surround the juvenile criminal with the sympathetic care of a foster parent and rescue him from a career of crime rather than to consign him to the company of abandoned criminals where an advanced education in crime is inevitable."

Franklin L. Randall, superintendent of the Minnesota state reformatory, treating "The Treatment of Offenders after Conviction," described the male convicts as he had found them at the institutions under his care, indicating the character of teaching and training that they require for their reformation and for the best protection of the interests of society.

He referred to their congenital and acquired incompetency and to the misfits and defectives in the various public institutions. He advocated the individualization of punishment and treatment and pointed out the difficulties that embarrass judges when called upon to sentence convicted persons of whose individuality and previous history they are usually ignorant. He suggested that the work of the court and its officers should cease with the conviction of the offender and his commitment, except in cases where it appears clearly that the person may be properly released upon probation under supervision.

Mr. Randall also advocated the establishment of a commission to receive all persons found guilty by the court and to sort them out at a receiving station, assigning them to those state institutions where they will receive effective treatment looking to their rehabilitation. He would give to such commission, however, full authority to transfer convicted persons from one institution to another as often as necessary and to release them finally only when it seems clear that they are fitted to be at large. He favored a state custodian asylum for the criminal insane, the habitual criminals, and those who by their conduct have shown themselves to be incompetent to refrain from criminal action.

Judge Reid, president of the Wisconsin branch, discussed the administration of the criminal law by the Wisconsin courts, speaking highly of the record made by his state, thirty-three out of thirty-six convictions having been affirmed on appeal in the last few years. He felt justified in challenging anyone to find in the recent past or the immediate future any glaring mis-carriage of justice due to any technicality. He said that he would not advocate giving to the judge the right to express to a jury his opinion of the guilt or innocence of the prisoner.

The report of Committee G, on Crime and Immigration, Gino C. Speranza, chairman, was presented, the conclusions being as follows: —

1. Let us strengthen our ridiculously weak methods of exclusion of alien criminals; let us ask for a passport showing the criminal record, if any, of the arriving alien and let us insist that the alien's photograph accompany the passport lest a common trick of alien criminals nullify our efforts to bar them.

2. Let us enlarge the power of deportation both as to the time within which this government may exercise it and as to the acts for which it may be exercised. To my mind nothing would be so effective as a provision making alien criminals deportable for any crime committed here within five years of their arrival, such deportation to take place at the expiration of their sentence.

3. Let us profit by the experience of older countries in the war of the state against crime by overcoming our national prejudice against a secret police. The benefits resulting to the law-abiding citizens of large cities like New York and Chicago by a corps of secret detectives on their police force would be incalculable.

4. Let us learn to give full faith and credit to the efforts of foreign governments to appre-

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hend criminals. We are too apt to imagine either that foreign governments are happy and anxious to dump their criminals upon us, or that when, by extradition proceedings, they attempt to get some of their criminals back such proceedings are only a mask for vindictive political action. But countries like Italy which derive an immense benefit by the emigration of their honest citizens are very much interested that the criminal element, small at best, should not affect the preponderatingly honest and useful migatory current. On the other hand, our attitude is unjustified in viewing every extradition proceeding as an attempt to get back a political offender. There are some very dangerous foreign criminals at large today in this country whom we have declined to surrender because technically the proof against them of murder, for instance, would not come up to the finest Anglo-Saxon probative grade. Surely we should welcome for our own interest such modifications of existing extradition conventions as would substitute for the present uncertain and expensive method of surrendering fugitives a simple and inexpensive one.

Lastly, let us bear in mind that nowadays crime in many cases can be effectively handled only by international action. No country is more vitally interested in this than our own, made up, as it is, by so many foreign elements. In our battle against crime we must and should welcome international co-operation. We must act on the assumption that nobody loves a criminal and that the only safe way against him is to segregate him not only from one country but from all countries. Let us therefore encourage international conferences on this subject and welcome the efforts of other countries in this respect.

The report of Committee F, on Indeterminate Sentence and Release on Parole, was presented by Edwin M. Abbott of Philadelphia, chairman. It contained a valuable summary of state and federal legislation on the subject. Mr. Abbott contended that the time has arrived when a uniform law upon the subject has become necessary, and that by a careful comparison of the systems of the various states a bill could be drafted which might be adopted not only by the states in which the system is now in use, but also in those states which have thus far not adopted it. Mr. Abbott does not regard the indeterminate sentence as an essential part of the system; the objection to it is that it places the actual punishment of the prisoner within the discretion or possibly within the will, caprice or whim of a prison or parole board.

In regard to the discharge of a paroled prisoner, great diversity exists in the statutes of the several states. The system which Mr. Abbott apparently regards as one of the best is that of New Mexico, by which the superintendent keeps in touch with the parole, and at any time after six months of exemplary service he may recommend him to the Board of Parole for official discharge. If the board consider the case favorably, they certify the same to the trial judge for his approval; if this is secured, the record is transmitted to the Governor, whose action is final.

Not only in this country, but throughout the world, [says the report] the treatment of convicts as still worthy of reclamation is growing. The extension of the parole system to life-termers, after serving a lengthy term in prison, is another evidence of the trend of mind which the public is assuming. Of course, in many states pardons have been procured for life-termers, but the growing substitution of a system of parole after fifteen or twenty years in prison, or in some instances even less, with a close scrutiny upon the actions of the paroled convict, adds a humanitarian zest in the expansion of the parole system. In Germany, in England, in Austria, in Norway, in Switzerland, in Finland and in other European nations has the system of parole been established and expanded. . . . The parole system continues to grow with mighty force. The results have justified the adoption of this system of mercy. Nearly every state where it has not as yet been given a trial has the matter under consideration.

Committee A, on System for Recording Data Concerning Criminality, reported through its chairman, Judge Harry Olson of Illinois. It has not been easy, he said, to secure from all

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criminals all the data concerning heredity and personal history that was planned by the Institute three years ago. Effort for complete data, it was recommended, should be confined to selected individuals who may present themselves as peculiarly interesting, significant or practicable for such investigation. The committee urged there should be connected with the court a doctor of medicine or a man whose training makes him proficient in the recognition of nervous and sensory disorders, with psychological training to execute the anthropometrical, medical and psychological examinations.

Committee No. 3, on Criminal Statistics, reported through John Koren of Massachusetts, chairman, that data collected from the chief justice of every appellate and supreme court in the country show that a gradual change is taking place in criminal practice. It used to be in every state that every case of the grade of felony was presented by indictment. There are now twenty-four states in which criminal cases are prosecuted by information. Grand juries, while retaining all their former powers, do not exercise them. The responsibility for investigating an alleged crime rests on the district attorney.

Reports were also received from Committee D, on the Organization of Courts; Committee C, on Judicial Probation and Suspended Sentence; Committee E, on Criminal Procedure; Committee B, on Insanity and Criminal Responsibility, and the committees on co-operation with other organizations, translation of European treatises, and state societies and membership. In addition, many reports by committees of the Wisconsin branch were received.

A plea for simplicity in the instructions of a judge to a jury was made by Justice Charles A. DeCourcy of Massachusetts.

The "long-winded present instruction, replete with compound legal phrases, only tends to confuse the average juryman," he contended, whereas a brief and simple charge in words almost bordering on the "language of the street" would make the meaning more plain.

As a whole, the annual meeting is accounted one of unusual success. Decisive steps have been taken, it is believed, that will have strong bearing on the desire for progressive and uniform laws in the several states, and it is believed that official opinion expressed as to needed improvement in criminal procedure will have good effect throughout the country.

The officers chosen are:

President, Orrin N. Carter, Chicago, Chief Justice of the Supreme Court of Illinois; vice-presidents, Charles A. DeCourcy, Lawrence, Mass.; Franklin L. Randall, St. Cloud, Minn.; Charles R. Henderson, Chicago, Ill.; Robert W. McClaughry, Fort Leavenworth, Kan.; Jane Addams, Chicago; treasurer, Bronson Winthrop, New York; secretary, Eugene A. Gilmore, Madison, Wis.; executive Board, John B. Winslow, Madison, Wis.; Chief Justice William Gemmill, Chicago; Edward J. McDermott, Louisville; George W. Kirchwey, Columbia University; Edwin M. Abbott, Philadelphia.

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Reviews of Books

THE CONSTITUTION AND SOCIAL QUESTIONS

Social Reform and the Constitution. The Kennedy Lectures for 1911, in the School of Philanthropy conducted by the Charity Organization of the City of New York and affiliated with Columbia University. By Frank J. Goodnow, LL.D., Eaton Professor of Administrative Law at Columbia University. American Social Progress Series. Macmillan Company, New York. Pp. 359+6 (index). ($1.50 *net*.)

THE topic of this book is so often treated discursively by partisans alike of the conservative and progressive theories of governmental functions, and in its legal aspects has so commonly been dealt with fragmentarily by writers merely surveying some particular portion of the field, that it is a pleasure to peruse a book which affords a treatment that is unified, logical, and thorough, that is free from partisan bias, and that maintains the character of an ably prepared legal essay. The writer undertakes to answer the most pressing question of the day, and by a procedure which is analytical rather than argumentive, he gradually formulates its answer. From the path thus chosen there is no deviation, and we approach the goal of the concluding chapter with a feeling akin to one of dramatic suspense. It is unusual to find the matter of a book so well grouped in accordance with a definite scheme of procedure. Professor Goodnow's treatment, moreover, is so well rounded and thorough that it is sure to provide a useful basis for study of the bearings of every latest decision involving interpretation of the federal and state constitutions. A satisfactory presentation of the existing situation has long been needed, and the helpfulness of Professor Goodnow's book can hardly be overrated.

The question of which this book seeks to furnish the solution is briefly that whether under the prevailing rules of constitutional interpretation our constitutional system can fully meet every strain which may be placed upon it in future by popular insistence on a liberal social program. The writer does not pose as the advocate of the new social program, but he does urge the need of a sufficiently flexible system to yield to new pressures and guard against the danger of a violent upheaval. He is of course fully justified in his fears that too literal an application of the principle of *stare decisis* to the interpretation of a Constitution that had its birth in eighteenth century doctrines of natural rights, social compact, *laisser faire*, and separation of powers, if persisted in, must lead sooner or later to disastrous results. He is also right when he repeats Governor Baldwin's remark that there is probably no other country in the world that would submit to the power exercised by the American judiciary in overriding legislation. There is thus a very serious question whether our system of government is framed in a manner which is going to enable the country to meet successfully such conditions as those to which the governments of Europe have had to respond. In taking up this question, the author distinguishes between measures of political and of social reform, and adopts a lucid and convenient classification of the social reform proposals under three heads, government ownership, government regulation, and government aid. This simple classification is broad enough for every purpose, for under the first head are comprised such measures as

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public insurance, under the second, for instance, labor legislation and regulation of monopoly, and under the third, pensions and the use of public funds to assist the poor to obtain homes. The attitude of the courts toward all the political and social reform proposals is analyzed, with frequent citation of cases decided. The decisions of the United States Supreme Court naturally receive most attention, but in so far as the problem is a state as well as a federal one, every element which the states contribute to the complexities of the situation receives adequate recognition. The exposition shows clearly to what extent the courts have adopted the more liberal rules of construction, and how, reasoning by analogy, we may infer from the manner in which particular subjects have been dealt with in the past the probable solution of the more or less closely related problems of the future.

The conclusion reached is that while it is reasonable to expect that a very large number of the new reform measures will succeed in securing the sanction of the courts, there are some measures which we "are probably precluded from adopting because of the attitude *now* taken by our courts towards our practically unamendable federal Constitution." (We italicize the word *now* because the author is not really so pessimistic in his outlook as the quotation might seem to imply.) Among such measures he cites government pensions where the recipient is not actually a pauper, the regulation of hours of male labor in other than harmful trades, regulation of the use of urban land, and employment of the powers of taxation and eminent domain for the benefit of the needy classes. He also doubts whether the distinction between interstate and intra-state commerce, and the decentralization of private law which the uniform state laws movement can hardly hope to overcome, make it possible for our political organization to develop in accord with economic conditions which in their nature are national rather than local.

Professor Goodnow does not conclude, in view of this situation, that our constitutional system cannot adapt itself to future exigencies. On the contrary it can if the courts are made to feel the pressure of public opinion. It is practically impossible to limit the powers of the judiciary, he says, consequently our only recourse is a persistent criticism of those decisions "which evince a tendency to regard the Constitution as a document to be given the same meaning at all times and under all conditions, and which fail to appreciate that the courts in our system of government have been accorded a really political function, and that, with our Constitution in the position in which it actually is, courts should not absolutely block change although they may quite properly limit the rate at which it may proceed."

Careful to avoid an inference that the courts may be expected to apply more liberal rules of constitutional interpretation in future than they have in the past, Professor Goodnow, if he errs at all, errs on the side of undue caution. Sound lawyer that he is, he keeps carefully within the bounds of the law actually declared. If a paradoxical phrase may be employed, he is a strict constructionist, not of the Constitution, but of the rules of liberal construction which the Supreme Court has itself applied. Of the possible elasticity of these rules, of the possibility of their becoming broadened still further to meet almost every conceivable exigency, he has nothing to say. Because of the same

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general tendency — a slight formalist as opposed to a sociological tendency it may be — he seems tempted to underrate the flexibility of our written Constitution, which some contemporary writers on constitutional law may be disposed to regard as not much less flexible, in reality, than an unwritten one. Whether the measures he mentions in his concluding chapter are definitely outside the pale of the existing rules of construction, liberally applied, may indeed be questioned. But if they are public opinion will undoubtedly compel the adoption of broader rules, and this will come about inevitably without a deliberate attempt of individuals to influence public sentiment.

BLAKEMORE AND BANCROFT'S INHERITANCE TAX LAW

The Inheritance Tax Law; containing all American decisions and existing statutes. By Arthur W. Blakemore of the Boston bar, author of Massachusetts Court Rules Annotated, and "Wills" in the Cyclopædia of Law and Procedure, etc., and Hugh Bancroft, formerly District Attorney, northern district of Massachusetts, author of Inheritance Taxes for Investors. Boston Book Co., Boston. Pp. 1280 + 96 (tables index). ($9.)

THE inheritance tax law is new. It comprises chiefly decisions interpreting statutes which leave little room for original reasoning and require principally accurate compilation and classification. Our highly developed hostility to the simple duty of good citizenship to contribute to the support of the government has multiplied ingenious efforts at evasion. These have to be evolved from the highly technical field of powers and future estates wherein the antique lawyer reveled. Where it touches this field the subject presents opportunities for display of learning and acumen that it cannot be said the authors have taken the fullest advantage of. They have, however, done well the pioneer work of analyzing and collecting statutes and decisions, and have produced a book in which the practitioner can find quickly what has been said on his point.

The first part of the book is a treatise on the general subject. The latter half is a collection of the various state statutes annotated so that the reader may search for his authority by either method. The history of the state statutes is shown through reprints of the earlier forms of statutes to illustrate the interpretation of the most recent ones. There is a chapter on methods of avoiding the tax, which will be well thumbed. The book contains an excellent index of nearly one hundred pages. It is arranged clearly with all the modern aids of varied type.

A REALISTIC ACCOUNT OF PRISON LIFE

My Life in Prison. By Donald Lowrie. Mitchell Kennerley, New York. Pp. 422. ($1.25 *net*.)

A BOOK of such absorbing interest as this can do more than many volumes of penological discussion for the improvement of our penal system, and Mr. Lowrie's purely descriptive treatment of life in a very badly administered prison — ignoring the question whether the fault lies with the prison officials or the state itself — at no time runs counter to the teachings of penological science. He is not a sentimentalist setting forth any crude, squeamish opinion regarding the rights of criminals, for his attitude could not possibly offend any one save those who refuse to consider criminals human beings. Nothing that he has written implies disapproval of any measure that may be necessary for the protection of society or for the effective maintenance of prison discipline. But every page ex-

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presses his disapprobation of the base, inhuman tortures that serve no useful end, and of the stupid blunders, arising from callousness or indifference, which tend to encompass the complete ruin of the prisoner morally, mentally, and physically, so that he is worse, instead of better, when he leaves prison than he was when he entered it.

The book is not argumentative, the writer merely setting forth facts within his own observation, without comment, but it does, by implication, offer very powerful arguments for such important reforms as the selection of competent, adequately paid prison officials, the classification of offenders, the prohibition of inhuman punishments, regulation of solitary confinement to prevent its abuse, maintenance of good hygienic conditions, and adequate protection of the prisoner from moral and physical deterioration.

It is desirable that such a book be read very widely, for the laxity of prison administration, and the consequent abuses arising in like degree under any theory of punishment, whether retributive, protective, or deterrent, are not likely to be remedied without the cooperation of a new public sentiment. It is of course difficult for state administrators to awaken or mould such a sentiment. But once created, it may be guided by men who have made an expert study of penal problems into channels leading to an efficient, sound, and moderate policy.

NEW YORK STATE BAR ASSOCIATION REPORT

THE Report of the Proceedings of the thirty-fifth annual meeting of the New York State Bar Association at New York City, January 19 and 20, contains discussions on subjects of especial timeliness and importance, such as the reform of procedure in the courts of New York, revision of the land title registration law, improvements in the existing law of the criminal insane, corporation law in relation to corporations having shares of capital stock without nominal or par value, contingent fees, the recall of judges, salaries of federal judges, the mode of election of candidates for judicial office, and workmen's compensation.

The Report also contains papers of importance read at the meeting, including the president's address by Hon. Elihu Root on "Judicial Decisions and Public Feeling," a notable document on the recall of judges, also the annual address by Hon. Philander C. Knox on "The Monroe Doctrine and Some Incidental Obligations in the Zone of the Caribbean," tracing the history and growth of the doctrine and making a strong argument for the ratification of the conventions between the United States and Honduras and Nicaragua.

Interesting papers on "Procedure" deal with statutory and common law practice in various states. The next annual meeting of the association will be held in Utica.

NOTES

Continental Legal History Series

From Messrs. Little, Brown & Co. of Boston we have just received the opening volume of the important "Continental Legal History Series," consisting of translations of important modern works on the history of the civil, criminal, commercial, procedural and public law of continental Europe, with special reference to France, Germany and Italy. The works were selected by an editorial committee appointed for the purpose in 1909 by the Association of American Law Schools and translated by competent scholars appointed by the editorial committee. The committee has been engaged for three years past in making the selection of works and in arranging for the translations.

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The first three volumes to appear this autumn are as follows: "A General Survey of Events, Sources, Persons and Movements in Continental Legal History," translated from works by eminent European authors by John H. Wigmore, Rapelje Howell, Francis S. Philbrick and John Walgren, with introductions by Oliver Wendell Holmes and Edward Jenks; "Great Jurists of the World, from Papinian to Von Ihering," by various authors; "History of French Private Law," by J. Brissaud, late Professor of Legal History in the University of Toulouse, translated by Rapelje Howell, of the New York Bar.

The other volumes which will follow at the rate of two annually include: "History of Germanic Private Law," by Rudolph Hübner, of the University of Rostock; "History of Continental Criminal Procedure," by A. Esmein, Professor in the University of Paris, and others; "History of Continental Criminal Law," by Ludwig von Bar, of the University of Göttingen; "History of Continental Civil Procedure," by Arthur Engelmann, Chief Justice of the Court of Appeals at Breslau; "History of Italian Law," by Carlo Calisse, of the Italian Council of State, translated by John Lisle, of the Philadelphia Bar; "History of French Public Law," by Jean Brissaud, late of the University of Toulouse; "History of Continental Commercial Law," by Paul Huvelin of the University of Lyon; and "The Evolution of Law in Europe," by Gabriel Tarde, Raoul de la Grasserie, and others.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Aerial Law. "The Jurisprudence of the Air." By H. Brougham Leech. *Fortnightly Review*, v. 92, p. 235 (Aug.).

"Subject to undefined and uncertain rights, the territorial waters of a state must still be classed among the *res omnium communes*. They cannot be deemed to be, as in the view of some jurists, a sort of extension of the adjacent territory. If that were so, they could not be freely traversed, as they are now, by foreign vessels of all descriptions.

"If these principles — that of the *res communis* and the right of self-protection — are applied in the air, the conclusion must be that foreign aircraft have a right to traverse the atmosphere which the territory of any state subtends, and that the Governments of the territories so traversed have a right to take all steps necessary for self-protection. This right can only be exercised within such a limited space as is capable of control from below — *i.e.*, it will be measured, as in the case of the sea, by the range of the guns which are now being constructed for this purpose. We thus arrive at a zone or belt of atmosphere, corresponding to the belt of territorial waters, and an upper region of the air — the supraterritorial atmosphere corresponding with the open sea, in which the passage of aircraft is as free as that of ships upon the ocean. This is in accordance with the view generally taken by jurists."

Bryan. "Mr. Bryan." By Ellery Sedgwick. *Atlantic*, v. 110, p. 289 (Sept.).

"Mr. Bryan is an interesting man with an uninteresting mind. He has none of those powers of generalization which lead to the larger reaches of thought; nor has he that mental flexibility which enables a man to understand a position alien to his own. His ideas are cement hardening to stone before they can take rightful shape."

Capture. "Capture after Capitulation: A Juristic Anachronism." By Howard Thayer Kingsbury. 6 *American Journal of International Law* 650 (July).

The re-actionary position of the United States, in two cases recently decided by the Supreme Court (*Herrera* v. *U. S.*, 222 U. S. 558; *Dias* v. *U. S.*, 222 U. S. 574) is unfavorably criticized.

Criminal Procedure. See Evidence.

Direct Government. See Elective Judiciary, Judicial Recall.

Elective Judiciary. "How Should Our Judges be Selected?" By George Gordon Battle. *Editorial Review*, v. 7, p. 694 (Aug.).

A very able argument in favor of the popular election of judges.

"The judges in Massachusetts have always been appointed, and in New York they have been since 1846 elected. We think the judges of the Court of Appeals in the latter state would have little to fear in comparison with those of the Supreme Court of the State of Massachusetts. We think moreover that Church, Allen, Grover, Peckham, Folger, Earle, Ruger, Andrews and Cullen will match even the great names of Spencer, Kent, Walworth, Bronson and Cowen, the latter being appointed prior to the year 1846, the former being elected after that year."

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Evidence. "Circumstantial Evidence." By N. W. Sibley, LL.M. 37 *Law Magazine and Review* 441 (Aug.).

"According to some *dicta* of Lord Bramwell, in homicide cases, motives exist unknown and innumerable, and therefore to demand proof of specific motive is to requisition an impossible proof in some cases. At the trial of Rush for the murder of Mr. Jermy, Recorder of Norwich, Rolfe, B., observed, that 'it is true great crimes are often perpetrated without any imaginable motive, but when motives did appear to exist, they were so far a means of arriving at a satisfactory conclusion.' It has been observed in the Court of Criminal Appeal that there is a great difference between absence of proved motive and proved absence of motive. *Ellwood's Case* [1908], 1 Cr. App. R. 181."

Federal and State Powers. See Government.

Government. "New Nationalism and New Statehood." By John Maynard Harlan. *Editorial Review*, v. 7, p. 676 (Aug.).

"If government is not what it should be, the fault lies not in a defect of power in either nation or state, but in a failure on the part of the people, through their representatives, intelligently to exercise the powers now completely vested in the states. We do not need a New Nationalism. We need rather a New Statehood. We need no crusade for enlargement of the powers of the nation. All the industrial, commercial and social forces nowadays are centripetal and are operating irresistibly to increase national prestige and national power."

"Labor Legislation and the Recall of the 'Judicial Veto.'" By Henry Winthrop Ballantine. *Case and Comment*, v. 19, p. 225 (Sept.).

"The repeal of the 14th Amendment would leave to the state instead of the federal courts to decide what are the powers of the state legislatures over business and property. This would be much more in harmony with our system of government than to let corporations appeal to the courts of an external sovereignty, as they now do, for relief from state legislation."

See Direct Government.

International Arbitration. "General Arbitration Treaties." By Hon. Richard Olney. 6 *American Journal of International Law* 595 (July).

The writer does not accept the view that the United States has irrevocably abandoned the proposal for a general arbitration treaty with Great Britain. He proposes that a draft of a general arbitration treaty between nations be proposed by the American representatives at the next Hague Conference, so framed as to minimize if not remove objections to making all differences *prima facie* arbitrable. It would conduce to the success of such a proposal, he suggests, if a reservation be inserted in such a treaty allowing the *legislature* of either of the contracting parties to withdraw a special subject-matter from arbitration by a declaration that it concerns its honor, independence, or vital interests. Thus the question would rest not with the treaty-making power, but with that part of the government most directly responsive to public opinion.

"The Real Significance of the Declaration of London." By Senator Elihu Root. 6 *American Journal of International Law* 583 (July).

In his opening address as president of the American Society of International Law, delivered at its sixth annual meeting last spring, Senator Root explained the significance of the Declaration, as necessary to the existence of the International Prize Court and therefore of any Judicial Arbitral Court.

"The Arbitration Treaties and the Senate Amendments." By William Cullen Dennis. 6 *American Journal of International Law* 614 (July).

Opposing the ratification of the two treaties, but conceding their inspirational power.

International Law. See Aerial Law, Capture.

Judicial Recall. "The Recall of the Judges." By Prof. Edwin Maxey. *Forum*, v. 48, p. 294 (Sept.).

"Viewing the judicial situation as we find it in the United States, it appears to us that in the reasonably short terms for which most of our judges are elected and the fact that life tenure may be changed to a fixed term of years, if deemed advisable, we have a sufficient safeguard against judicial usurpation or oppression, without resorting to a remedy attended with such evils as the judicial recall. The time may come when heroic remedies will be necessary, but we should not hasten to cross that bridge until we get to it."

Maritime Law. See International Arbitration.

Marriage and Divorce. "The Reporting of Divorce Cases." By Alfred Fellows. *Fortnightly Review*, v. 92, p. 321 (Aug.).

"It must first be emphasized — a point often forgotten — that the court is open, not, like a circus, for the benefit of the audience, but solely for that of the litigants, prosecutors, and prisoners. Indirectly it is for the benefit of the public, but only because each individual may become involved in legal proceedings; the court is thrown open to ensure a fair trial and to prevent suitors being oppressed, but no person has an inherent right to be present at a trial in which he is not directly concerned. For if the interests of justice or decency require it — a matter solely for the consideration of the judge — any court can sit *in camera*. Some years ago there was a doubt whether the divorce court could do so, but this has now been swept away, and the late Lord St. Helier sat *in camera* on a few occasions when the evidence was more than usually revolting."

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The New Zealand statute is held up as a good example (Cons. Stats., no. 50, s. 65): —

"The court may, on the application of either the petitioner or the respondent, or at its discretion, if it thinks it proper in the interest of public morals, hear or try any such [*i.e.* divorce] suit or proceeding in chambers, and may at all times, in any suit or proceeding, whether heard or tried in chambers or in open court, make an order forbidding the publication of any report or account of the evidence or other proceedings therein, either as to the whole or any portion thereof, and the breach of any such order, or any colorable or attempted evasion thereof, may be dealt with as contempt of court."

Monopolies. "A Group of Trusts and Combinations." By W. S. Stevens. *Quarterly Journal of Economics*, v. 26, p. 593 (Aug.).

An interesting chapter of recent economic history, treating of the methods of the Electric Lamp Combination, the Keystone Watch Case Company, the United Shoe Machinery Company, the Consolidation Coal Company, the Bath Tub Combination, the National Cash Register Company, and several wholesale and retail dealers' associations.

Particular attention is given to the methods practised for the suppression of competition.

"So much stress has been laid upon the Tobacco and Standard Oil decisions, so much emphasis given to the fact that the dissolutions of these two great combinations have left them in practically the same situation as before, that other suits brought by the Government have been completely overshadowed. To those obsessed with the idea that combination is a natural phenomenon and that competition is essentially anarchical and *ipso facto* undesirable, and to those who desire the repeal or amendment of the Sherman Act, the method of dissolution employed in the case of these conspicuous corporations is a proof of the impossibility of real competition, the absolute necessity of combination, and the general uselessness of the Sherman Act. While not in the least denying the existence of the tendency to co-operation in business, it is the belief of the writer that the fundamental basis upon which it rests is unreasonable restraint of trade. In other words, if the Sherman Act can eliminate certain piratical and predatory methods of competition, a large proportion of the 'natural' tendency toward combination would dissolve into the thin air."

Newspaper Reports of Divorce Cases. See Marriage and Divorce.

Penology. "Criminals and the Criminal Class." By W. S. Lilly. *Nineteenth Century*, v. 72, p. 371 (Aug.).

The writer, who professes his belief in the retributive theory of punishment, says of the habitual criminal: "What he has a right to is *justice*. And it is supremely just that one whose whole existence has been a perpetual warfare against civilized society should be cut off from civilized society. It is the righteous retribution which reason itself prescribes. That is its first justification. The second is that it would be eminently deterrent. Nothing except his miserable life is dearer to a malefactor than his personal liberty."

Political Issues. "The New Political America." By James Milne. *Fortnightly Review*, v. 92, p. 272 (Aug.).

"It is hard to convince an American, unless he happens himself to know, as many do, that England today is much nearer being a real democracy than America. . . . Perhaps it would be fair, as well as informing, to say that there is a certain analogy between the constitutional problem which is surely emerging in America, and the constitutional problem of the Lords which we have recently solved. . . . Wherever one looks in America there is the 'flowing tide,' and it will bring more than new wine in old bottles." Two things are coming, "legislation toward a more responsive political machine," and a tariff for revenue.

"The Political Situation." By Col. George Harvey. *North American Review*, v. 196, p. 289 (Sept.).

A remarkably acute analysis of the present strength of Taft, Wilson, and Roosevelt, and of the outlook of the results in the electoral college. A strong demonstration is given of the likelihood of a deadlock between Wilson and the opposition, leaving to the House of Representatives no alternative but the election of Sherman.

"The actual situation now existing resolves to this: —

"Wilson will probably be elected. If he carries New York he cannot be beaten.

"Neither Taft nor Roosevelt can win.

"A vote for Taft is a vote for Sherman.

"A vote for Roosevelt is a vote for Sherman.

"A vote for Wilson is a vote for Wilson."

"Democracy in Europe." By Samuel P. Orth. *North American Review*, v. 196, p. 406 (Sept.).

"In the light of recent movements in Europe our democracy remains the most conservative democracy in the world. Can you imagine a transformation in the Federal Senate such as the English democrats affected in their House of Lords? Or the kaleidoscopic changes of Paris taking place at Washington? Or the Erfurt Programme of Herr Bebel's party adopted as the platform of either of our great parties?

"It is true we have no burdensome militarism, no hereditary tinsel, and have achieved universal manhood suffrage. In spite of all this, democracy in Europe is more radical in theory and in practice than democracy in America. This will remain true just as long as the laboring-men continue to trust the promises of the old parties. When their suspicions and their prejudices impel them to organize a genuine political Labor party of their own, European Social Democracy will invade our Capitol.

"Maybe that day is not far distant."

Procedure. "Cardinal Principles to be Observed in Reforming Procedure." By Prof. Roscoe Pound. 75 *Central Law Journal* 150 (Aug. 23).

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"A story is told of a judge in Vermont at an early day, before whom an unsealed deed was objected to. 'If a seal had been put upon this deed,' said he to counsel, 'it would have been good, would it not?' Counsel assented. 'A seal ought to have been put on and was omitted by mistake?' Counsel again assented. 'Very well,' said the judge, 'a court of equity sits for the purpose of compelling parties to perform their contracts, and instead of compelling your client to put a seal on this deed, I will put one on myself.' Accordingly, he put on the seal and, saying, 'Now that is a good deed,' overruled the objection and proceeded with the real controversy. The great judge of the Year Books would have done the same, and the great judges of England today would get at the same result with equal speed by making it clear to counsel that the objection ought to be withdrawn."

"The Scientific Attitude Toward Reform in Procedure." By Herbert Harley. 75 *Central Law Journal* 147 (Aug. 23).

"With the need and the proper disposition existing, the problem becomes one of practical organization. The profession must shape within itself a definite machine with tools selected for special work. A scientific revision of adjective law must itself depend upon a scientific shaping of means to an end. . . .

"The projected organization must shoulder the entire responsibility. Somewhat parallel instances are furnished by the Conference on Uniform State Laws and the American Institute of Criminal Law and Criminology. Were it not for the fact that criminal law involves so much of substantive law and penology, the latter organization would be fairly well adapted for the purpose. The projected organization will both serve and employ the Institute and the Conference as it will the state bar associations and those in cities and counties."

"Reform in Legal Procedure from the Practitioner's Standpoint — A Review of the New Jersey Act." By Everett P. Wheeler. 75 *Central Law Journal* 144 (Aug. 23).

"What I wish now to point out is the character of the fundamental principles on which this reform should be based. In doing so to a large degree I draw upon the 'Practice Act (1912) of the State of New Jersey; with rules of court and forms prescribed by said act.' . . . These principles may briefly be stated as follows: —

"1. The pleading should give notice to the adverse party of the contention of the pleader and should not be required to do more. If in any respect they fail to do this, there should be a right of amendment, without prejudice to the proceedings had before the amendment.

"2. The parties litigant should have the right to take their testimony wherever they can find it, upon giving reasonable notice to the adverse party.

"3. If any applications for interlocutory relief are required, they should be made promptly and in one group. This is accomplished in the English practice and in the New Jersey Practice Act by authorizing either party to take out a summons after issue is joined. . . .

"4. There should be some summary method for disposing of sham defenses. The constitutional guarantee of the right of trial by jury has led courts in some of the code states to deny the power of the court to strike out a defense as sham. Such decisions overlook the well-settled principle that fraud vitiates everything; contract, deed, will and even the solemn judgment of the court. It has always been competent for the chancellor without a jury to set aside any instrument or proceeding for fraud. It would seem to be clear, therefore, that a judge has the right to strike out a fraudulent defense without the intervention of a jury. The New Jersey Practice Act makes provision for this. . . .

"5. The trial should be conducted for the purpose of obtaining final decision upon the facts, reserving questions of law for subsequent consideration. All long arguments on the legal points should be suppressed. Great liberality in the introduction of evidence should be allowed. The narrow rules on this subject which often prevail show a lack of faith in the good sense of juries that is unwarranted. When specific questions arise which can be formulated and submitted a verdict upon these should be taken and go into the record.

"6. After the verdict or decision of the trial judge, there should be full opportunity for argument, as to what judgment should be rendered upon the facts as presented on the trial and found by the court or jury. In rendering this judgment, all technical errors in the process of arriving at the decision that do not affect the substantial rights of the parties should be disregarded.

"7. An appeal should take up the whole record. The appellate court should have full power to render final judgment upon this record. . . .

"8. Legislative provision for legal procedure should be brief. The regulation of the details and the modification of these details from time to time should be left to the court."

"Argument in Favor of 'Tentative Suggestions' for Reform in Procedure Formulated by the Missouri State Bar Association." By P. Taylor Bryan. 75 *Central Law Journal* 168 (Aug. 30).

"The last suggestion of the committee is that the trial judge should be permitted by instructions to comment on the evidence, provided that he shall also instruct the jury that they are the sole judges of the weight and credibility of the evidence.

"This proposal has been attacked most vigorously as one calculated to tear down the temple of liberty. Of course, it is not a novel proposition. It existed at common law, still exists in the federal courts and in the courts of many of the states. It proposes merely to put back into the judges the power rightfully belonging to them. . . . The objection most seriously urged against this proposition is that a prejudiced judge might by his comments on the evidence throw the decision of the case one way or the other. That is perfectly true, but he has a

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greater power in equity cases or in jury waived cases, and I do not recall that we hear very much about an abuse of such power."

"Reform in the Judicial Administration of Justice." By Alexander W. Stephens. 75 *Central Law Journal* 127 (Aug. 16).

"We are sadly in need of a standard practice act for adoption by the various states. It should first be adopted by Congress for the federal courts: — then each state, as it saw fit, could adopt it, or parts thereof, as same might be applicable to conditions obtaining in such particular state. A practice act should not consist of hard and fast rules. It should merely lay down general rules to be followed as guides governing the procedure of a trial, together with wholesome restrictions upon the power of the judge calculated to prevent an abuse by him of the functions of his office. Specific rules of procedure should be worked out and formulated by the judges themselves as rules of court. The best thought of the profession today seems to be along this line. Rules of procedure should be directory in their nature rather than obligatory."

"Civil Judicial Statistics, 1910." 37 *Law Magazine and Review* 430 (Aug.).

"The chief results shown by the returns are tersely summed up by Sir John Macdonell: 'Decrease in total proceedings begun or heard, absolutely and relatively to population; this decrease extending to almost all the Courts including the County Courts; the shrinkage particularly observable in the Chancery Division.'"

Public Insurance. "Social Insurance in England and Germany — A Comparison." By William Harbutt Dawson. *Fortnightly Review*, v. 92, p. 304 (Aug.).

Comparing the principal features of the two systems, and showing in what respects they diverge, without, however, reaching any general conclusion regarding the superiority of one over the other.

Publicity of Court Proceedings. See Marriage and Divorce.

Social Insurance. See Public Insurance.

Latest Important Cases

Bankruptcy. *Trust Funds — Mingling with General Funds — Recovery by the Cestui que Trust.* U. S.

In *In re M. E. Dunn & Co.*, 28 Am. B. R. 127, the rule was stated that where trust funds have been unlawfully diverted and intermingled with the general funds of a bankrupt, so as to render their identification impossible, the bankruptcy court, acting as a court of equity, will follow them and decree restitution to the *cestui que trust*, if the unlawful appropriation of the trust funds resulted in swelling the assets and came into the possession of the trustee; but if after the misappropriation and mingling all the money is withdrawn, the equities are lost, although moneys from other sources are subsequently deposited in the same place; or if a part of the funds so mingled is withdrawn, so that the fund is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and funds subsequently added from other sources cannot be subjected to the equitable claim of the *cestui que trust.*

Employers' Liability. *Release Executed in Accordance with Sick Benefit Contract Invalid.* U. S.

An employee on entering the service of a railroad company and becoming a member of its relief department, entered into a contract which provided that, in the event of his disability or death from accidental injuries, the benefits thereunder should not be payable or paid until a release should be made and filed releasing the company from all claims for damages by reason of such injury or death. The employee received sick benefits and life insurance by virtue of his membership of the department, and, on subsequently receiving an injury while employed in moving a train in interstate commerce, in order to obtain the benefits provided therefor duly executed a release in the terms required by the contract of membership.

In *Gawinske* v. *Baltimore & Ohio R. Co.*, decided in May (*N. Y. Law Jour.*, Sept. 13) the United States Circuit Court of Appeals for the third circuit (Buffington, J.) held that while the release was voluntarily made after the injury and after his right of action therefor had accrued, it was not based on any settlement thereof, nor on any new consideration, and, being made in pursuance of the original contract and without additional consideration, was made void by Employers' Liability Act, April 22, 1908 (c. 149, sec. 5, 35 Stat. 66, U. S. Comp. St. Supp.

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1911, p. 1324), providing that "every contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

The decision followed the authority of *Chicago* v. *McGuire* (219 U. S. 561, see 23 *Green Bag* 320).

Juries. *Right of Jurors to Utilize their own Expert Knowledge.* Wis.

The right of jurors, in weighing the evidence, to utilize whatever personal expert knowledge they may have of the subject under consideration, and give the benefit of their knowledge to other jurors who may lack it, is sustained in *Solberg* v. *Robbins Lumber Co.* (Wis.) 37 L. R. A. (N. S.) 790. The question of the right of jurors to act on their own knowledge is treated in an exhaustive note to this case.

Jurisdiction. See Sherman Anti-Trust Act.

Monopolies. See Sherman Anti-Trust Act.

Obligation of Contracts. *Rights of Bondholder not Impaired by Statute Consolidating Borrowing Company with Another — Fourteenth Amendment.* U. S.

Complainant, a bondholder of a street railway company, sought to set aside the consolidation of the company with another similar company on the ground that the legislative act authorizing the consolidation was unconstitutional because it impaired her contract and was a taking of property without due process of law.

In *Young* v. *West End Street Ry. Co.*, decided by the United States District Court for Massachusetts Sept. 5, Judge Colt dismissed the action, holding the statute not unconstitutional.

"It is difficult," said the Court, "to see how the plaintiff's constitutional rights are impaired by the statute in question. In its essence the statute is simply the case of a state legislature authorizing one solvent corporation to sell all its property, privileges and franchises to another solvent corporation, the latter corporation assuming and being responsible for the liabilities and indebtedness of the former corporation. The purpose of the statute is not to wind up the business of the West End Company but to continue its business under the name of the Boston Elevated Company, and since the sale of the assets of the West End Company is upon condition that the Boston Elevated Railway so assume all its liabiliteis and indebtedness the effect of the whole transaction is simply a change of name. Since that is the real effect of the transaction there is clearly no impairment of the plaintiff's right or remedy under her contract."

Even if the transaction were a sale of the West End to the Boston Elevated company as distinguished from a consolidation of the two companies, and the West End company were dissolved, such a result, said the Court, under the authorities, in no way impaired either the plaintiff's right or remedy under her contract.

Sherman Anti-Trust Act. *Remedies Provided for by the Statute not Exclusive — Suits in Equity May be Brought in State Courts — Parallel and Competing Railroads.* N. Y.

In *Delaware* v. *New York, N. H., & H. R. Co. et al.*, decided in July, the New York Supreme Court, Special Term, Part I, held that an action to restrain acts of a railroad in violation of the federal anti-trust law might be maintained in a state court by a person directly injured in respect to the matters involved in the illegal transaction. (*New York Law Journal*, Sept. 6.)

The Court (Gerard, J.) considered the adverse observations of Mr. Justice Harlan, in *Minnesota* v. *Northern Securities Co.* (194 U. S. 48) to apply to original suits in equity brought in state courts in the interest of the general public, or of all alike, and not to proceedings brought in the interest of directly interested parties. The Court consequently held the remedies included in the Sherman act not to be exclusive, relying for this conclusion on the decisions in *Shawmut Compress Co.* v. *Anderson* (209 U. S. 423), *Bigelow* v. *Calumet & Hecla Co.* (155 Fed. Rep. 869), *Continental Wall Paper Co.* v. *Voight* (212 U. S. 227) and other cases.

It was held that the lines of the Rutland Railroad Company and of the New York, New Haven & Hartford Railroad system are parallel and competing within the meaning of the Sherman Anti-Trust Act and the fact that the ability of the two railroads to compete may be affected to a greater or less extent by the circumstance that the grades on parts of the two lines differ is immaterial.

An injunction *pendente lite* restraining the New Haven road from acquiring any of the stock of the Rutland road was accordingly granted.

Street Railroads. See Obligation of Contracts.

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The Editor's Bag

THE AMERICAN BAR ASSOCIATION AND PUBLIC OPINION

THE American Bar Association shows itself this year more than ever before, perhaps, far in advance of the prevailing popular opinion in matters pertaining to a well ordered court procedure and scientifically framed laws. The stage has definitely been reached where it becomes necessary to educate public opinion before the beneficent undertakings which the Association has in hand are to be successfully carried out. Laymen do not on the whole grasp the situation. They are still inclined to blame the lawyers for the faulty administration of justice and for the baffling intricacy of the statute laws of the country and the case law dependent upon them. But it is the legislator, rather than the lawyer, who is to blame, or if they happen to be one, the legislator who forgets that he is a lawyer. The matter is definitely "up to" the legislatures of the states and nation. Were they to act on the deliberate and in some cases many times repeated recommendations of the Association and of the Uniform State Laws Conference there would be a truly tremendous advance. The experience of our American democracy has not shown legislatures, on the whole, to be much more enlightened than the public opinion they represent, and hope for progress is founded solely on the prospect of perhaps influencing the public to demand of its representatives the reforms of procedure and adoption of the model uniform statutes which the Association is advocating.

The American Bar Association has no agency or department for the dissemination of propaganda corresponding to an important feature of the organization of the Carnegie Peace Foundation. It is a voluntary association supported by the dues of members and possessing no endowment or sources of income adapted to the magnitude of the work in which it is engaged, and the wonder is that it is able to do this work so well, for the committee reports presented at Milwaukee show this to have been a most fruitful year. The problem of publicity is most difficult to solve, and may be commended to the attention of the Association for earnest consideration.

That the movement for the reform of procedure is not making more rapid progress is due primarily to Congress and particularly to Senator Heyburn of Idaho, who availed himself of the courtesy of that body to prevent the passage of the American Bar Association bill providing that cases shall be decided upon the merits without regard to technical errors which do not affect the merits, and that the appellate court shall have power to render final judgment upon the merits without being obliged, as it is under the present system at common law, to order a new trial. The House had passed the bill.

Another bill approved by the Association provides that in case a plaintiff

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in an action brought in the federal courts has mistaken his remedy and brought his suit at law when it should have been brought in equity, or *vice versa*, this shall not defeat his action, but he may amend his proceedings and go on without delay. It also provides that equitable defenses may be interposed in actions at law without the necessity of bringing a new suit in equity. This bill had passed the Senate, but had not been reported in the House.

A third bill gives to litigants in the state courts an opportunity for a review in the United States Supreme Court of a decision of the state court that a state statute is in violation of the Constitution of the United States. This right does not now exist. A bill for this purpose also had passed the Senate, but had not been reported in the House.

When Congress cannot find time to bring these important matters to a vote, and to consider measures which can receive no weightier endorsement than that of the American Bar Association, progress is effectually blocked for the time being, and no wonder that the Uniform State Laws Conference, though it approves the proposition of a uniform state statute governing procedure and pleading, deems it inexpedient to enter upon the task of drafting such an act at the present time, when the procedure in the federal courts is treated by Congress with indifference. Will the new proposal of the Association, that Congress take steps to revise common law pleading and procedure in the federal courts, meet with the same fate?

In this connection it may be mentioned that another enlightened proposal is likely soon to be made to Congress by the Association, namely that for a bill-drafting agency at Washington, and how will this proposition be treated by Congress?

In the state legislatures, as well as in the national body, the work of the Association and Conference on Uniform State Laws is obstructed by the apathy of legislators, who are indifferent to the larger claims of state comity and who handicap the Conference by failing to cause their respective states to share in the expense of maintaining a most useful organization. We do not understand the attitude of states which see fit to avail themselves of the results of the work of the Conference without choosing to shoulder any part of the financial burden. Still less do we understand the failure of states to adopt laws to which they apparently have no definite objection, for the purpose of improving the quality of their statute law without the least trouble and of bringing it more closely into harmony with a common standard. In but few of the states would the enactment without debate of the uniform acts regarding divorce, child labor, family desertion, foreign wills, sales, warehouse receipts, stock transfers, and bills of lading, occasion the least dissatisfaction in any quarter. Receiving such scant encouragement, the enthusiasm of the Commissioners cannot help being somewhat dampened, and the country is fortunate indeed in the persistency with which they continue to codify new subjects, such as the evasion of marriage laws, partnership, workmen's compensation, and business corporations.

Nothing in the legal system of the country has given rise to greater scandal or excited more popular denunciation than the situation with respect to the remarriage of divorced persons forbidden by the courts to remarry, and for this reason no action taken at the Milwaukee meetings was of greater importance than the adoption by Uniform State Laws Conference of the

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new uniform act on this subject. This act solves the whole problem by prohibiting in one state every marriage void under the laws of a foreign state in which one of the parties resides and intends to reside. The states which have failed to overtake the work of the Conference would undoubtedly do much to recoup themselves by passing this legislation. But as we have said, the Conference is far in advance of the times, and it will be long before the states can catch up with the procession, and can truly say to the Conference and to the American Bar Association, "You lawyers are too conservative; all great reforms must be brought about by popular action untrammeled by your interference!" Can we conceive of that day ever coming?

JOHN MORLEY

A SOUTH DAKOTA correspondent writes to the *Green Bag* as follows:

"John Morley will be seventy-four years old next Christmas Eve. Besides this, his career as a man of letters and his thirty years in Parliament, taken together with the fact that he has long been England's most popular public speaker, entitle his recent definition of an educated man to considerable weight.

"On July 25, Blackburn, where Lord Morley was born, conferred upon its distinguished son the honorary freedom of the borough. The ceremony took place at a special meeting of the Town Council, held in the assembly room of the Town Hall, and was distinguished by all the formalities attendant on such occasions.

"Lord Morley chose as the topic for his address 'The Author in Public Life,' and in the course of his remarks undertook to define an educated man. Here is his definition as given by the *London Times* of July 26:—

"The Archbishop of York once gave a definition of education, which was that an educated man was a man who knew the difference between knowing and not knowing; and he quoted another prelate who said — I submit this for your meditation — that an educated man was the man with a clear view of some purpose running through human affairs with which he identified himself and tried to co-operate.

"I say an educated man, among other qualifications, is a man who knows what is evidence and when an assertion is proved and is not proved That is my opinion for practical purposes, political and social.

"Not a bad definition that. Moreover, its interest lies in the fact that it is not only an illuminating definition of an educated man, but is a well nigh faultless definition of a good lawyer as well."

HIS SHAKY MEMORY

THE lawyers got a Tartar when, in a recent trial in a Southern city, they summoned to the stand an aged darky, who had been an eye-witness of a fight that had occurred between a number of persons.

"Tell us what you know about this fight," said counsel when old Mose has been placed upon the stand.

"Fight?" asked Mose, apparently greatly surprised, "What fight?"

"You know very well what fight is meant," said counsel. "Tell us about it."

"I don't know nothin' about no fight," insisted the witness. "When was it?"

"See, here, Moses!" exclaimed the lawyer, "No trifling! The fight day before yesterday. You know all about it. Tell us — "

"O, de fight day befo' yisterday," said Mose. "Well, suh, you see I'se slept since de day befo' yisterday, and I never kin rickollect anything after I'se been asleep."

And that was all they could get from him.

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DUCKS' IDENTITY

THE bucolic mind moves slowly, but it moves in a straight line and with considerable momentum. A Maryland lawyer, who came into collision with a farmer, did not need to apply the rule that mass miltiplied by velocity gives the momentum, to calculate the force of the shock.

A man was on trial for stealing a farmer's ducks. The farmer swore point blank against the prisioner.

"How do you know that they are your ducks?" asked the prisoner's counsel.

"I should know *them* ducks anywhere," answered the farmer, and then he described their peculiarities.

"But these ducks," said the counsel, "are not a rare breed. I have some like them in my own yard."

"Very likely, sir," answered the farmer; "those that feller stole are not the only ducks I have had stolen lately."

"Call the next witness!" exclaimed the lawyer.

THE FIRST WOMAN LAWYER IN ITALY

THE council of lawyers at Rome, by a close vote, have admitted to their profession Signorina Teresa Labriola, a member of a family noted for those in it who have been distinguished in science and literature, says the *Outlook*. While it is true that her position as the first woman in Italy to be admitted to practice at the bar can be rendered of no avail by the supreme court, should it so decide, such action by the court seems far less likely in this case than in a previous one, as the present applicant has doubly won her right to admission, having gained her laureate of doctor of laws at the university of Rome, and having passed every examination required of men. Signorina Labriola's motive in entering the profession should also be recorded. She says: "I shall throw myself heart and soul in to every case where the proverbial woman is at the bottom of it."

SUGGESTING A PATRIARCHAL REGIME

A RATHER unusual event occurred in Australia this summer, when a case came before Chief Justice Sir Stephen Parker in the Kalgoorlie circuit of the Australian Supreme Court, one of his sons appearing as Crown Prosecutor and another son as counsel for the defendant. The case in which they were engaged, says the *Daily News* of Perth, W. A., "lasted about two hours and three-quarters, during which period His Honor was not troubled with lively exchanges between the opposing advocates, nor called upon to decide any knotty point that one might have raised on the other. The way in which Mr. Hubert Parker pleaded the cause of his client against the array of evidence adduced by Mr. Frank Parker, the Crown Prosecutor, won the day."

ACTIVE PERSUASION

AN old clergyman who formerly lived in Maine was remarkable for his eccentric ideas and sayings.

At one time there had been an affray among some men in his neighborhood and one of them was hurt. A trial took place, and the old clergyman, who had seen the fight, was called as a witness.

"What was Morgan doing?" was the first inquiry.

"Oh, he was slashing around," replied the old man.

"Well, sir, what is that?"

"He was just knocking about him here and there."

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"Now, sir, tell us plainly what did he do to this man?" asked the lawyer, with a note of vexation in his voice.

The clergyman thought a moment, and then answered slowly: —

"Why, he enticed him."

"*Enticed* him! How?"

"He enticed him with a crowbar. He used the crowbar to persuade the man, to entice him; and by a series of pokes and blows he succeeded," concluded the reverend gentleman.

PROMPT JUSTICE

THE following is related of a good justice of the peace in Massachusetts in Colonial times.

On a cold night in winter a traveler called at his house for lodging. The ready hospitality of the justice was about being displayed, when the stranger unluckily uttered a word which his host considered profane.

Whereupon he informed his guest that he was a magistrate, pointed out the nature of the offense, and explained the necessity of its being expiated by sitting an hour in the stocks.

Remonstrance was unavailing, for custom at that time allowed the magistrate to convict and punish at once, and in this case the magistrate acted as accuser, witness, jury, judge and sheriff, all in one.

Cold as it was, the worthy justice, aided by his son, conducted the traveler to the place of punishment, an open spot near the meeting-house where the stocks were placed. Here the wayfarer was confined in the usual manner, the benevolent executor of the law remaining with him to beguile the time of its tedium by edifying conversation.

At the expiration of the hour, he was reconducted to the house, and hospitably entertained until the next morning, when the traveler departed.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

Judge Locke, Presiding Judge of the Federal Court, First District of Florida, was annoyed at seeing one of the attorneys, attendant upon a sitting of the court, put his feet upon the desk in front of the one at which he was seated.

"Marshal," roared his Honor, "you will oblige me by identifying the legs to which those feet belong." — *Judge.*

A lawyer was defending a burglar accused of housebreaking. "I submit, your Honour," he concluded, "that my client did not break into the house at all. He found a window open, merely inserted his arm and removed a few articles. Now, my client's arm is not himself, and I fail to see how you can punish the whole person for an offense committed by one of his limbs only."

"That argument," said the judge gravely, "is well put. Following it out logically, I sentence the prisoner's arm to twelve months' imprisonment. He can accompany it or not as he chooses."

Whereupon the prisoner smiled, and with his lawyer's aid unscrewed his cork arm, and leaving it in the dock, walked out.

— London *Law Notes.*

The District Attorney of the District of Columbia announced recently that the smashing of straw hats after the fifteenth of September, because they are out of season, would have to stop, for, "If this idea of smashing a man's hat because he chooses to ignore fashion's edict were carried out a man who chose to wear low shoes might have his legs broken."

And any old lady who showed herself too decided about matters of costume might be in danger, we presume, of having her will broken.

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The Legal World

Monthly Analysis of Leading Legal Events

The professional organizations during the month just ended have furnished more significant devolopments than the national Administration or Congress. This is seen, for example, in the case of workmen's compensation, the proposed federal act having failed to receive the support of both houses of Congress, but the subject being more nearly in a completed state than at any previous time through the co-operation of the three most important bodies which have had the matter of uniform acts under consideration, namely, the American Bar Association, the Commissioners on Uniform State Laws, and the National Civic Federation. A basis of uniformity for future legislation is now available and no state contemplating the adoption of a statute or the revision of an existing one can afford to ignore it. It is to be hoped that the recent action of the American Bar Association will bear fruit in national as well as in state legislation.

The greater significance of professional as opposed to government activity is likewise illustrated in the field of procedural reform. Congress failed to enact any of the three acts recommended by the American Bar Association. Not discouraged, however, the Association has gone forward with a plan to secure the passage, if possible, of federal legislation for the reform of pleading and procedure on the common law side of the federal courts. The promulgation of the new rules of the Supreme Court governing equity procedure is expected to assist in the proposed reform of common law procedure, and hopes are entertained that the next session of Congress will be more fruitful of legislation helpful to the desired reforms. It is also believed that the Supreme Court rules will have a marked effect on reforms in the state courts. Not in a long time has the outlook for substantial accomplishment been so encouraging.

Speakers before the bar associations have been emphasizing the fact that great political and social changes are either impending or in the embryo stage, and in this light, possibly, the denunciations of the judical recall adopted by the American Bar Association and by the state bar associations of Minnesota, Wisconsin, Kentucky, and West Virginia are to be interpreted. It is not without significance, however, that a small minority in the bar associations often comes forward to defend the recall, the final action not always being secured without debate, even when unanimous in form. The passage by the last Congress of the joint resolution favoring a constitutional amendment for the direct election of Senators tends to stimulate discussion of these issues of popular government, and to deepen the meaning of such speeches as Senator Sutherland's before the American Bar Association.

A serious problem of state legislation has been solved by the proposed uniform act respecting the evasion of marriage laws by divorced persons, and several other new uniform acts are now ready for adoption by such of our more progressive states as desire to further the movement for uniform state laws. Not only is legislation covering such subjects as child labor and marriage licenses now

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possible, but the suggested amendments to the Negotiable Instruments act should do something toward arresting the tendencies toward diverse judicial interpretations of certain provisions of this law.

In the field of international affairs, the action of President Taft in signing the Panama canal bill has been widely criticised as involving a breach of treaty obligations. If the Administration erred in this respect, it may deserve to be congratulated for its victory in preventing the abolition of the Commerce Court, at least till March 4th next.

Personal

In addition to those mentioned in the July issue of the *Green Bag*, the honorary degree of LL.D. was conferred by the University of Michigan, at the celebration of the seventy-fifth anniversary of its founding, upon Professor Melville M. Bigelow of the Boston University Law School, and upon Professor Floyd R. Mechem of the University of Chicago Law School.

Henry W. Dunn, who has just assumed the office of Dean of the Iowa State University law school, till lately practised law in Boston as junior member of a firm doing a large amount of corporation work. Ten years ago he was graduated from Harvard Law School, where he was a member of Phi Delta Phi fraternity and a member of the editorial board of the *Harvard Law Review*. The law school to which Mr. Dunn goes has an unusually large member of graduates in public life, such as, for example, Senator Crawford of South Dakota, Senator Clark of Wyoming, Senator Kenyon of Iowa, Judges McClain, Evans, Deemer, and Ladd of the Supreme Court of Iowa; Judge Campbell of the Supreme Court of Colorado; Judges Haney of the Supreme Court of South Dakota and Beard of Wyoming; and C. B. Elliott of the Philippine Commission, formerly judge of the Supreme Court of Minnesota and later Chief Justice of the Supreme Court of the Philippines.

The Senate in August confirmed the appointment of Chandler P. Anderson as Counsellor to the State Department. Mr. Anderson, has held the office since the death of Henry M. Hoyt. By act of Congress this office is henceforth to be filled by Presidential appointment, and Mr. Anderson is made practically the under Secretary of State. Mr. Anderson, who is a member of the New York City bar, was one of the counsel before the Alaskan Boundary Tribunal, and counsel for the State Department under Secretary Root and Secretary Knox from 1905 to 1910. He has been President Taft's legal adviser in the consideration of the British protest against free tolls for American vessels passing through the Panama Canal.

Isaac Franklin Russell, Professor of Law in New York University for over thirty years, and now Chief Justice of the Court of Special Sessions of the City of New York, has given an interesting statement of his impressions of the English Courts. In an interview he said: "It has been a great delight to me to visit the London courts and observe at close range the operations of the English legal system. First, always, we Americans note the presence of trial lawyers, holding briefs that are models of patient and exhaustive preparation. The barristers, disciplined by daily appearances in court and prepared to the last detail for their forensic labors by thorough study, and holding high the standard of professional honor, greatly expedite the business of the court in dis-

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posing of the cases on the calendar. In New York City we have no trial lawyers who specialize in pleading before courts and juries. The congestion of cases on the calendars of the New York courts can best be dealt with, in my judgment, by developing at the bar a group of specialists in forensic advocacy. This will be very difficult, as every young lawyer wishes to figure as a leader of the bar, at least in the presence of his client, and dislikes to be completely obliterated by a big wig with whom he is associated."

Criminology

The Governor of New York has appointed the three members of the Board of Examiners of Feeble-Minded Criminals and Other Defectives created by the Bush sterilization act, which passed the last session of the legislature. The examiners are empowered to examine into the mental and physical condition, the record and family history of the feeble-minded, epileptic, criminal and other defective inmates of state institutions, and one of its members is authorized to perform such operation as shall be decided by the board to be most effective. Only criminals convicted of such offenses as convince the board that they are subject to "confirmed criminal tendencies" come within the operation of the law.

The Indiana State Reformatory is about to establish a psychological laboratory. A laboratory for the psychological study of the inmates has been in existence in New York State at the Bedford Reformatory for Women for over a year. Thanks to the generosity of certain private citizens who have provided land and buildings and funds, the work of the department is to be extended. The object of the superintendent, Miss Katharine Bement Davis, is to make a psychological examination of every criminal after conviction, but before sentence, which will enable the court to know pretty definitely whether the criminal is mentally defective, is capable of reform or is apparently incorrigible, so that the court may sentence him to the proper institution.

Miscellaneous

Nineteen lawyers have been disbarred in New York City, borough of Manhattan, since the first of the year, and the cases of thirty-three more are before referees appointed by the Appelate Division of the Supreme Court. More than 200 complaints against other lawyers have been filed with the counsel for the grievance committee of the New York City Bar Association, some of which have been acted upon.

New rules for equity practice in the federal courts will be promulgated by the Supreme Court of the United States when that body reconvenes in October. It is believed that the new rules will be almost of a revolutionary character and will materially expedite business in the courts. Chief Justice White made up his mind soon after he became the head of the Court that this revision would be undertaken, and while the judicial department and the executive department are absolutely independent each of the other, it is well known that President Taft not only has encouraged the revision but has been helpful in more ways than one as the work has progressed.

The Eighteenth Annual Convention of the Commercial Law League of America was held in Colorado Springs, July 23-25. The address of welcome was delivered by Governor John F. Shafroth of Colorado, and the annual address by Hon. Rosseau A. Burch, Associate Justice of the Supreme Court

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of Kansas. The reports of the respective committees showed the accomplishment of substantial results. Much time was devoted to the consideration of the report of the committee to correct abuses in the bankruptcy practice. Canons covering the ethics of such practice were adopted as drawn by the American Bar Association.

International Law

The sessions of the International Conference for the Unification of Laws of bills of exchange, which had been sitting at The Hague since June 15, came to an end on July 23. An agreement for the introduction of a uniform law governing bills of exchange was signed by twenty states, but neither Great Britain nor the United States were among the signatories.

The twenty-seventh session of the Institut de Droit International, was held at Christiania Aug. 24-31, the United States being represented by Dr. James Brown Scott and Prof. George Grafton Wilson. M. Delapradelle brought forward a motion, which was carried by a large majority, in favor of the exemption from capture of private property at sea. Dr. Scott's proposal for the creation of a permanent Court of Arbitration was adopted with some reservations, the question of its constitution being held in obeyance. A discussion of a report on the work of the relation of the Institut to the international law division of the Carnegie Peace Foundation resulted in the Institut accepting the position of *conseiller général* to that division, delegating its functions as such to a representative committee consisting of Prof. Holland, Dr. Lammasch, and six others. The Institut decided to hold the next session in the autumn of 1913, at Oxford. Professor Holland was elected President.

Bar Associations

Colorado.—The fifteenth annual meeting of the Colorado Bar Association was held at Colorado Springs July 12-13. Henry C. Hall delivered the president's address and Justice Harry Olson of the Chicago Municipal Court presented the annual address, dealing with that court. Other addresses were: "Criminal Procedure," by Thomas Ward, Jr., Denver; "The Court of Commerce," by Judge Julian W. Mack; "Civil Procedure," by John H. Denison, Denver; "Water Procedure," by S. G. McMullin, Grand Junction. The officers .elected were: president, Harry N. Haynes, Greeley; first vice-president, Charles C. Butler, Denver; second vice-president, Alva B. Adams, Pueblo; secretary-treasurer, W. H. Wadley, Denver.

Kentucky.—At the eleventh annual meeting of the Kentucky State Bar Assocation, held at Louisville July 10-11, the president's address was delivered by John Bryce Baskin of Louisville. Papers were read by L. C. Willis of Shelbyville, on "Some Great Lawyers of Kentucky," by Judge Robert H. Winn of the Kentucky Court of Appeals on "Courts of Last Resort," by Judge Charles Kerr on "Responsibilities of Officers and Directors of Private Corporations," by Malcolm Yeaman, on "Kentucky Criminal Law and its Codification," and by Judge Alex. P. Humphrey of Louisville, on "The Supreme Court of the United States, October Term, 1911." Hon. John Maynard Harlan of Chicago delivered the annual address, on "New Nationalism and New Statehood." A resolution was adopted opposing the recall of judges. These officers were elected: president, Justice Robert H. Winn, Mt. Sterling; vice-presidents, S. Y. Trimble, Hopkinsville; J. C. Simms, Bowling

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Green; C. R. Carden, Mumfordville; Alex. P. Humphrey, Louisville; Denis Dundon, Paris; D. C. Lee, Covington; J. H. Jeffries, Pineville; treasurer, W. W. Crawford, Louisville; secretary, R. A. McDowell, Louisville; executive committee, John K. Todd, R. E. Simmons, James M. Yeaman, E. L. Hutchinson, and Judge W. P. Sandidge.

Minnesota. — The annual meeting of the Minnesota State Bar Association was held at Minneapolis, Aug. 19-21. In his presidential address, Cardenio A. Severance of St. Paul criticized superficial attacks on the courts by writers and politicians, favored higher salaries for federal judges, and found fault with the law that prevents judges, unlike Congressmen, from practising law while holding office.

The report of the committee on workmen's compensation was presented by H. V. Mercer of Minneapolis, its chairman. Mr. Mercer estimated that in Minnesota 15,000 industrial workers are injured each year. He declared the present system of compensation obsolete, and contrasted the progress made in foreign countries with the slow progress in the United States.

The report contained a proposed statute similar in many respects to the bill presented to the last legislature.

Walter George Smith of Philadelphia described the work of the Uniform State Laws Commissioners.

Seth Low of New York City delivered the annual address, on the subject of "Workmen's Compensation." He urged the desirability of having the workmen's compensation acts uniform, as otherwise they would have a tendency to tempt the states to compete with with one another in making the laws less stringent so as to encourage the employers to locate within their borders.

John Jenswold of Duluth led the discussion in favor of the judicial recall, while Lorin Gray of Mankato argued against it. Mr. Jenswold declared that the United States Supreme Court had been active in politics and that, therefore, the recall was an essential remedy. Mr. Gray, on the other hand, described the recall as pernicious in the extreme.

A vote on the question resulted as follows: 14 for and 61 against the recall of judges and 8 for and 62 against the recall of judicial decisions.

Tennessee. — At the thirty-first annual meeting of the Tennessee Bar Association, held at Knoxville, July 10-11, the annual address, by President L. D. Smith of Knoxville, was devoted largely to a review of national legislation and a discussion of judicial decisions in state and national supreme courts. Other addresses were : "Highways and Legislation," by N. B. Morrell of Knoxville; "Courts and Legislation," by Prof. Roscoe Pound of Harvard University; "Inventions and Investors," by Cyrus Kehr of Knoxville; "Code of Ethics and Its Enforcement," by Alexander H. Robbins of St. Louis; "The Primary, Initiative, Referendum and Recall," by Noble Smithson of Knoxville; "Reform and Uniformity of Judicial Procedure," by Thomas W. Shelton of Norfolk, Va.; "Husband and Wife in the Fifteenth Century," by Judge C. W. Turner, University of Tennessee; and "Chimney Corner Law," by Col. William A. Henderson, Knoxville. The officers elected are: president, Albert W. Biggs, Memphis; vice-presidents, Sam S. Williams of Johnson City, R. F. Spraggins of Jackson, and Judge Joseph C. Higgins of Fayetteville; secretary and treasurer, Charles H. Smith of Knoxville (re-elected).

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West Virginia. — The twenty-eighth annual meeting of the West Virginia State Bar Association was held at Grafton, W. Va., July 24-26. The annual address of the president, Federal Judge B. F. Keller, dealt with "The Jurisdiction of the Federal Equity Courts as Affected by State Statutes." A manifesto unqualifiedly adverse to the recall of judges was adopted. The annual address was delivered by Prof. John Wurtz, of Yale Law School, on "The Jury System Under Changing Social Conditions." The election of officers resulted: president, William G. Matthews, Charleston; vice-presidents, S. D. Bruce Hall, Hugh Warder, E. G. Nuckolls, Reese Blizzard, George S. Wallace, and Benjamin Daily; secretary, Charles McCamic, Wheeling; treasurer, C. A. Kreps, Parkersburg; executive council, Henry M. Russell, Wells G. Koontz, W. W. Brannon, B. M. Ambler, and W. P. Willey.

Wisconsin. — A resolution approving the American Bar Association report denouncing the recall of judges by popular vote, was unanimously adopted by the Wisconsin State Bar Association at a meeting held in Milwaukee Aug. 28. The officers were re-elected, as as follows: president, John M. Olin of Madison; vice-presidents, Thomas M. Kearney, Racine; John F. Harper, Milwaukee; Fred Beglinger, Oshkosh; E. G. Nash, Manitowoc; J. W. Murphy, Platteville: J. E. McConnell, La Crosse; B. B. Park, Stevens Point; Spencer Haven, Hudson; J. W. Claney, Stoughton; O. E. Clark, Appleton; George B. Hudnall, Superior; A. E. Matheson, Janesville; Judge Martin L. Lueck, Juneau; S. H. Cody, Green Bay; M. Barry, Phillips; G. D. Jones, Wausau; S. N. Marsh, Nielsville; Daniel H. Grady, Portage; Judge James Wickham, Chippewa Falls, and J. B. Fairchild, Marinette; secretary, Adolph A. Kanneberg, Milwaukee; treasurer, John B. Sanborn, Madison. There was no special business before the association, it being dispensed with in order not to interfere with the convention of the American Bar Association.

Obituary

Beckwith, Judge James R., prominent in New Orleans, died Aug. 8, in that city, aged 79. He was a native of Philadelphia. He was United States Attorney under Grant's administration, being peremptorily removed from office by Grant just as he was about to put one Casey, Collector of the Port of New Orleans and closely related to Grant by marriage, on trial in the "whiskey ring" cases.

Blair, Associate Justice Charles A., of the Michigan Supreme Court, who died in Lansing, Mich., Aug. 30, was appointed to the Supreme Court in 1904 to fill a vacancy. Before that he was Attorney-General of Michigan.

Frazee, Judge W. D., United States Attorney for the northern district of Mississippi, died at Okolona, Miss., Aug. 16.

French, William B., who died in Boston Sept. 8, was a charter member of the Boston Bar Association. For a number of years he was a lecturer on insolvency law at the Boston University Law School.

Hartwell, Alfred Stedman, former Chief Justice of Hawaii Supreme Court, died at Honolulu, Aug. 30. He was a graduate of Harvard Law School, class of 1858, and practically all his professional life was spent in Hawaii.

Heath, Herbert M., who died in Augusta, Aug. 18, was the acknowledged leader of the Maine bar. He had an

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enormous law practice, and was consulted frequently as an expert in the subjects of street railways and municipal waterworks. He had several times declined an appointment to the bench. He was an able orator. Governor Plaisted said of him: "Herbert M. Heath was one of Maine's greatest lawyers. He measured up intellectually with the ablest men of the whole country. His death is a distinct loss to the state. Here in Augusta, we who knew him best loved him for the many excellent qualities of heart which he possessed and admired him for his brilliancy of intellect. He was, moreover, an honest man and a most loyal citizen."

Herron, John W., father of Mrs. William H. Taft, died Aug. 5 at his home in Cincinnati, aged 85. Mr. Herron was one of Cincinnati's most prominent lawyers until he abandoned the practice of law a few years ago. He was one of the most prominent members in the deliberations of the Ohio constitutional convention of 1872. Under President Harrison Mr. Herron became United States Attorney for the southern district of Ohio and served in that capacity for four years.

Koon, Martin B., distinguished lawyer, business man and worker for civic betterment in Minneapolis died Aug. 20. He was county attorney from 1870 to 1874 and judge of the fourth judicial district of Minnesota from 1883 to 1886.

Miller, T. Scott, of Dallas, Tex., former general attorney for the Missouri Kansas & Texas Railway, died at his summer home in Michigan Aug. 3. He was a native Louisianian, and was graduated from Harvard College and Harvard Law School, going to Dallas in 1876 to practise law in partnership with Judge Seth Sheppard and later with Col. W. Leake. Judge Miller was made dean of the law department of the University of Texas in 1896. It was said of him, before his health became impaired, that he enjoyed the largest civil practice in Texas.

Parker, Judge Luman F., of Vinita, Okla., former federal judge of the northern district of the Indian Territory, died Aug. 14 in St. Louis. Judge Parker was one of the ablest jurists in in the state.

Simpson, R. T., Associate Justice of the Alabama Supreme Court, died Aug. 12 of bronchitis in a New York hospital. He was educated at Princeton and fought in the Confederate army. He had served in both houses of the state legislature.

Stringfellow, Col. Charles S., for many years one of the most distinguished attorneys of Richmond, Va., died Aug. 11, in his seventy-sixth year. He retired in 1908.

Stripling, Col. Joseph N., former United States Attorney for the southern district of Florida, died Aug. 16 in Hendersonville, N. C., whither he had gone from Jacksonville in search of health.

Sweeney, Judge Edward, superintendent of the United States Mint at San Francisco, died Aug. 17. He had been county attorney and judge of the Superior Court.

Toney, Sterling B., former judge of the chancery court at Louisville, Ky., died in that city Aug. 22. He had practised law both in Alabama and in in New York, being elected to the legislature of both states. He was elected judge of the Kentucky Court of Appeals in 1904, but declined and moved to Denver, where he became a leading figure.

Walling, Stuart Douglas, Justice of the Colorado Court of Appeals, died at Denver Aug. 22. He was a former law partner of Governor Shafroth.

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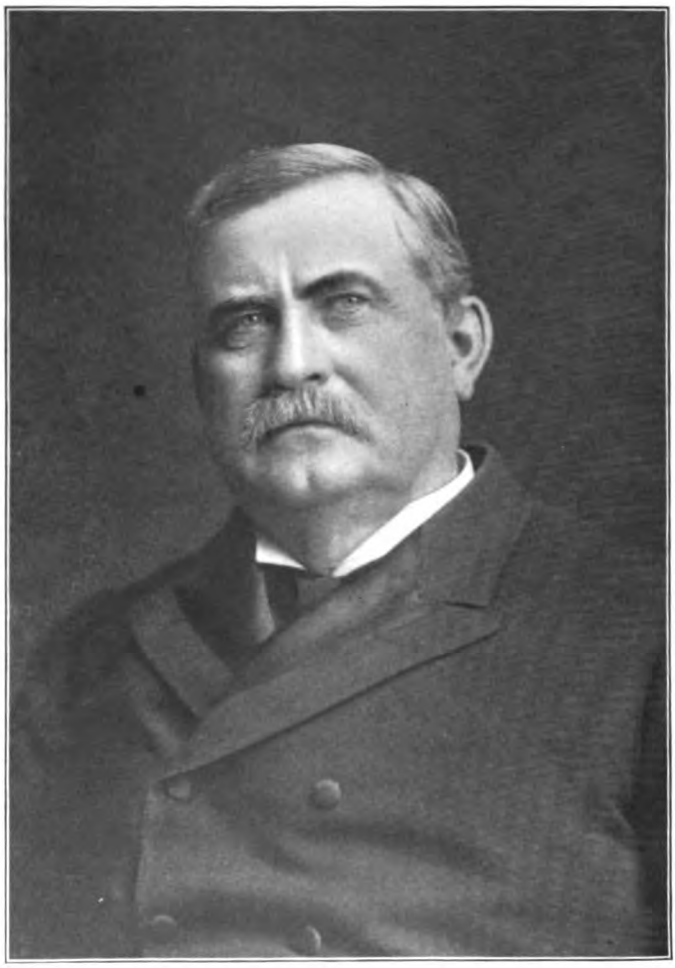

THE LATE ISAAC NEWTON PHILLIPS

FOR SIXTEEN YEARS REPORTER OF DECISIONS
OF THE ILLINOIS SUPREME COURT

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The Green Bag

Volume XXIV November, 1912 Number 11

Isaac Newton Phillips

ISAAC NEWTON PHILLIPS, for sixteen years Reporter of Decisions of the Illinois Supreme Court, died at his home in Bloomington, Ill., on Thursday, October 3. Two years ago he had been forced to resign his position by continuous and increasing ill-health. Just one week before his death he had been brought home from a sanitarium in Wisconsin, where he had been for over a year.

Mr. Phillips was born on a farm in Tazewell county, October 24, 1845. When but eighteen years of age he entered the Union army as a private soldier in Company A, 47th Illinois infantry. After leaving the army he attended school in Peoria and later entered the Illinois Wesleyan University at Bloomington, Illinois, where he remained three years. He taught school a year after leaving college and later studied law in the office of Robert G. Ingersoll, at Peoria. He received his degree of Bachelor of Law from the old Chicago University in 1871. He then began the practice of law at Bloomington, Illinois, and was for twenty years a law partner of Joseph W. Fifer.

Before his appointment as Reporter of Decisions Mr. Phillips was for four years chairman of the Illinois Railroad and Warehouse Commission under Governor Fifer's administration, and his work in that position attracted wide and favorable notice. He was also a close friend and adviser of Governor Tanner.

Mr. Phillips was a man of strong and attractive personality, and his keen sense of humor and inexhaustible supply of interesting and amusing anecdotes made him always a welcome guest at any gathering. He read widely, his preference being for the classics and works of history and biography, but appreciating good things in a lighter vein. Worry over his health during the last eight or ten years cast a gloom which he could not entirely shake off. Had he possessed health and energy commensurate with his ability, he would beyond question have achieved even greater honors than he did.

Mr. Phillips was a big man in every sense of the word. Body, brain and heart were on the same generous lines. Impressive in his manner, exact in his expression and vivid in his description, he was, in truth, an orator of the old school. In his practice at the bar his sound legal learning, his forceful logic, and his shrewd knowledge of men and affairs, his sarcasm, wit, and alertness in cross-examination made him an ideal advocate. In his youth he was no stranger to hardship and this made him to the poor and needy a loyal and priceless friend. He was a close student of men, and his writings on Lincoln, Washington, Marshall and others showed exceptional discernment and ability.

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Ohio's New Constitution

OHIO has long been classed as a conservative state. Its new constitution now places it in the category of progressive, not to say radical states. Liberal as it is, however, the new fundamental law is nevertheless differentiated from those of western states which have taken up "advanced" positions on the recall of judges, woman suffrage, and various other questions. The most radical features of the new constitution may be said to be those respecting the initiative and referendum. The provision that the Supreme Court may not declare a law unconstitutional when more than one judge dissents is hardly to be called radical. Many provisions are novel, such as those relating to three-fourths verdicts in civil cases, to the removal of public officials, including judges, to excess condemnation, and to progressive taxes on incomes and inheritances, but are not therefore to be classed as revolutionary or inconsistent with sound principles of government. Others are novel and also in some degree experimental and hazardous, as the provisions regarding minimum wage for instance, and the entrance of municipalities into the field of publicly owned business undertakings. On the whole, however, while Ohio's new constitution is certainly "up-to-date," and shows the influence of the latest political and social fads, it does not yield blindly to the newer tendencies, and minus the direct legislation features it might be in a way to be regarded a fairly conservative and moderate scheme of government.

The people voted on September 3 on forty-two proposed amendments to the constitution of 1851, and all but eight of them were adopted. These proposals practically amount to a new constitution, and the resulting instrument will be likely to serve as an example influencing various other states in future. It can of course hardly be considered a perfect model, in view of the piecemeal method by which it was formulated. Really the work of the convention, rather than of the voters, it bears evidence of the conscientious effort of a body of delegates not selected on a basis of distinguished ability, but nevertheless showing a respectable general average of capacity, to evolve, in a short session of 82 days, a consistent and sensible frame of principles from the mass of 340 proposed amendments and 162 resolutions, 502 questions in all, submitted for their consideration. This convention defeated the more radical proposals of judicial recall, and recall of decisions, and voted for woman suffrage merely in order to give the people a chance to decide for or against it. The initiative and referendum provisions were drawn with unusual care, as may be perceived from the fact that the possibility of two conflicting laws being approved on a referendum in different parts of the state, with absurd consequences, was foreseen, and provided for by making certain requirements regarding signatures on initiative petitions, and by prescribing that the bill or constitutional amendment receiving the highest number of votes on the referendum should be the law. Thus was wrought a constitution which seems well knit together except as regards the home rule provisions for municipalities — just what the state retains in the new distribution of powers has already caused some perplexity.

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The smallness of the vote throws upon the convention the credit or discredit of the new constitutional amendments. The total vote cast did not exceed 550,000, and was less than half the vote cast at the last Presidential election (1,121,588). On the woman suffrage and initiative and referendum proposals the voting was heavy, on many other questions it was so light as to indicate that they were not understood by those voting. On the liquor license amendment, for example, 132,110 fewer votes were cast than on woman suffrage, and this amendment was ratified by barely 25 per cent of the voters of the state. The rejection of certain proposals did not show a high level of intelligence, as for example that which would have struck the word "white" from the constitution, removing the denial of negro suffrage already void since the adoption of the Fifteenth Amendment of the federal Constitution.

Indications are that the validity of some or all of the amendments adopted will be challenged in the courts on two grounds: (1) that the constitution required a proposal to be accepted not by a majority of those voting thereon, but by a majority of the whole number of votes cast at the election; (2) that the legislature could not constitutionally delegate to the constitutional convention, by the Green law, the authority to call the special election.

A large number of matters properly statutory are included in the amendments adopted, for the reason, it is said, that they had been so dealt with by the legislature that this was the surest method of getting them enacted into law. For convenience in summing up the proposals, we way class as statutory not only those within the power constitutionally delegated to the Ohio legislature, but also those which would be within the scope of a normal range of legislative authority.

First of all, the following eight proposals of the constitutional convention which were rejected may be eliminated:

No. 2 — Abolition of Capital Punishment.

No. 22 — Anti-Injunction. This section prohibited issuance of injunctions in labor disputes except for protection of physical property, and granted right of jury trial in contempt cases.

No. 23 — Woman Suffrage.

No. 24 — Enfranchisement of Negroes. This proposal eliminated the word "white" from the clause giving "white male persons" the right of suffrage, the word having no legal validity under the Fifteenth Amendment of the federal Constitution.

No. 25 — Use of Voting Machines Authorized.

No. 29 — Inter-County Roads. State loans not to exceed limit of $50,000,000 for construction proposed.

No. 36 — Admission of Women to Offices for care of women and children.

No. 38 — Billboard Advertising. Removing present constitutional obstacles to legislative regulation.

This leaves thirty-two out of forty-four proposals which were accepted. They may grouped by subjects.

Legislative (Political) Provisions

The most important changes in the fundamental laws are effected by the following provisions, which provide for a more flexible constitution and express distrust of the legislature: —

No. 6 — Initiative and Referendum. Direct initiative of constitutional amendments provided for, which must be submitted to the people at the next regular or general election on petition of ten per cent of the voters. If approved by the majority of the electors voting thereon they become law.

Direct initiative of statute legislation provided for, on petition of three per cent of the voters. "The limitations expressed in the Constitution on the power of the General Assembly to enact laws shall be deemed limitations on the

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power of the people to enact laws." Thus the people cannot initiate constitutional amendments in the guise of ordinary statutes. The initiative of bills must be exercised not less than ten days before the commencement of any legislative session. If the bill is passed by the legislature it is subject to the referendum, like other laws. It it is rejected or amended, or no action is taken, the submission of the bill in original or amended form at the polls may be demanded by the filing of a supplemetary petition signed by an additional three percent of the voters. Such a bill adopted by majority vote in the election becomes law, even though in conflict with a bill which has passed the legislature. Any conflicting form of the bill adopted by the legislature shall go into effect only when the bill voted for on the referendum shall have been rejected.

Optional referendum on laws passed by the legislature provided for on petition of six percent of the voters. Laws go into effect only after ninety days following their filing in the office of the Secretary of State, to afford opportunity for this referendum. This provision does not apply to laws making tax levies, appropriating money, and to emergency laws necessary for immediate preservation of public peace, health and safety.

The Governor may not veto any bill originating by popular initiative and approved by referendum.

Use of the initiative and referendum to effect classification of property and single or unearned increment land taxes is prohibited.

Provision is made for preparing, publishing, and mailing to each elector a true copy of every proposition submitted on a referendum, together with an explanation and argument both for and against it, each not exceeding 300 words in length. The persons who prepare such explanation or argument for the proposition submitted may be named in the petition proposing it; those who prepare the argument against the proposition are to be named by the General Assembly if in session, otherwise by the Governor.

(The vote on the foregoing proposal was: yeas, 311,188; nays, 220,184.)

No. 39 — Constitutional Amendments. Provides that future conventions called to revise the constitution must be non-partisan and provides that hereafter amendments to the constitution are to be placed on the ballot at elections without party designation, and to be carried by a majority of those voting on proposals instead of by a majority voting at the election. Leaves unchanged the present constitutional requirement that a three-fifths vote of all those elected to each branch of the General Assembly shall be necessary to submit a constitutional amendment. Is a radical modification of the present method of amending the Constitution and is a means of amendment supplementary to the initiative and referendum.

No. 8 — Governor's Veto. Provides for a three-fifths instead of a two-thirds vote of each house of the legislature to pass a bill over the Governor's veto. Gives the Governor power to veto any bill, or any item of an appropriation measure, but not separate sections of a bill.

No. 26 — Primary Elections. Presidential preference primaries and advisory popular nomination of United States Senators provided for. Party conventions abolished. All nominations for district, county, and state offices shall be made by direct primaries or by petitions. Provides direct municipal primaries in all save municipalities with less than 2,000 inhabitants. Exempts townships, but provides that townships and municipalities of less than 2,000 may have primaries on the petition of 50 percent of the electors.

The amendment of the constitution by popular action is thus made comparatively easy. The percentage of voters (ten percent) required to sign a petition, in order to get a proposed amendment submitted at the polls, while not small, is nevertheless small enough to compel the submission of measures receiving the support of labor or other special class interests. The voting on special proposals of constitutional change on a non-partisan ballot, a majority on each proposal being sufficient for its adoption, makes it possible for the constitution to be amended by minorities of those legally entitled to vote. The changes cannot be said to insure the deliberate expression of the popular will.

With regard to statutory legislation, the direct initiative is not made so easy that there is danger of its being so employed as to burden the legislature

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with too many popular proposals. But when a measure has been initiated by the direct method, the legislature can enact a competing measure only at random, on the chance that it will not be sustained on the referendum, and for this reason is likely often to hesitate to propose a competing measure when the latter is clearly desirable. The provision for a referendum on all laws is also likely to cause the legislature to put aside its objections too readily from motives of political expediency, and cannot be said to make for a fuller sense of legislative responsibility.

The weakening of the executive check on legislation is obviously due to the feeling that the checks now provided by the initiative and referendum make a more limited power of veto sufficient.

The principle of direct popular nominations expresses the growing distrust of the party convention system, and the desire to secure a legislature more responsive to the popular will.

Professor Frank J. Goodnow has written of these political features of the new constitution:[1]

> When we consider the great ease in constitutional amendment, the great increase in the powers of the legislature, the decrease both in the powers of the courts and in the independence of the judges, and finally the powers to be granted to a comparatively small percentage of the electors of the state on the one hand to force action by the legislature and on the other hand to prevent action by that body by subjecting their action or their failure to act to the direct approval of the people, it must be conceded that the Ohio Constitutional Convention has traveled a long distance on the road to an almost purely democratic government. If the proposals which have been made are adopted, the government which the people of Ohio will enjoy will certainly be a government of the people and by the people. Whether it will be a government for the people is still to be determined.

[1] *New York Times*, Aug. 18, 1912.

STATUTORY MATTERS

No. 18 — Special Legislative Sessions. Would restrict the General Assembly in special session to the consideration of only such matters as stated in the Governor's call for the extra session.

Provisions Affecting Courts and Litigation

The judiciary provisions of the amendments primarily deal with the organization of the court system of the state and with the jurisdiction of the various courts. They thus treat largely of matters properly statutory. The new system relieves the Supreme Court by transferring a substantial portion of its appellate jurisdiction to the Court of Appeals. The changes make for greater expedition of procedure, and for the prompter determination of questions of public interest by the Supreme Court.

Simplification of procedure is aimed at by increasing the original jurisdiction of the Supreme Court, by giving an enlarged final jurisdiction to the Court of Appeals, and by limiting the power of the Court of Appeals to reverse judgments.

In two respects, however, the changes made are of far-reaching importance as affecting the fundamental law, namely, those regarding opinions by a divided court and the failure of the accused to testify in criminal cases. These changes are found in the following amendments:

No. 19 — Re-organization of Court System. "One trial, one review" — the maxim of President Taft — is the principal feature of this change, which leaves the Supreme Court unchanged in number of judges. Gives it original jurisdiction in all cases in which it now has original jurisdiction, but gives in addition the writs of prohibition and certiorari. Prohibition allows it to order inferior courts to cease objectionable practices and later to take to itself cases of great public interest to decide. Allows laws to be passed providing direct review in Supreme Court of all orders of administrative

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state offices. Supreme Court cannot hold a statute unconstitutional unless all but one of the judges concur, although a similar judgment of the Court of Appeals may be affirmed by a majority decision.

Gives name of Court of Appeals to circuit courts, and gives the Court of Appeals final jurisdiction in all cases save felonies and cases involving constitutional questions. Requires judgments of the Common Pleas courts to be overruled only with the concurrence of all the judges of the Court of Appeals on the weight of the evidence, though by a majority of the judges on other questions. Provides that equity appeal cases are not to be tried *de novo*, or as in the first instance, by courts of appeal.

No. 3 — Depositions in Criminal Cases. Provides that the state shall have the right to take depositions of absent witnesses to be used in the trial. Failure of the accused to testify may be the subject of comment by counsel and may be weighed by judge and jury.

The requirement that no statute shall be set aside as unconstitutional unless all but one of the seven judges of the Supreme Court concur in the decision illustrates the tendency to restrict the undoubted evil of excessive judicial tampering with legislation. The limitation seems rather too drastic, however, when we consider that the rights of minorities should be safe in the hands of a decisive majority of the judges, and that a decision in which four of the ablest of six judges, or five of seven, concur has almost the same moral weight as a unanimous judgment.

The proposal that failure of the accused to testify may be made the subject of comment by counsel and by the court seems hardly revolutionary or dangerous.

STATUTORY MATTERS

No. 1 — Three-fourths Verdicts — Trial by Jury. The legislature given power to enact laws whereby juries in civil cases may return verdicts on not less than three-fourths vote; makes no change in criminal trials. The legislature may fix the number of persons necessary to constitute a grand jury, as well as the number thereof necessary to concur in an indictment.

No. 4 — Suits against State. Provides that suits may be brought against the state.

No. 5 — Damage for Wrongful Death. Takes off present limit of $12,000 damages for wrongful death, and places no limit.

No. 15 — Expert Testimony. Legislature may enact laws regulating use of expert witnesses and expert testimony in criminal trials.

No. 20 — Common Pleas Courts. Provides for a common pleas court in each county, and gives the people the right to combine the common pleas judgeship with the probate judgeship.

No. 21 — Justices of the Peace. Justice of the Peace Courts abolished in cities having Police Courts.

Administrative Provisions

The recall of judges was defeated in the constitutional convention 57 to 45. A general provision for the removal of public officers, including the judiciary, upon complaint and hearing, however, passed and was ratified by the people. As the charges must be determined by a legislative commission there is no great danger of the abuse of this power in the case of judges.

No. 14 — Recall of Public Officers. "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers and judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution." The General Assembly is empowered to create a board or commission to determine charges brought against an official.

No. 40 — Local Government. Municipalities are given the right to frame their own charters. They may adopt any plan of local government. Cities have "all powers of local self-govenment," subject to the limitation that they shall not adopt and enforce any local police, sanitary,and other similar regulations which are in conflict with general laws.

Municipalities are permitted to own and operate public utilities. By condemnation or otherwise, any municipality may acquire public utilities, and may issue bonds to do so. A vote

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of the people is made necessary before any such steps can be taken. The right of excess condemnation is also granted. Municipalities receive the right to sell their products, such as light, power, etc., outside their borders up to 50 per cent of the total.

Municipalities are classified into cities and villages, 5,000 being the line of demarcation. General laws are authorized for "the incorporation of government of cities and villages," applicable to those that adopt them, but no additional law "passed for the government of municipalities" shall affect any municipality until it has been approved by a vote of the people thereof. By two-thirds votes of the councils or the petition of 10 per cent of the electors, the question whether there shall be a charter commission shall be submitted to the people. Fifteen men shall compose the commission. The charter so framed must be submitted to a vote of the people. By a vote of two-thirds of the legislative body or 10 per cent of the people, amendments may be submitted to the charter.

The foregoing is a liberal measure of autonomy in municipal government. Municipalities are afforded every facility to try new experiments in municipal ownership, possibly with the danger that state regulation of municipal finances and administration may now encounter constitutional obstacles. The plan seems to underrate some of the advantages of uniformity and of beneficent state supervision. The provisions with regard to the determination of local questions by direct vote of the citizens hardly ensure them adequate protection from the activity of powerful minorities.

Professor Goodnow of Columbia comments on these provisions affecting municipalities as follows:[2]

It may be said that on the whole the new constitution of Ohio marks a long step in the direction of the development of municipal home rule, although it is to be regretted that it is not more specific and clear as to the validity which is to be given to general laws and locally adopted municipal charters and charter amendments which are conflicting in character.

STATUTORY MATTERS

No. 27 — Education. State educational system centralized, with autonomy for city school districts, which may determine the size and organization of their boards of education.

No. 28 — Superintendent of Public Instruction. Provides for the election of this officer for a term of four years. He replaces the present State Commissioner of Common Schools, an appointive officer whose term is one of two years.

No. 31 — Superintendent of Public Works. Abolishes elective Board of Public Works and provides a superindent of Public Works, to be appointed by the Governor for a term of one year.

No. 35 — State Printing. Allows the state to do its own printing and provides that all supplies for state offices shall be bought by competitive bidding.

No. 37 — Civil Service Appointments. Requires the state and all political subdivisions above villages and townships, which are excepted, to establish compulsory civil service examinations and substitution of the merit system for the spoils system. Adds new section for the constitution.

Provisions Affecting Labor

A progressive position is taken up on the regulation of hours of labor and matters involving the health and safety of employees, and the minimum wage provision is significant:—

No. 11 — Labor Laws and Minimum Wage. Legislature suthorized to regulate hours of labor, and provision adopted to the effect that other sections of the constitution shall not limit legislative power to establish a minimum wage and sanitary factory regulations.

STATUTORY MATTERS

No. 11 — Workmen's Compensation. Legislature may provide compensation to workmen and their dependents for death, injuries, or occupational diseases by passing laws establishing a state fund, to be created by compulsory contribution thereto by employers. Such laws may take away from both employers and employees all rights of action and defenses, except that no right of action may be taken away from an employee when the injury, death,

[2] *New York Times*, Sept. 1, 1912.

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or disease arises from the failure of the employer to comply with any lawful requirement for the protection of the lives, health, or safety of employees.

No. 9 — Mechanics' Liens. "Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men their just dues by direct lien upon the property upon which they have bestowed labor, or for which they have furnished material. No other provision of the constitution shall impair or limit this power."

No. 13 — Eight-Hour Day. Eight hours made a day's work on all public work, whether done directly by the state or by contract.

No. 17 — Prison Labor. Contract labor system prohibited. Provides that prisoners in the penal institutions and reformatories of the state shall not be employed at work the product of which shall be sold or given away, and that goods made by such prisoners, either within or without the state, shall not be sold within the state unless conspicuously marked "prison made." Provision is made that such prisoners may be employed in the production of goods for the use of the state or any political subdivision thereof.

Provisions Affecting Business and Private Property

No. 32 — Taxation. Provides for levying of a progressive inheritance, a progressive income tax, and excise and franchise taxes, and taxes upon the production of coal, oil, gas, and minerals. Retains the rule of uniform taxation in the present constitution, but provides that state, city, village, hamlet, county, or township bonds issued henceforth shall be subject, like other property, to taxation. Poll taxes prohibited.

No. 12 — Conservation of Natural Resources. Provides for conservation by authorizing three sorts of conservation laws. Gives right to conserve mineral deposits and power to pass a law regarding the weight of coal as it comes from mines. Gives authority to encourage forestry gy exempting woodlands from taxation, and gives authority to provide water conservation districts.

No. 7 — Legislative Investigations. Either house of the legislature may obtain information affecting future legislative action or with reference to any alleged misconduct of its members, and to that end may enforce the attendance and testimony of witnesses and the production of books and papers.

STATUTORY MATTERS

No. 33 — Business Corporations. While the rule is retained which provides that corporations may be formed under general laws, it is specifically provided (1) that corporations may be classified, (2) that there may be conferred upon proper boards, commissions, or officers supervisory powers over corporate organization, business, and the issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations in the state; (3) that the sale and conveyance of other personal property, whether owned by a corporation or an individual, may be regulated by law; (4) that the stockholders of corporations authorized to receive money on deposit shall be responsible for all the contracts and debts of such corporations to an amount, in addition to their stock, equal to the par value thereof; and (5) that no corporation not organized under the laws of the state or person shall use the words "bank," "banker," or "banking" to carry on business except upon the condition of submitting to inspection, regulation, and examination as may be provided by statute.

No. 42 — Regulation of Liquor Traffic. Provides for stringent regulations under a local option licensing system. The liquor traffic shall not be licensed where it is now or may hereafter be prohibited under laws applying to counties, municipalities, townships, residence districts, or other districts provided by law. No license shall be granted to a person who does not sustain a good moral character. No license shall be granted to a person who is not a citizen of the United States. No license shall be granted to a perons interested in the sale of intoxicating liquors at another place of business. Applicants for license must be the only persons interested in the business for which license is asked. Conviction for a second offense against the liquor laws of the state revokes license. Licenses are limited to one for every 500 population in townships and municipalities. Municipalities may further restrict the number of saloons within their corporation limits.

No. 16 — Present constitutional obstacles to Torrens land title registration system removed. Provides for the creation and collecting of guaranty funds by fees assessed against lands.

No. 30 — Insurance. Provides for the passage of laws regulating insurance, including rates; foreign companies not exempted. Will

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permit public property to be insured in mutual insurance companies.

No. 34 — Banking Inspection. Makes stockholders of institutions authorized to receive deposits liable to depositors in double the amount of their stock in the event of failure of the institution. Abridges to this extent the single liability provision affecting corporations. Puts private banks under state inspection.

SCHEDULE

No. 41 — Schedule. Provides that these amendments shall go into effect on Jan. 1, 1913, with the exception of the initiative and referendum, which went into effect Oct. 1, and that they shall prevail over anything inconsistent in the previous constitution.

The Compulsory Working of Patents

By Cbed C. Billman, M.P.L.

PATENTS have been one of the most important factors in the growth of the United States from a group of poverty-stricken non-manufacturing dependencies to the greatest manufacturing country in the world. In fact, the late Senator O. H. Platt of Connecticut, one of the profoundest minds in the United States Senate for the past thirty years, maintained that the American patent system has been the greatest factor in the material development of the nation.

This supremacy may be said to be primarily due to the *absence* in our patent laws of the *two great burdens* imposed on patentees under the patent systems of the principal Europian countries — *First*, the compulsory working of patents; *second*, annual taxes after the second or third year of the grant. Such impositions as these are contrary to the spirit of American institutions.

PROPOSED AMENDMENT COMPARED WITH CONSTITUTIONAL CLAUSE

The framers of the Constitution of the United States thought the encouragement of inventing of sufficient importance to provide in the Constitution for the granting of patents.

Section 8 reads: "The Congress shall have power . . .

Clause 8, "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The protection of authors and inventors in the possession of their works and inventions, rests on the common rule that a man is entitled to the rewards of his own labor. Besides, such protection promotes the progress of science and the arts.

PATENTS AS PROPERTY

In this country patents are recognized as property and as such as much entitled to protection under the law as the legal owner and possessor of real estate or other forms of property.

If a man in due form enters upon and legally proves a claim to a certain tract or parcel of land, the government will issue a patent deed for the same under which the claimant becomes absolute owner and as such may make such use of it, either directly or indirectly, as he may see fit. He is not compelled to either work it himself, or to lease it to others for the same purpose. Indeed,

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like many owners of real estate in cities and other rapidly growing communities, he may prefer to hold it for the purpose of having its value enhanced by the operations and improvements of holders of similar property. Furthermore, the condition of the country or immediate community may be such as not to create a demand for the particular class of property.

Why should not the holder of patent property be entitled to similar privileges and immunities? As an inventor he may wish to hold his patented invention until it becomes to others "a missing link in the chain of progress."

PATENTS AS LEGITIMATE MONOPOLIES

Patents are the only form of absolute monopoly. And they are absolute so far as they go. In a recent decision the court said: —

> Within his domain, the patentee is czar. The people must take the invention on the terms he dictates or let it alone for seventeen years. This is a necessity from the nature of the grant. Cries of restraint of trade and impairment of the freedom of sales are unavailing, because for the promotion of the useful arts the constitution and statutes authorize this very monopoly.

The possession of suitable patents is, therefore, of great importance to the manufacturer. If the manufacturer develops an invention of value, he should patent it, even though he might not care to be able to prevent his competitors from using it; because, if he does not patent it, someone else may patent it, and may then sue for an injunction to prevent his use of the invention, and it is much cheaper to patent an invention than to defend a suit for an infringement for some other person's patent. This is not at all an impossible occurrence, but has actually happened.

PROPOSED AMENDMENT WOULD RETARD WHEELS OF PROGRESS

It should be remembered in this connection, that inventive progress is entirely evolutionary in character. One search of the U. S. Patent Office Records along any line or class of invention will demonstrate this fact. It should also be remembered that the U. S. Patent Office in the grant of patents, does not take cognizance of questions of infringement. These questions are left exclusively to the federal courts. The matter for consideration in the examination of applications for patents is largely a matter of determining the patentable novelty over the "prior art" — the latter being generally disclosed by an examination of the United States and foreign patents of record.

In the evolutionary character of invention, it naturally follows that there will be generic or primary inventions and specific or secondary inventions. The inventors of the first class of inventions are known as "pioneer inventors" and of the second, "improvers."

It necessarily follows that if the scope of the patent is commensurate with that of the "genus" invention it will be a "generic" patent, and as such will cover all subsequent inventions which amount to no more than a "species" of the "genus."

In order "To promote the progress of science and useful arts," as authorized in the Constitution, the government grants patents for secondary inventions, thus encouraging "improvers," and should the claims of some earlier "live" patent be found by the patentee to cover his patented invention, if unable to make terms with the owner of such prior patents he may await the expiration of such patent (when it becomes public property — a great contribution to progress and public welfare held in

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view by the framers of the Constitution) and then proceed to work his patented invention embodying the invention of the expired patent. In this way the patentee of the secondary invention may reap the just reward for his labor. Under the proposed law, as we shall see, the holder of the servient patent would be compelled to grant a license to the holder of the dominant patent upon the ground that the former's patented invention "is being withheld or suppressed" for the purpose or with the result of preventing competition.

On the 16th day of April, 1912, Representative Oldfield of Arkansas introduced a bill seeking to obtain what may be termed "The Compulsory Working of Patents." The bill was at once referred to the House Committee on Patents and is known as House bill No. 23,417. On August 8, 1912, the Committee on Patents reported the bill back to the House with amendment in the nature of a Substitute Bill (Report No. 1,161) with the recommendation that the amended or Substitute Bill be passed. This bill was committed to the Committee of the Whole House on the State of the Union and ordered to be printed (Union Calendar No. 370). As contra-distinguished from the decisions of the U. S. Supreme Court, the larger part of the present or Substitute Bill is devoted to provisions attempting to bring patent property within the provisions of the Sherman Anti-Trust Law approved July 2, 1890.

Before considering the bill, as now amended, the following questions may be asked:—

First: Do the provisions of the following quoted from the Patent Committee's recently reported Substitute Bill carry out the spirit of the Constitutional Clause? Obviously not.

Second: Are these proposed amendments calculated to *secure* for limited times to inventors "the exclusive right to their discoveries" within the terms of the Constitution? Obviously not.

By the terms of section 1 of the Substitute Bill it is proposed to amend section forty-eight hundred and eighty-four of the Revised Statutes to read as follows:—

Sec. 4884. Every patent shall contain a short title or description of the invention or discovery correctly indicating its nature and design, and shall have annexed thereto and made a part thereof a copy of the specification, claims, and drawings of the application therefor, to which it shall refer for the particulars of the invention or discovery, and contain a grant to the patentee, his heirs, or assigns, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and all Territories and possessions under the jurisdiction thereof for the term of seventeen years. But every patent granted for an invention shall be so limited as to expire nineteen years from the date of the filing in this country of the application upon which the patent was granted, exclusive of the time actually consumed by the Patent Office or the courts in considering the application and where the application has been involved in interference, of the actual time in which it has been so involved; and in no case shall the patent be in force more than seventeen years.

The district court wherein the owner of a patent or of any interest therein has a residence or established place of business shall have jurisdiction to compel the granting of a license under such patent under the circumstances hereinafter set forth.

The person applying for such license shall file a bill in equity setting forth briefly the facts and circumstances, and the court shall thereupon hear the person applying for such license and the owner of the patent. If the applicant shall allege and prove to the satisfaction of the court that the patented invention is being withheld or suppressed by the owner of the patent, or those claiming under him, for the purpose or with the result of preventing any other person from using the patented process, or making, using, and selling the patented article in the United States in competition with any other article or process, patented or unpatented, used, or made, used and sold, in the United States by

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the owner of the patent or those claiming under him or authorized by him, and also allege and prove that the application for said patent was filed in this country more than three years prior to the filing of such bill in equity, the court shall order the owner of the patent to grant a license to the applicant in such form and upon such terms as to the duration of the license, the amount of royalty, the security for payment thereof, and otherwise as the court, having regard to the nature of the invention and the circumstances of the case, deems just: Provided, however, That nothing herein contained shall be construed to authorize the court to compel the granting of a license by the original inventor who has not obligated himself or empowered another person to suppress or withhold such invention.

From the order of the district court granting or refusing such license, appeal may be taken by the party aggrieved to the circuit of appeals in the same manner and form as in other cases arising under the patent laws: Provided, That the provisions of this section shall not apply to any patent granted prior to the passage of this Act.

The provisions of the above are obviously repugnant to and inconsistent with the Constitutional Clause and are clearly inconsistent with the nature of a patent.

The provision that the "party aggrieved" may appeal to the Circuit Court of Appeals from the order of the District Court granting or refusing to grant such a license is merely calculated to increase litigation and only further burden the poor inventor or manufacturer with the expense and annoyance of litigation.

Section 2, of the Substitute Bill amends section 4899 of the Revised Statutes to read as follows: —

Sec. 4899. Every person who purchases of the inventor or discoverer, or with his knowledge and consent, constructs any newly invented or discovered machine or other patentable article prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor.

No purchaser, lessee, or licensee of a patented article sold by the owner of the patent, or by the owner of any interest therein, or by any person having authority to sell the same, shall be liable to an action for infringement of the patent because of any breach of the contract of sale or of any provision thereof.

No person who obtains a license of the owner of a patent, or of the owner of any interest therein, to use any art or process, or to make, use, and sell any article protected by such patent, shall be liable to an action for infringement of the patent because of a breach of such license or of any provision thereof.

The above provisions still further encourage the prevalent piracy of unpatented inventions, and the second and third paragraphs above quoted prevent the owner of the patent from protecting or enforcing his rights by reasonable conditions and stipulations in the sale or royalty contract.

Sections 4 and 5 of the Substitute Bill read as follows: —

Sec. 4. That no patent shall be used to restrain unreasonably or to monopolize or to attempt to monopolize any part of the trade or commerce among the several states or with foreign nations, except in such articles as and to the extent that they embody the invention or discovery so patented. No patent shall be used as a part of any combination in restraint of such trade or to monopolize or in any way attempt to monopolize the same. Any patent used in any manner prohibited by this Act may be condemned by like proceedings as are provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 5. That whenever in any civil suit or proceeding brought under or involving the provisions of this Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," it shall appear that any combination was entered into, existed, or exists, which was or is in restraint of trade, and that any patent has been used to restrain, or in connection with the restraint of, such trade or commerce, such restraint shall be conclusively deemed to have been or to be unreasonable and to be in violation of the provisions of said Act as to any party thereto who, in carrying on any business to which such combination relates or in connection therewith.

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It seems clear from the above provisions that the enactment of such a law as proposed would not only lead to endless confusion and expensive litigation in its enforcement but would ultimately result in the total destruction of patent property. This is especially manifest in view of the proviso at the end of section 4884 as proposed and as above quoted which proviso reads as follows:

> *Provided*, That the provisions of this section shall not apply to any patent granted prior to the passage of this Act.

As the large trusts and industrial corporations now hold unusual powers by reason of their ownership of fundamental or dominant patents in great industrial lines, it is clear that the initial effect of thus amending section 4884 will not be other than to immediately increase or multiply these powers and privileges to the great detriment of the public welfare.

In view of the above it is obvious that the patentee of a secondary invention would be entirely at the mercy of the holder of the dominant patent, since the holder of the latter patent could merely refuse to grant a license and enjoin any working of the patented secondary invention.

The situation which arose when Edison, Blake, and Berliner improved the Bell telephone will serve to exemplify the power now held by owners of dominant patents. Their telephones were immeasurably better than Bell's telephone, and yet they all embodied the principle which Bell had patented. Therefore, none of these "improvers" could use his telephone without Bell's permission, and the result was that their patents came under the control of the owners of the Bell patents.

Had the law contained a compulsory working provision, as now proposed, it is believed that the inventions of Edison, Blake and Berliner would never have been heard of.

In view of the above, it is not believed to be an unwarranted statement to say that the enactment of such a provision would be exceedingly unwise, detrimental to the just rights of manufacturers and inventors, and decidedly un-American.

Cleveland, O.

The Kansas Electoral Case

By Arthur Wakeling

THE Kansas electoral case will doubtless be argued before the full bench of the United States Supreme Court soon after this journal goes to press.

The Justices will determine whether or not eight Republican electors may run on President Taft's ticket with the understanding that if they are elected they will vote in the Electoral College for his opponent, Colonel Roosevelt.

Involving momentous issues, this legal battle is without precedent in the history of the country. Beneath its prosaic title of *Marks* v. *Davis* is hidden a peculiarly intricate and novel political struggle. And this conflict, in turn, is the cloak for two questions of fundamental importance that have never before arisen in exactly the same way. One is the perplexing problem

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of state rights. Disputes over the demarcation of state and federal authority have been frequent and, as before the Civil War, serious. The other question has to do with the rights of Presidential electors.

Has the United States Supreme Court jurisdiction in the matter of choosing Presidential electors?

Has an elector, once he has been elected, the right to show his personal preferences?

Associate Justices Mahlon Pitney and Willis Van Devanter granted a writ of error in the case on August 1, five days before the primary election in which the disputed electors were nominated.

In their opinion, they said:

> It is conceded that the questions are important and of large public concern, and we have concluded that those who present them are fairly entitled to the judgment of the court which by the Constitution is made the final arbiter of all controversies arising under that instrument. In this situation we think the writ of error should be allowed.

The application for the writ was made by the regular Republicans in a Taft-Roosevelt fight over eight Kansas electors. These men were nominated by petition before the Republican National Convention met. After President William H. Taft and Vice-President James S. Sherman were re-nominated the eight electoral nominees said that they would run on the Taft-Sherman ticket but would cast their votes in the Electoral College for Colonel Roosevelt and his associate.

This was something new and astounding. Never before had such a thing been heard of. Electors had always voted for the head of their ticket. The Electoral College had been considered merely a cog in the elaborate machinery for electing a President. But here were eight men who said they would not vote for the man in whose column their names were to be placed.

Nothing like it had ever been encountered in politics before. The Taft forces were perplexed beyond measure. They nominated ten additional candidates by petition, making twenty in all. The state's allotment in the Electoral College was ten, so that if the eight Roosevelt men were nominated at the primaries, the Taft column of the Presidential ballot in November would contain only two Taft supporters.

On the other hand, it was too late under the laws of Kansas to organize the Bull Moose party there. The Roosevelt men were determined to fight to keep their electors on the regular Republican ticket.

The legal fight was started when the Taft forces made charges of gross fraud against the eight men. R. A. Marks and eleven other citizens of Kansas, all of whom had signed the petitions of the eight electoral nominees, asked the Harvey County Court for an injunction restraining the county clerks of Kansas from placing the eight names on the primary ballots.

In this action Samuel A. Davis, the seven other disputed nominees, and all the county clerks of the state were named as defendants.

The plaintiffs wanted the petitions of the eight declared null and void on the ground that their twelve signatures had been obtained by fraud and under false pretenses and that, without their signatures, the petitions of the defendants would not have the requisite number.

A temporary injunction was granted and the case was fixed for argument on July 23, 1912. The primaries were to be held on August 6, making a speedy settlement imperative.

Before the Harvey County case came

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up, however, the Attorney-General of Kansas instituted mandamus proceedings in the state Supreme Court for the purpose of compelling the county clerks to place the names of the eight Roosevelt electoral candidates upon the ballot.

This was the court's opinion:

The court is of the opinion that the district court of Harvey County had jurisdiction to entertain the petition filed therein and to issue a restraining order pending its examination of the case. It is further of the opinion that such petition does not state a cause of action for a kind of fraud cognizable by a court of law or equity. Assuming the facts stated to be true they are political in their nature and the remedy of the plaintiffs is by political methods. The courts cannot be called upon to decide political matters further than the statutes clearly require, and the statutes of Kansas do not, expressly or by implication, authorize the granting of the relief asked of the district court of Harvey County.

It is assumed that the district court of Harvey County will reach the same conclusion and dismiss the action pending before it. Upon such dismissal the occasion for the proceeding in this court will be removed and, consequently, this proceeding is dismissed.

The next day, when the proceedings in the Harvey County Court were head, this opinion was read and the defendants moved the dismissal of the action. Objecting, the plaintiffs set forth their claim of rights, privileges, and immunities under the Constitution.

The opinion of the County Court was as follows:

And thereupon the court, having heard argument of counsel and being fully advised concerning the said opinion of the Supreme Court of Kansas, finds that said objections, protest and claim of right under the Constitution and laws of the United States, should be and the same hereby is denied;

And thereupon the court further finds that the plaintiffs herein have not stated a case by their petition cognizable in any court of law or equity, and it is, therefore, by the court ordered and adjudged that this action be, and the same is, dismissed.

But this was only the beginning of the rapid-fire proceedings. An appeal was immediately taken and on July 27 the Supreme Court of Kansas delivered this opinion:

The court adheres to its ruling in the case of the *State ex rel.* v. *County Clerks, et al.*, and since the questions involved in the present case are political and moral in their nature and the wrongs complained of are of a kind for which the courts are not authorized to grant relief, the judgment of the district court dismissing the action and denying the injunction must be affirmed. The court refrains from the expression of any opinion respecting the regularity or irregularity of the conduct of any political faction or organization.

So far the Taft forces had been defeated at every point. The day for the primary election was drawing very near and 300,000 ballots had to be printed. By stipulation it was agreed that the printing of the ballots should be delayed still longer, pending an application to the United States Supreme Court for a writ of error.

Justice Van Devanter, in whose circuit, the eighth, Kansas is included, was on his vacation in West Springfield, N.H. out of telegraphic communication.

Justice Pitney, who was at his home in Morristown, N. J., seemed to be the only Supreme Court Justice available, and to him application for the writ was made on Monday, July 29. After telegraphing to Governor Stubbs for assurance that the case would be preserved *in statu quo*, he set down argument on the application for the following Thursday.

The hearing was held in the Federal Building, New York City. Justice Van Devanter arrived from New Hampshire the night before and sat with Justice Pitney.

Representative Marlin E. Olmsted, of Harrisburg, Pa., and Dick R. Hite, of Topeka, argued for the writ; Representative Frederick S. Jackson, of To-

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peka, and L. W. Keplinger, of Kansas City, opposed the granting of it.

Mr. Olmsted asserted that there was a federal question sufficiently presented by the record to warrant the allowance of the writ of error. He insisted that the eight electoral nominees had fraudulently obtained their petitions and that their names therefore should not appear upon the primary ballot.

Mr. Jackson, on the other hand, urged that under the Constitution the method of choosing electors was specifically reserved to the legislature of the state, that all necessary relief could be had within the state, and that no federal question was involved.

The Justices announced their decision in the evening. They granted the writ of error but refused to order the names of the disputed electoral nominees removed from the primary ballots. In case the Taft forces were ultimately victorious, the names of the eight Roosevelt electors, it was understood, could be excluded from the official ballot in November.

The opinion of the Justices was, in part, as follows:

> The record discloses that the plaintiffs specially and clearly asserted in the state courts certain rights claimed to arise under the Constitution and laws of the United States, and that these rights, by necessary implication and intendment, were denied by the two state courts.
>
> Whether the rights asserted have a real basis in the Constitution and laws of the United States is the criterion by which we must determine whether the writ of error should be allowed. Under the settled practice, if the Justices to whom the application is made believe that the existence or non-existence of the rights asserted is involved in serious doubt, the writ should be allowed. We think that is the situation here.
>
> The questions raised do not seem to be determined or settled by any previous decision of the United States Supreme Court. Some of the opinions of the court contain expressions which tend to sustain the contentions of the plaintiffs. Whether in view of the facts in the cases in which these expressions occur they should be regarded as deliberate and controlling, ought not to be determined otherwise than by the court itself. . . .
>
> As courts are reluctant to interfere with the ordinary course of elections, whether primary or otherwise, as the rights asserted are not clear, but doubtful, and as the injury and public inconvenience which would result from a *supersedeas* or any like order, if eventually the judgment of the state court should be affirmed or the writ of error dismissed, would equal the injury which otherwise would ensue, we think no *supersedeas* or kindred order should be granted.

The final decision of the Supreme Court in the Kansas tangle will be of importance in judicial history not only because the case is itself unique, but also because it profoundly involves the status of Presidential electors.

JUDGES are not lawmakers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of the first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that determinations of what the law is must respond to popular impulse and to popular judgment.

It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence, by threat of recall, those who merely interpret the law already established.

— *Woodrow Wilson.*

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Warren's History of the American Bar[1]

By Lee M. Friedman

of the Boston Bar

It has long been the fashion at bar association meetings for speakers to deplore the evil days upon which we have fallen when lawyers no longer hold the public confidence and command the positions of leadership in the community. They speak of the early American lawyers as "the fathers of our Constitution." They point to those early days of American history as the golden age of lawyers, and groan over the present assaults on the bench and the titles of dishonor heaped upon the bar, as if it was entirely a new manifestation of degeneration of the present age. They seem to forget that long before the discovery of America Jack Cade proposed to begin his reforms by first killing off all the lawyers, and that if examined closely there never was an age when lawyers were popular favorites with their fellowman. Law and lawyers have ever been fearsome things to the layman. Milton voiced a perennial popular sentiment when he wrote: —

> Most men are allured to the trade of law, grounding their purposes not on the prudent and heavenly contemplation of justice and equity which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees.

Not only did the good Puritan fathers import the inherited antipathy to lawyers into the early American colonies, but also the popular distrust of the Common Law of England. Far from being proud of it "as their birthright," they were decidedly anxious to escape from it. The common law was neither popular nor a source of pride. It was popularly and stoutly denied that the laws of England had followed to the ends of the earth.

In the early days in Massachusetts, the ministers arrogated to themselves the functions both of legislators and of the judiciary. Thomas Lechford, one of the first professional lawyers to attempt to practise there wrote in 1642:

> The ministers advise in making of laws, especially ecclesiastical, and are present in courts and advise in some special causes annual and in framing of Fundamental Lawes. Matters of debt, trespass and upon the case, equity, yea and of heresy also are tryed by a jury.

Another contemporary wrote: —

> The preachers by their power with the people made all the magistrates, and kept them so entirely under obedience that they durst not act without them. Soe that whenever anything strange or unusual was brought before them, they would not determine the matter without consulting their preachers.

Indeed the first lawyers in that colony fared but ill. Thomas Morton, who described himself as "of Clifford's Inn Gent." but better remembered by Governor Bradford's description, "a kind of petite fogger of Furnewells Inne" came to Massachusetts about 1625 and settled near Quincy. Contemporary complaint reported that he maintained: a school of atheisme, set us a maypole and did quaff strong waters and act as they had anew revived and celebrated the feast of ye Roman Goddess Flora or the Beastly products of ye madd Bacchanalians.

and he was soon shipped out of the country. Thomas Lechford of Clements Inn began practice about 1638 in Boston. For some time he was what Washburn

[1] A History of the American Bar. By Charles Warren of the Boston bar. Little, Brown & Co., Boston. Pp. 562 + 24 (appendix and index). ($4 *net*.)

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called "the embodied Bar of Massachusetts Bay." He found the practice of law but lean pickings and described himself as being supported largely as a scrivener "in writing petty things." Finally at a Quarter Court in September, 1639, it was ordered that "Mr. Thomas Lechford, for going to the Jewry and pleading with them out of court is debarred from pleading any main cause hereafter unless his own and admonished not to presume to meddle beyond what he shall be called to by the court." Shortly after this he returned to England.

The people of Massachusetts were anxious to check with a stern hand the practice of law. In 1656 the General Court enacted that: —

> This court taking into consideration the great charge resting upon the colony by reason of the many and tedious discourses and pleadings in court, both of plaintiff and defendant, as also the readiness of many to prosecute suits in law for small matters; it is therefore ordered by this court and the authority thereof that when any plaintiff or defendant shall plead by himself or his attorney for a longer time than one hour, the party that is sentenced or condemned shall pay twenty shillings for every hour so pleading more than the common fees appointed by the court for the entrance of actions, to be added to the execution for the use of the country.

It was therefore not to be wondered at that there was such a dearth of trained lawyers in the colony that in 1689, Edward Randolph, Secretary to Governor Andros, wrote to England: —

> I have wrote you the want we have of two, or three, honest attorneys (if any such thing in nature). We have but two; one is West's creature — came with him from New York, and drives all before him. He also takes extravagant fees, and for want of more, the country cannot avoid coming to him so that we had better be quite without them, than not to have more. I have wrote Mr. Blackthwaite the great necessity of judges from England.

It was not until 1701 that the practice of law bacame dignified as a regular profession through the requirement by statute of an oath for all attorneys admitted by the courts as follows: —

> You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court, or some of them that it may be reformed. You shall not wittingly and willingly promote, sue or procure to be sued any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients.

Still the number of practising lawyers was so small that as late as 1715 a statute was enacted that:

> No person shall entertain more than two of the sworn allowed attorneys at law, that the adverse party may have liberty to retain others of them to assist him, upon his tender of the established fee, which they may not refuse.

After the Revolution, business and finances were much disturbed, and the process of adjusting the community to new conditions was slow and difficult. Litigation, foreclosures of mortgages, and collecting debts kept the courts busy and proved very irritating for the public at large. People attributed all their misfortunes to the lawyers, and began to express themselves in no uncertain terms. The town of Braintree in public meeting in 1786 voted that: —

> We humbly request that there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of the town.

Dedham instructed its representatives in the Legislature: —

> We are not inattentive to the almost universally prevailing complaints against the practice of the order of lawyers; and many of us now sensibly feel the effects of their unreasonable and

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extravagant exactions; we think their practice pernicious and their mode unconstitutional. You will therefore endeavor that such regulations be introduced into our Courts of Law, and that such restraints be laid on the order of lawyers as that we may have recourse to the laws and find our security and not our ruin in them. If upon a fair discussion and mature deliveration such a measure should appear impracticable, *you are to endeavor that the order of Lawers be totally abolished;* an alternative preferable to their continuing in their present mode.

The "Letters of an American Farmer" (1787) voiced this same sentiment: —

Lawyers are plants that will grow in any soil that is cultivated by the hands of others, and when once they have taken root they will extinguish every vegetable that grows around them. The fortunes they daily acquire in every province from the misfortunes of their fellow-citizens are surprising. The most ignorant, the most bungling member of that profession will, if placed in the most obscure part of the country, promote litigiousness and amass more wealth than the most opulent farmer with all his toil. . . . What a pity that our forefathers who happily extinguished so many fatal customs and expunged from their new government so many errors and abuses, both religious and civil, did not also prevent the introduction of a set of men so dangerous. . . . The value of our laws and the spirit of freedom which often tends to make us litigious must necessarily throw the greatest part of the property of the Colonies into the hands of these gentlemen. In another century, the law will possess in the North what now the church possesses in Peru and Mexico.

In short, popular opinion expressed itself that "no lawyers should be admitted to speak in court, and the order be abolished as not only a useless but a dangerous body to the public." John Quincy Adams wrote that "the mere title of lawyer is sufficient to deprive a man of the public confidence."

The Supreme Court of the United States had not yet attained its unique position and power in government. It was not until the appointment of Marshall as Chief Justice in 1801 that it began on its great career. In 1791 Rutledge resigned from that Court to become Chancellor of South Carolina. In 1795 Jay resigned as Chief Justice to become Governor of New York, and as late as 1800, in declining re-appointment, wrote that he

Left the bench, perfectly convinced that under a system so defective, it would not obtain energy, weight and dignity, which were essential to its affording due support to the National Government; nor acquire the public confidence and respect which, as the last resort of the justice of the Nation, it should possess.

With the case of *Marbury* v. *Madison*, in 1803, began that line of decisions that established the United States Constitution as the supreme law of the land, and that gave the Supreme Court its position as final arbiter of our law.

From that day to the present, there is an unbroken history of splendid development in American law. Each state has produced its great lawyers. Each court and each generation has brought forth great judges. Ever growing and ever fitting itself to new conditions, our law has kept pace with advancing American civilization. It is a history of impressive achievement, of which not only every lawyer, but every patriotic citizen may well be proud.

Mr. Warren in his recent "History of the American Bar" has written so entertainingly and so intelligently of this long record of American legal achievement that the book throbs with vital human interest. In these days when popular clamor is directed against our courts and laws, the history of similar discontent of former generations, and of what our laws and our courts have been in the past, must help to give this point and direction to the efforts of those who still believe in the vitality of our constitutional system.

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Reviews of Books

THE PSEUDO-PROBLEM OF FREE WILL IN CRIMINOLOGY

The Individualization of Punishment. By Raymond Saleilles, Professor of Comparative Law in the University of Paris and in the College of Social Science. With an introduction by Gabriel Tarde, late magistrate in Picardy and Professor of Philosophy on the College of France. Translated from the second French edition by Rachel Szold Jastrow, with an introduction by Roscoe Pound, Professor of Law in Harvard University. Modern Criminal Science Series, v. 4. Little, Brown & Co., Boston. Pp. xliv., 313 + 6 (index). ($4.50 *net.*)

Criminal Responsibility and Social Restraint. By Ray Madding McConnell, Ph.D., instructor in social ethics, Harvard University, author of "The Duty of Altruism." Charles Scribner's Sons, New York. Pp. 339. ($1.75 *net.*)

IN THE work of Professor Saleilles, the fourth to appear in the Modern Criminal Science Series, less discussion is given to the concrete problems of individualization of punishment than the title would suggest. This is because the writer occupies an intermediate position between the earlier and more recent types of penologists. Most of his effort is expended in analysis and criticism of the various schools. The book is animated by a spirit more critical than constructive. If its author could have frankly embraced the progressive position he would have been able to devote less time to general considerations, and to write a treatise of greater practical helpfulness. But it must not be supposed that he is not conversant with the actual problems, nor free from ripe practical suggestions.

A second defect of the book is the writer's evident lack of acquaintance with developments in Germany. Von Liszt is the only German penologist who receives much attention. In the case of De Quiros, who wrote an earlier volume in the series, this fault was more excusable, the author being a Spaniard writing under Latin influences; in the present case it is more serious in view of the effort to produce a treatise of cosmopolitan scope.

The subjects of free will and responsibility receive a disproportionate amount of attention. These topics ought not to be too prominent in a work on penology. They lead the reader too far afield from problems of leading importance alike from a scientific and from a practical standpoint. The reason why the author is at such pains to develop his own views on the subject of responsiblity is because of his reluctance to accept the position of the advanced school. He is not satisfied with the notion of the personal responsibility of the criminal as providing a sound basis for a penal system in combination with the principle of social protection. He must, like Merkel for instance, assume that prevailing ethical conceptions of value must be upheld by punishing infractions of the popular code of morals in accordance with a notion of social rather than personal responsibility. Subjective responsibility is not sufficient; responsibility in the objective or social sense "is a principle to be preserved at all cost" (p. 154). After he has spent many pages in exposing the errors of the so-called classical penology with regard to free will and the objective aspect of crime, as "materiality," it is disappointing to find him defending an independent theory of free will built partly upon a foundation of fiction, and urging that crime be treated objectively in a manner that retains some of the retributive spirit of the earlier school. This view ill

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accords with the proposal of individualization of punishment on the basis of personal or subjective responsibility, and in his desire to reconcile his position with recent theories of individualization the author fails to pursue a path of logical directness.

The book will be prized chiefly for its summaries of the positions of leading Italian and French criminologists, for its practical comments on the French and Italian criminal codes, and for its full discussion of the subjects, of legal judicial, and administrative individualization of punishment. The soundness of the author's practical conclusions does not seem to suffer to any great extent from the over-emphasis laid on the punitive aspect of penal remedies. The work is held in high regard in France, and must be studied as one of the important landmarks in recent literature.

The excellence of the translation, which is the work of Mrs. Rachel Szold Jastrow of Madison, Wis., who is also the translator of Berolzheimer's "Die Kulturstufen der Rechts- und Wirthschaftsphilosophie," in the Modern Legal Philosophy Series, deserves notice. It shows a firm grasp of the technical idiom of scientific writing in English.

The late Dr. McConnell, in his work on "Criminal Responsibility and Social Constraint," committed the same mistake as Prof. Saleilles of giving disproportionate attention to the subjects of responsibility and free will. We are glad to note that instead of taking up the futile task of mediating between the free will and deterministic positions, he has no fear of the consequences of a deterministic theory. Why, then, should he devote one third of his book to consideration of freedom, and another third to that of responsibility? It was said long ago that free will does not present an actual problem, but only a pseudo-problem. It is unfortunate that so much attention should have been wasted by Dr. McConnell on an unnecessary discussion which cannot hope to invite the study that a more pregnant treatment of questions connected with social control would call forth.

He says that determinism differs from fatalism "in that it maintains that a man's acts are the result of internal as well as external causes" (p. 226), surely not an idle distinction. He chooses to regard punishment not as an expiation for past offenses, but as a motive and guarantee of future good behavior. He further attributes paramount and controlling importance to the principle of social utility. One is led to expect, therefore, a complete abandonment of the principle of retribution, and a support of the passionless employment of the penal substitutes of the newer penology for the purpose of safeguarding the social interest, without the infliction of pain except in so far as it may serve a useful object. Dr. McConnell, however, though close to this position, never quite adopts it. He believes that there is some precious quality in punishment, as such, which requires its preservation as a fundamental measure. Social necessity, he says, calls for legal vengeance. The community needs a safety valve. While social utility sometimes calls for rehabilitation, that in fact being the best means of social self-defense, the infliction of deterrent punishments may also be called for by the interest of the community. To a certain extent this may be true, but such inflictions are expedient only under appropriate conditions ensuring their efficiency. The author pleads for a retributive procedure that ill accords with his deter-

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ministic position. His attitude is perhaps to be explained by his curious conception of retribution. "If my crime was a free one, there is no warrant for punishing either for having done it or in order to prevent its recurrence." For from that standpoint I cannot have been the cause of the crime, it is not my act. This is futile chop-logic, for under the classic retributive theory the very reason for punishment was found in the freedom of the agent to determine his own conduct, and the freedom and retribution theories are inextricably united, just as the deterministic and penal tutelage theories, on the other hand, are inseparable. Deterrent punishment is administered to a child not because he is without power to shape his future conduct but because he has that power. Dr. McConnell makes the mistake of basing deterrent punishment not on that residual concept of freedom which determinism does not take up, but on the notion of a determinism with which freedom is incompatible. He thus offers a strange mingling of the older and newer theories, rather than a logical application of determinism. The result is that he is led unconsciously, somewhat in the manner of Saleilles, to exaggerate the moral responsibility of the criminal, and to defend a retributive system as opposed to a system based wholly on the motive of social protection.

Though the author professes to make social utility supreme, he does not really succeed in doing so. Is the punishment to be measured and determined by the principle of social utility, or to express the same thought differently, by the principle of efficacious action to achieve the correction or reform of the criminal, or is it to be governed by some principle antecedent to that of social utility? From the concluding pages it is clear that it is to be governed not by efficacy, but by the demand of the social will. The will of society, we are told, "is the ultimate source of all social authority." "An act is a crime in so far as it contravenes the will of society." Does then, the will of society govern social utility, or is it governed by social utility, or are the two so closely correlated that we cannot say that either is prior to the other? There can be no question as to Dr. McConnell's position, for with him the social will is clearly supreme. When a purely pragmatistic position is assumed, it is of course easy enough to justify retributive punishment or any other institution on which the will of society insists, whether it is actually essential to the conservation of the social well-being or not.

MR. CHAMBERLAYNE'S THIRD VOLUME

A Treatise of the Modern Law of Evidence. V. 3, Reasoning by Witnesses. By Charles Frederic Chamberlayne, Esq., of the Boston and New York bars, American editor of Best's Principles of the Law of Evidence, American editor of the International Edition of Best on Evidence, American editor of Taylor on Evidence. Matthew Bender & Co., Albany N. Y. Pp. xxxiii, 1278 + 93 (index). ($28 for the four volumes.)

THE third volume of Mr. Chamberlayne's work on evidence, entitled "Reasoning by Wittnesses," will be of great value to the legal profession. Though an integral part of the entire work and best to be understood in connection with it, this volume is nevertheless in itself a complete treatise on this important topic.

A logical treatment of the subject is insured by a thorough going analysis at the outset of the mental processes of witnesses, yielding the important distinction between intuition and deduction. These principles are then applied

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in detail. According to the proportion which the intuition of observation bears to deduction, the mental acts of witnesses are considered as intuitive inferences, where this element of observation is greatest, through reasoned inferences, and conclusions of law or fact, where it is increasingly less, to judgements of experts, where it disappears entirely, leaving pure reasoning or deduction from assumed facts in absolute supremacy. For administrative purposes, witnesses are regarded as ordinary or skilled.

A striking feature of the present volume is the arrangement, in proper order, under each class or species of mental process, of the various forms of human activity, engineering, mechanic arts, medicine, railroads, street railways, etc., which furnish practical litigation with illustrations of the particular rule in question. In this way, the busy lawyer may find, with any desired degree of minuteness, the case most nearly "on all fours" with his own.

MUNICIPAL FRANCHISES

Municipal Franchises: A Description of the Terms and Conditions upon which Private Corporations enjoy Special Privileges in the Streets of American Cities. V. 2, Transportation Franchises, Taxation and Control of Public Utilities. By Delos F. Wilcox, Ph.D. Engineering News Publishing Co., New York. Pp. xxi, 885 (index). ($5 *net*.)

THE first volume of this work (reviewed in 22 *Green Bag*, p. 410) contained an introductory exposition of general principles and a discussion of pipe and wire franchises. The second volume, now before us, treats of transportation franchises and of the taxation and control of public utilities. There is an important chapter on the elements of a model street railway franchise. The views of the author on public regulation are clearly developed, and he is never reluctant to take up an aggressive position when he feels that a consistent application of principles of sound public policy demand it. He represents a progressive yet sound attitude on the subject of public regulation. Yet the volume also presents a mass of detailed information regarding franchises, and the index renders the practices of any city readily ascertainable.

We are inclined to approve the writer's views to the effect that original cost offers a better test of capital value than cost of reduplication, that increments of land value should be annually added to the capital value, that actual capital should approximate as nearly as possible to capital value and should be fully paid in, that the market value of stock should be kept near par by public regulation if necessary, that franchises need not be taxed except in unusually prosperous years, and that a rigid public control should be exercised, ensuring the fulfillment of the obligation to provide satisfactory service and at the same time guaranteeing a fair dividend to the stockholders. The suggestion that no franchise should be granted for a longer term than thirty years is good advice.

BOOKS RECEIVED

The Courts, the Constitution and Parties: Studies in Constitutional History and Politics. By Andrew C. McLaughlin, Professor of History in the University of Chicago. University of Chicago Press, Chicago. Pp. 299 (index). ($1.50 *net*.)

Handbook of the Law of Banks and Banking. By Francis B. Tiffany, author of "Death by Wrongful Act," and handbooks on "Sales" and "Principal and Agent." Hornbook Series. West Publishing Co., St, Paul, Minn. Pp. 579 + 51 (table of cases) + 37 (index). ($3.75 delivered.)

A Short History of English Law from the Earliest Times to the End of the Year 1911. By Edward Jenks, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, Principal and Director of Legal Studies of the Law Society. Little, Brown & Co., Boston. Pp. xxxviii, 379 + 11 (index). ($3 *net*.)

Majority Rule and the Judiciary: an examination of current proposals for constitutional change affecting the relation of courts to legislation. By William L. Ransom, of the New York bar. With an introduction by Theodore Roosevelt. Charles

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Scribner's Sons, New York. Pp. xx, 183 (index). (60 cts. *net.*)

Law of Contract. By William T. Brantly, Reporter of the Court of Appeals of Maryland; author of the "Law of Personal Property," etc., formerly Professor of Law in the University of Maryland. 2d ed. revised and enlarged. M. Curlander, Baltimore. Pp. 466 + 39 (table of cases) + 55 (index). ($4 *net.*)

The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898. By William Miller Collier. 4th ed., by William H. Hotchkiss. 9th ed. with amendments of 1903, 1906 and 1910 and with decisions to July 1, 1912, by Frank B. Gilbert, of the Albany bar, editor of Street Railway Reports. Annotated, joint author of Commercial Papers, etc. Matthew Bender & Co., Albany, N. Y. Pp. lxxvii, 1313 + 107 (appendix) + 93 (index). ($9.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Criminal Procedure. "The Burrell Oates Case." By Chester T. Crowell. 3 *Journal of Criminal Law and Criminology* 407 (Sept.).

"The fact that Burrell Oates, a negro, who has been convicted of murder in the first degree five times, is still unhanged, might not have stirred as much comment as it has but for the fact that Holly Vann, a white accomplice, was convicted the first time he was tried and promptly hanged. Texas doesn't understand why it should be so difficult to hang the negro. The Burrell Oates case is one of the facts forcing both of the present candidates for Governor of Texas to declare for court reform, which will put additional obstacles in the way of reversal of either civil or criminal cases. . . .

There was no evidence of error in the record, . . . but Judge Ramsey held the Governor had no right to appoint a special judge to try a case than had the porter in his office. He writes one of the most earnest opinions he has ever handed down, in making this point, and he refers to Burrell Oates as 'probably a very guilty negro,' but says that it is necessary to have the court which tries him authorized by the constitution."

Criminology. "Negro Crime and Strong Drink." By Booker T. Washington. 3 *Journal of Criminal Law and Criminology* 384 (Sept.).

"A further confirmation of the fact that prohibition tends to reduce crime is shown by the statement of Chief Justice Walter Clarke of the state of North Carolina, who says that since prohibition has gone into effect in the state the general crime rate has been reduced 50 per cent."

"Police Gleanings." By Joseph Matthew Sullivan. 3 *Journal of Criminal Law and Criminology* 393 (Sept.).

"It is interesting to ask the vagrant what his personal opinion is concerning the legal qualifications of the different members of the judiciary. The ability of the judge is determined by the leniency or severity of the sentences imposed in various cases. If a judge is easy-going and imposes light sentences the vagabond sings his praises and extols him to the skies. In like manner if the judge is unnecessarily inquisitive and imposes severe sentences he comes in for universal condemnation."

See Juvenile Delinquency, Penology.

Desertion. See Domestic Relations.

Direct Government. "The Initiative and the Referendum in Switzerland." By William E. Rappard. *American Political Science Review*, v. 6, p. 345 (Aug.).

"Viewed in the light of Swiss experience, the apprehensions of those who predict that the initiative and referendum lead to social revolution are as unfounded as the fears of those who expect these institutions to work against all cultural progress. In Switzerland their result has simply been a legislation eminently characteristic of the national temperament. The Swiss have therein shown themselves as they are, a well-schooled, practical, unimaginative, thrifty and enterprising people, averse to high-flown political speculation, but awake to the possibilities of careful progress; jealous of their local autonomy, but not stubbornly loath to sacrifice it on the altar of national unity when general interest clearly demands a sacrifice; suspicious of all superiority and hostile to all social and economic privileges, but still more suspicious of and hostile to all policies which tend to destroy the privileges of superior wealth and ability by encroaching too boldly on the personal liberty of all; impatient of arbitrary rule, but willing to submit to authority when imposed by the will of the majority and especially when backed by historical tradition; unsentimentally sympathetic to deserving poverty, but almost harshly unfeeling for thriftless indolence."

Domestic Relations. "The Court of Domestic Relations of Chicago." By William H. Baldwin. 3 *Journal of Criminal Law and Criminology* 400 (Sept.).

"As Judge Goodnow says, non-support of wife or children should be an extraditable crime,

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as it already is when coupled with desertion, which is made a misdemeanor under the law. It would be a mistake to make it a felony to secure extradition, as was done by New York, followed by other states since, for it could not then be handled in Judge Goodnow's court by his efficient methods, which conclusively demonstrate the unwisdom of indulging in undue severity in such cases."

General Jurisprudence. See Government.

Government. "Sovereignty." By W. A. Coutts. 75 *Central Law Journal* 223 (Sept. 20).

This article contains some interesting and indeed valuable points. For example: —

"The distinguishing feature of constitutional government consists of the ease with which the sovereign power or some portion of it, that is to say, the will of the people or of some portion of them, can be applied in practice to the ordinary functions of government. The reservation of sovereign power to the people, so far from being a distinctive feature of American law, is a feature pertaining to the laws of all nations, not indeed that such power is expressly reserved, but that its reservation is a moral and physical necessity because of the simple fact that one man's energy cannot be transferred to another.

"It is, of course, only by a legal fiction that the whole people of a nation can be regarded as a corporation sole. Its corporate action must always be through agents, and a multitude of agents are now employed in the work of government where there were formerly but few employed. Nevertheless the corporation action of the nation is as binding upon each individual as it would be if it were the action of the individual himself, and indeed, more so, and hence the fiction by which the sovereign people can be regarded as a corporation sole is not more absurd than that which imputes corporate existence to the King.

"When, however, one comes to examine the real nature of sovereign power, he sees that it is very far from being supreme, absolute or uncontrolled. In the first place, the action of every nation is controlled by the common sense and common morality of mankind."

"The Parliament Act of 1911, II." By Alfred L. P. Dennis. *American Political Science Review*, v. 6, p. 386 (Aug.).

"Over all these questions there rests the shadow of the Cabinet, to which Sir William Anson rightly says, 'legislative sovereignty may be said to have passed.' He also refers to the effect of the payment of a salary to the members of the House of Commons as an additional reason why men will shrink from independence and the prospect of a dissolution. The power of the Cabinet may thereby be increased. . . .

"The Parliament Act, while it emasculates the horde of 'backwoodsmen' in the House of Lords and gives rough equality to both political parties, has probably placed the chief power more definitely in the hands of the twentieth century party machine as controlled by party leaders. Potentially democratic it is first of all the 'apotheosis of party.' Thus in one sense the public had a Hobson's choice of 'revolutions.' Though the Parliament Act is only half a 'revolution,' inasmuch as in years of Conservative government the country had already become familiar with most of its possibilities."

See Direct Government, Local Government.

India. "The High Courts in India." By Sir Henry T. Prinsep. *Nineteenth Century*, v. 72, p. 455 (Sept.).

"In 1872 Sir James Fitzjames Stephen, the law member of the Governor-General's Council, summed up the situation, and in a well-known minute expressed his own opinion on the subject. His recommendations were not accepted, and the only result was the separation of the Civil Service into two separate departments — judicial and executive — under which the prospects of official advancement were so clearly in favor of the latter that candidates for judicial service were few, and as a rule represented the least capable in the Civil Service. . . . In Bengal a Judgeship of the High Court is a *cul-de-sac* and a bar to higher office under Government either in India or in England, whereas in Madras and Bombay it has usually led to a seat in the Local Council, and even to the Council of the Governor-General."

Industrial Accidents. See Workmen's Compensation.

Interstate Commerce. See Railway Rates.

Juvenile Delinquency. "The Responsibility of Children in the Juvenile Court." By H. H. Goddard. 3 *Journal of Criminal Law and Criminology* 365 (Sept.).

"Twenty-five per cent at least of the children who come before our Juvenile Courts are feeble-minded. Therefore, it is incumbent upon every person who is interested in the work of children to insist that every child who comes before the court shall be tested — by the Binet test until something better is evolved — and if he proves to be feeble-minded, he shall be provided for in an institution where he can be made happy and useful and cared for throughout life, rather than be sent to the reformatory for a few years or to a detention school for a few weeks and then be let out to commit misdemeanors again because he has no power of doing otherwise."

Life Insurance. "'The Big Three,' 1905–1912." By Sydney Brooks. *North American Review*, v. 196, p. 484 (Oct.).

Since the upheaval in the three great life insurance companies seven years ago — the Equitable, the Mutual, and the New York Life — "each company has turned the interval to account by inaugurating a rigid policy of internal reform, has improved the character and yield of its investments, has greatly diminished its expenses, has revolutionized its administrative methods and arrangements, and has added year by year to the returns to its policy-holders."

Local Government. "Village Government

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in New England." By Frank G. Bates. *American Political Science Review*, v. 6, p. 367 (Aug.).

Village government has been most highly developed in Vermont, Maine ranking second, and Connecticut (under the name of "borough" government) third. Massachusetts, however, affords types of minor forms of municipal incorporation, in its legislation constituting fire, water supply, and similar districts.

Marriage and Divorce. "The '*Ne Temere*' and the Marriage Law in Canada." By J. G. Snead-Cox. *Nineteenth Century*, v. 72, p. 570 (Sept.).

Treating from a Roman Catholic standpoint of the larger questions of the relations between state and religion involved in the case (see 24 *Green Bag* 445).

See Domestic Relations.

Panama Canal. "The Panama Canal Tolls: A British View." By Archibald R. Colquhoun. *North American Review*, v. 196, p. 513 (Oct.).

"The essential feature for the success of the canal is that it should compete on favorable terms with existing trade routes, and especially with the transcontinental railroads. Any discriminating regulation will increase the possibilities for competition and decrease the margin of profit; it will also increase the necessity for close calculation in estimating possible profits; and all these things will, particularly at the outset, militate against the free use of the canal. Moreover, the possibility of directing trade into particular channels is better met by direct dubsidies than by a general immunity from tolls."

"Was Panama 'A Chapter of National Dishonor'?" By Rear-Admiral A. T. Mahan, U.S.N. *North American Review*, v. 196, p. 549 (Oct.).

"The treaty of 1846 not being applicable, the United States possessed an unimpaired international right to act as her interests demanded. A measure which should wholly bar all access by sea to the Isthmus was entirely within her legal competence. She had a legal right even to take a side, if she chose. She did not take a side, because neither Colombian nor Panama forces were to be permitted to land within fifty miles of Panama. . . . The order to the United States naval officers not to permit a landing within fifty miles of Panama was . . . wholly within the legal competence of the United States. It insured the neutrality of the Isthmus; an expression which means simply that the territory shall not be permitted to be a scene of war. The result was that the insurrection was successful."

Penology. "The Treatment of Crime — Past, Present and Future." By Warren F. Spalding. 3 *Journal of Criminal Law and Criminology* 376 (Sept.).

"Reformatories deal with only a small percentage of the criminals. The penitentiaries deal with another small percentage. Great progress has been made in their administration. Their most serious evils grow out of the ancient theories respecting criminals. Legislatures, with no special qualification for such work, say that certain offenses shall be punishable by imprisonment in the state prison. These offenses are all 'felonies'; the men who commit them are 'felons.' Felons and felonies are not all alike, yet only one place is provided for their punishment. . . . One of the worst results of the unclassified penitentiary is that its administration and discipline must be adapted to the worst men.

"But penitentiaries and reformatories, together, deal with only a few of the criminals. The problem of the felon is a simple one compared with the problem of misdemeanant. Misdemeanants outnumber the felons many times, but receive little attention, except from the police. The county prisons are filled with an ever-shifting population, for whose reclamation and restoration nothing is done. What can be done? First, classify the misdemeanants. The drunkards should be put by themselves. They should not be treated as criminals, or with criminals. They need light, air, sunshine, hard work in the open, and much longer sentences than they would receive on the penal basis. Other misdemeanants should be classified on the basis of character, and then their needs supplied. Prominent among these is education. This should not be confined to illiterates. It has been proved that intellectual improvement is attended by moral improvement. The warden of the Massachusetts state prison says that no man who has learned to read and write in his prison has returned."

"Some Fundamental Problems of Criminal Politics. By Giulio Q. Battaglini. 3 *Journal of Criminal Law and Criminology* 347 (Sept.).

Apropos of the draft penal codes of Austria, Germany and Switzerland.

"In the German Drafts the transition from punishments to measures of security is very remarkable. Thus §42 of the Draft German Code of 1909 provides for the placing of the criminal in a workhouse (*Arbeitshause*), but then goes on to give power to the judge to apply punishment, if the delinquent shows himself incapable of work. Ferri has remarked that 'this legislative admission is of itself sufficient to destroy the pretty castle of cards, ingeniously built up to maintain a distinction between punishments and measures of social security, which is the shadowy survival of discarded theories, not light of positive reality.' To me, on the contrary, it seems clear as midday light that, if for one remedy another may be substituted, then it is connoted that the two remedies are not identical. And further their difference arises from the fact that punishment is resorted to, when measures of security have been tried in vain. This demonstrates that there is something in punishment, which has a peculiar and distinct efficacy in dealing with crime."

"Behind the Bars: The Recollections of a Prisoner in a New York State Prison." *Outlook*, v. 102, p. 132 (Sept. 21).

An excellent description of the routine of

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convict life in a humanely administered prison in which discipline was well maintained. The writer's point of view is directly opposite to that of Lowrie in his recent book on the California prison of San Quentin, and unconsciously does honor to the effectiveness of the newer penal methods.

Procedure. See Criminal Procedure.

Railway Rates. "Present Problems in Railway Regulation." By William Z. Ripley. *Political Science Quarterly*, v. 27, p. 428 (Sept.).

"May power to fix minimum rates, so necessary to an adequate program of control, be constitutionally delegated by Congress? . . . Surely it seems an anomaly that the Government should ever seek to fix such a lower limit below which compensation may not be had. And yet many cases show that this is absolutely necessary to the end that justice may be done."

Social Progress. The Abolition of Poverty." By Jacob H. Hollander, Professor of Political Economy, Johns Hopkins University. *Atlantic*, v. 110, p. 492 (Oct.).

"In the last fifteen years the population of the civilized world, excluding China, has been increasing at the rate of about one per cent a year, whereas the average annual increase in the five great cereals, wheat, corn, oats, rye, and barley, has been about 2.5 per cent. In other words, production has increased two and a half times as much as was necessary to keep per capita consumption constant."

Taxation. "Recent Tax Reforms Abroad, I," By Prof. E. R. A. Seligman. *Political Science Quarterly*, v. 27, p. 454 (Sept.).

Meeting of significant developments in Great Britain, Germany, and Australia.

Workmen's Compensation. "How Germany Deals with Workmen's Injuries." By Eva E. vom Baur. *Political Science Quarterly*, v. 27, p. 470 (Sept.).

Interesting statistics are presented. If the same interest and sympathy could be instilled into the minds of American as of German employers, "we would not have to read that barely one-eighth of the industrial accidents are paid for, and that the best showing has been made by Wisconsin, where fifty per cent of the injured workmen received some compensation, if only for medical purposes."

Latest Important Cases

Defamation. *Libel per se — Words Imputing Want of Business Credit.* Md.

The plaintiff in *Stannard* v. *Wilcox & Gibbs Sewing Machine Co.* purchased a sewing machine of the defendants, and after paying four months' instalments declined to make further payments and asked for the removal of the machine. The defendants then wrote to the New York corporation, of which plaintiff was the local agent, reciting the foregoing facts and threatening a civil suit against the plaintiff. On learning of the contents of this letter the plaintiff brought his action to recover damages for an alleged libel, and the demurrer of the defendants was sustained by the Court below.

In the Court of Appeals of Maryland the judgment was affirmed (May 10, 1912), the Court (Stockbridge, J.), after reviewing the authorities on communications libelous *per se*, saying: —

"A generalization from all these cases leads to the conclusion that in order for words not ordinarily actionable in themselves to be libelous *per se*, because affecting the plaintiff in respect to his business, occupation or profession, it is necessary that the words have a reference to him in that capacity. Words which impute to persons engaged in business, such as merchants traders and others in occupations where credit, is essential to the successful prosecution of their occupation, nonpayment of debts, want of credit or actions which tend to lessen their credit, are libelous *per se*, unless they are privileged communications. In this case, Mr. Stannard was not in business on his own account, he was the local manager for a nonresident corporation. It is not alleged or suggested that he had any occasion for the use of credit, or that his credit had been in any way impaired or affected." (*Washington Law Reporter*, Sept. 20.)

Election Laws. — *Nomination Certificates of Independent Candidates — Unreasonable and Discriminating Statute Requirements Governing Number of Signers — Provision of Levy Law Unconstitutional.* N. Y.

By a decision handed down in New York State Sept. 5 by Supreme Court Justice A. S. Tompkins the provision of the Levy election law making 1,500 signatures necessary in an independent nomination petition for county officers and 800 signatures for Assemblyman was declared unconstitutional and void. Justice Tompkins in his opinion concluded that the present law was un-

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reasonable, unjustly discriminative, and void in view of the fact that it called for an excessive proportion of the figures of the nomination petition to the total number of legal voters of the county.

The decision was rendered in the case of *People ex rel. Hotchkiss et al.* v. *Smith et al., Board of Elections of Putnam County.*

The Appellate Division affirmed the order directing that a peremptory writ of mandamus issue directing the Board of Elections of Putnam County to disregard the provisions of the statute in question as unconstitutional and void.

On appeal, the Court of Appeals, Chase, J., writing the opinion, said that jurisdiction would be assumed in matters of a pressing public nature involving public officers. In Putnam county the average total vote at general elections is a little over 3,000. "A statutory provision requiring the signatures of 1,500 or even 1,000 voters to entitle a person to file a certificate for independent nominations is, in view of the total number of voters in some of the counties of the state, so manifestly unreasonable as a matter of law that the unconstitutionality of the requirement does not make necessary any discussion by us." The order of the Appellate Division was so modified as to direct the Board of Elections to receive certificates of nomination for certain offices when signed by 500 legal voters. (*N. Y. Law Jour.*, Oct. 8.)

Joint and Several Guarantors. — *Contribution Enforced after Claim was Barred by Statute of Limitations — Promissory Notes.* N. Y.

In *Hard* v. *Mingle*, decided by the New York Court of Appeals Oct. 1, two parties guaranteed, jointly and severally, the payment of a promissory note to a bank which it discounted for a third party. After the bank took the note, but before its maturity, one of the guarantors died. The maker became insolvent, but the bank failed to commence a timely action against the deceased guarantor's estate, whereupon its claim against the estate was barred by the short Statute of Limitations. The co-guarantor subsequently paid the note and then brought an action against the estate of the deceased guarantor for contribution.

It was held, per Haight, J., that the action could be maintained; that failure of the bank to commence a timely action against the estate of the deceased guarantor did not relieve the co-guarantor from full liability, or the decedent's estate from liability to make contribution to him. (*New York Law Journal*, Oct. 7.)

Wild Animals. — *Duty of Keeper to Look Out for Safety of Others — Degree of Care Owed to Persons Admitted on Free Tickets.* U. S.

A place of amusement known as the "Hippodrome" had been maintained for some time in Kansas City. In connection therewith was a wild animal show, with cages installed along one side of the room containing lions and other animals. A certain Miss Cushman, wearing a red hat, went to an afternoon performance with a view to going home with one Miss Rose, one of the exhibitors and trainers of the lions. She was admitted without having purchased a ticket, for Miss Rose had left word with the doorkeeper to that effect. The show closed, Miss Rose giving the last performance, and the lions were returned to their several cages. The audience left, but Miss Cushman remained, waiting for Miss Rose to come back from the dressing room. At some time during this wait four lionesses had been turned back from their cages into the arena. Probably attracted by the red hat, or because of some vicious propensity, one of the lionesses reached through the bars of the arena and seized the young woman by the head and seriously lacerated her. She brought suit for $5,000, and the jury found for her in the sum of $3,000.

The United States Circuit Court of Appeals, eighth circuit, held that while it is not unlawful for a person to keep wild beasts, though they may be such as are by nature fierce, dangerous, and irreclaimable, it is their duty to keep them in such a manner as to prevent the occurrence of an injury to others through such vicious acts of the animals as they are naturally inclined to commit. Miss Cushman was not a trespasser, even though she bought no ticket, but was lawfully in the place with defendant's consent, and defendant owed the same degree of care to protect her from injury as to other visitors. Judgment for plaintiff affirmed. *Parker* v. *Cushman*, 195 Federal Reporter 715.

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The Editor's Bag

TAKING THE BENCH OUT OF PARTY POLITICS

There seems to be a growing tendency to take the election of judges out of politics in states where the judges are elected by the people. One device favorable to this result is that of holding separate elections, at which no candidates other than those for judges are to be voted for and the attention of the public need not be diverted from the real issues by political and partisan considerations. When not only separate judicial elections are held, but bar primaries are also organized, the election of judges on a nonpartisan basis is pretty sure to come.

The Chicago Bar Association has successfully applied the principle of the bar primary, in a state which has provided for separate elections. President Edgar B. Tolman, in his last annual report, indicated the ideal procedure to be followed. Broadening his suggestions to make them apply to any bar association, we may say that bar primaries should be organized well in advance of party primaries or conventions, and the co-operation of the press should be invited to aid in the nomination and election of those selected. Before the primary is held, however, full information regarding the fitness of all probable candidates should be procured and circulated among the members of the bar. Such an arrangement saves members of the bar the annoyance of a flood of letters from those seeking office, and candidates expenses of solicitation. The sending out of a complete circular to the members of the bar may well be coupled with a request that the latter shall avoid pledging themselves to support any candidate in advance of the announcement of the results of the bar primary. The action of the primary, secured by this fair and satisfactory method, is apt to be conclusive and to receive the support of both press and public.

The plan of nonpartisan bar nominations has lately been tried in Denver, where candidates for five district judgeships were named this summer on a secret ballot, for presentation to the political party conventions in the hope of securing uncontested nominations.

We understand that in Virginia the bar associations practically nominate and elect the judges, even the politicians acquiescing in the wisdom of this course.

The next best thing to the nonpartisan method of choosing judges is the bipartisan method. It has been the custom in New York State, when two vacancies exist in the Court of Appeals, to nominate a Republican and a Democrat, and most of the county bar associations have recently adopted resolutions asking for the continuance of the custom this fall. It remains to be seen whether the party which has command of the situation will avoid the temptation this year to snatch two judgeships, or will yield to the strong pressure of the influence of the state

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and county bar associations and that of New York City.

LIMITATIONS ON THE FREEDOM OF THE PRESS

THE constitutionality of the legislation adopted by the last session of Congress in the form of a rider to an appropriation bill, encroaching somewhat upon the private business of newspapers by requiring them to publish statements of the owners of their stock and the volume of their paid circulation, is at least open to serious doubts. Even if the measure may be sound in part, some of its most salient features are hardly likely to survive the test of a judicial determination of their constitutionality, and the unsoundness of some provisions may vitiate the law so thoroughly that the less objectionable provisions will fail with the rest. It is widely considered questionable journalistic ethics, in most cases, for a paper to print as ordinary reading matter what is actually paid for as advertising, this principle being recognized, for instance, in a Massachusetts statute relating to political advertisements. There is also something to be said in favor of compelling newspapers to disclose their ownership to their readers, as is required by the New York statute.

It seems to be beyond the constitutional power of Congress, however, to deal with these subjects specially appropriate to state legislation except in so far as may be possible without exceeding the scope of the authority to regulate the use of the mails; and for this reason legislation applying to all newspapers, whether circulated by mail or otherwise, enforced by a much more drastic penalty than merely that of exclusion from the privileges of the mails, may be subject to a successful attack in the courts. It is conceivable that under a liberal interpretation of the police power, in line with that adopted in recent decisions of the United States Supreme Court, that in *Noble State Bank* v. *Haskell* for instance, the giving of this information to newspaper readers about owners and advertisers might be treated as one of the "great public needs," and that Congress would thus have the right to exclude from the mails publications failing to meet such requirements. That would be about as far as it would be possible to go in upholding the validity of this legislation. It clearly overreaches itself in calling for statements of circulation, which cannot be regarded as in any sense a great public need. It also seems to discriminate unfairly in favor of religious and fraternal periodicals, and likewise in favor of weekly at the expense of daily publications. On the latter grounds of unfair discrimination alone its constitutionality may perhaps be successfully assailed.

CULPABLE NEGLIGENCE

"IN an insurance case tried in an Ohio town," says a Cleveland lawyer, "a youthful attorney asked an old sailor, during the course of his cross-examination, at what time of day a certain collision occurred.

"About the middle of the first dog-watch," was the reply.

"In summing up the case, the youthful lawyer enlarged upon the information thus imparted, as follows: —

" 'You can imagine, gentlemen of the jury, the care which was exercised on this occasion, when, as appears from the testimony of one of the plaintiff's own witnesses, this valuable ship and her cargo, to say nothing of the lives of the passengers and crew, were entrusted to

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what, gentlemen? — why, to the mere watch of a dog!' "

SUPREME COURT DISTRICTS IN ILLINOIS

IN many ways the faults of the judicial system of Illinois lie at the door of the legislature.

One of the fundamental causes of the failure of the courts to respond to the need of the people as a whole comes from the failure of the legislature to reapportion the Supreme Court districts in accordance with the population of the state.

The constitution provides that the Supreme Court districts shall be apportioned "upon the rule of equality of population as nearly as county bounds will allow." In spite of this mandate the legislature has failed to reapportion Supreme Court districts at any time since the constitution was adopted. As a result, one-half the population of the state is crowded into a single district, while the other half of the population is represented by six judges.

It is not charged that this rotten borough system of apportioning Supreme Court districts has been used by Supreme judges intentionally to oppress. The fact remains, however, that judges of the Supreme Court are men. That they are eminent men in their localities, does not endow them with comprehension to grasp conditions entirely outside of their experience. Even the best country lawyers have very small practice as compared by city standards. Country trial judges have few cases and ample time to try them. Country jurors are glad to serve in the winter, and the better class of countrymen in the winter gladly spend long weeks at the county seat at public expense, and earning a daily wage.

With their superabundance of time country lawyers fairly revel in working out fine technical points of law which country judges enjoy to mull over, while the friends and adherents of contesting attorneys enjoy the display of wit and legal acumen of their champions.

In the city conditions are reversed. The enormous rents, combined with the high cost of necessities, compel lawyers to transact an enormous amount of litigation to obtain an income sufficient to maintain the position which their profession demands of them.

The best citizen looks upon jury service as an affliction. Indeed, it is a serious burden upon all business men, professional men, and higher wage earners. Litigation is heavy in the centers of population, and crowds on the courts, which are unable to dispose of it as it comes.

Trial judges in Cook County, while they average high in citizenship, do not occupy a professional, social, and political position proportionate to that of the country judges. They tend to weaken before powerful clients or political attorneys, and to defer their legal judgment to the great metropolitan lawyers who appear before them.

The character of litigation and litigants and of circumstances surrounding lawsuits and practice of law is practically different from what pertains in the six country Supreme Court districts.

Yet appeals from this mass of litigations are taken to a tribunal six-sevenths of which have no instinctive knowledge or adequate comprehension of the conditions on which they pass.

The great principles of the common law can be made to fit differing conditions, and where they are sympathetically and intelligently applied bring generally good results. But it is impossible for any six men to apply these

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principles to conditions with which they are so utterly unfamiliar as are the six country Supreme Court judges of Illinois with metropolitan conditions.

An honest reapportionment of the Supreme Court districts will automatically cause needed changes in the burdensome rules which now oppress litigants and obstruct justice.

THE CHARGE OF THE GRAFT BRIGADE

(With apologies to the spirit of Tennyson)

There were 600 claimants for $64,000 left by Jeremiah Moynihan, a St. Louis rag picker.
— *News item.*

EAGERLY, eagerly,
Eagerly onward,
Soon as they heard of his death
Came the six hundred.
Living they knew him not,
But now with pace full hot
Into the chamber of death
Rush the six hundred.

"Forward the Moynihans!"
On come the warring clans.
Altho by many leagues
Their homes are sundered,
They could not let go by
This tempting slice of pie;
That is the reason why
Into the chamber of death
Sneaked the six hundred.

Dollars to right of them,
Dollars to left of them,
Dollars in front of them;
Everyone wondered
What kind of tale to tell
His bank account to swell
And with old Jerry's wealth
To line his pockets well;
Greedy six hundred.

. . . . . .

Behold them walking home!
A ragged host they come, —
Someone has blundered.
They did but hold the bag
While others took the swag, —
Foolish six hundred.

SIRIUS SINNICUS.

OUT OF HIS OFFICE FOR A WEEK.

COL. J. T. HOLMES of Columbus, O., who has furnished the *Green Bag* with many good anecdotes, tells the following story:

"Colonel James Watson of the 40th Ohio, in some charge on the Atlanta campaign — Kenesaw Mountain — was pulled in over the enemy's works by a stalwart Confederate. He was a rather short, slender, dark-featured, black-eyed, black-haired young man of high spirit, intelligence and courage, but on that occasion had gone so far that 'discretion was the better part of valor.'

"They sent him to perhaps two different prisons and then to Libby, at Richmond. In course of two or three months, one of the Confederate prison surgeons conceived a great liking for the little Yankee Colonel, who some years after the war told the writer whose Ohio regiment was on that same campaign that he read Grote's History of Greece, in fine print, while he was confined in Libby.

"At the end of the imprisonment, one day in the fall of 1864, the surgeon cargeon carried a bundle as he went to a small room in the prison, and the guards did not notice that the Colonel passed newly clad into the exchange line, much in advance, as he well knew, of his time and turn for passing beyond the lines — a practical escape. The Confederate friend had said cautiously, "Colonel Watson, have you any money?" "Not a cent." "Well, here are $800, Confederate money; this ought to help you through, good-bye."

"The war closed; the Colonel had not heard from his 'friend in need,' and after a few years, at work in his law office in the Capital City, wrote to some correspondent in Richmond in an effort to find him. The effort was a success and

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the Colonel sent the ex-Confederate surgeon $800 in gold. Some considerable time later, Watson was one day working away at his desk and among his books, when a fine looking gentleman stepped in and inquired for Colonel Watson. Turning to him the latter said, 'I am Colonel Watson, what can I do for you?' 'Well, sir, I am Major —, the Confederate surgeon, whom you knew in Libby prison.' Instantly Watson sprang to him, grasped his hand, half embraced him and began to express his joy at the meeting. Suddenly he stopped, closed his desk with a bang, turned to his office mate, and saying, 'I shall be out of the office for a week,' went out with the Major.

"Arm in arm they started on the week's entertainment; never entirely sober, never drunk, but mellow, talkative, inseparable, at the theatres, in the Capitol, on the streets, at the club, in the restaurants, calling among the best families, at appropriate times and in proper condition, they fought the war over again, and especially their several and joint parts therein, including the phases of the prison episode and its connections and separations, until the final farewell and the Major's boarding the cars for his southern home.

"The Colonel closed his desk forever a few years ago, leaving a record as soldier and lawyer and citizen untarnished.

"Of the Major's later life, or his death, we have no information."

REMINISCENCES OF AN OHIO LAWYER

AS HE was "rummaging among old files the other day in search of the outline of an address delivered at an ex-soldier gathering, years ago," writes this same friend in Ohio, these two other anecdotes, "forgotten lore, turned up, dust-covered.

"Many years ago, say in the '30's, a young lawyer removed from Wayne County to the capital county of Ohio. His career promised well and for a time was prosperous. He built a fine residence for that day; an interesting family was growing up around him, he had both legal and literary ability, and 'everybody was his friend.'

"Gradually, however, a change came over his life. He lost his grip physically and to some extent mentally. His amiability remained after his clients were nearly all gone; some gleams of wit flashed out even after he had returned wholly to the jurisdiction of his first love, the justice of the peace.

"As years crept on his nasal tone became more pronounced, and a sort of judicial paralysis set in which impeded locomotion. The old man's clients had become like angel's visits and the capacity to take of those who came or remained was slender.

"We had a shrewd, keen, hard-headed member of the bar whose early education had been neglected — he spelled his Creator's name with a small g — but who was well up in the value of old judgments, the methods of collecting or compromising them, and the practice in 'the people's court.'

"The old man brought suit for one of his clients against a client of the petti-fogger. The bill of particulars was defective and on appearance day D. attacked it by motion to dismiss; the old man resisted in his earnest, feeble way, but he was over-matched and 'the Square' dismissed his case.

"As he shuffled from the justice's room across the rotunda of the building to the head of the stairway on the way to the street, he consoled his client and relieved his own feelings by assailing his adversary's conduct. His climax,

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spoken half through his nose, rather slowly and jerkily, was,

"'I wish the legislature would pass an act declaring Bill D—— a skunk, and then it wouldn't be manslaughter for *anybody* to kill him.'"

Each has gone to his reward and each life had in it, toward the last, many elements of failure.

"While they were in their prime, a young man, who has run his course and joined them beyond the river, came to this bar. Among his early cases, if not his first, was an action of replevin against his client to obtain possession of a hog. It was the old question of identity, the same, but of inferior magnitude, that was later involved in the *Tichborne* case.

"The justice's office was crowded on the day of the trial. The law of replevin had not then many of its recent features, and the young lawyer had not caught one material point of its operation. He had set his heart on winning possession of the chattel. The verdict came in for his client, somewhat in its form, and what the justice said about the damages sent his thoughts woolgathering. They were still at it as he went down the stairs.

"As soon as he struck the street, some friend, who had taken an interest in his success, hailed him, 'Well, John, how did you come out?'

"John, still dazed, was non-committal and, in a discouraged tone, replied, 'Why, I — I won the case, but I lost the hog.'"

THE ESOTERIC LANGUAGE OF THE LAW

A CORRESPONDENT sends us the following extract from a complaint recently filed in a New York court:—

"*Second*: That on the 27th day of August, 1912, the said R. G. B. was duly appointed guardian *ad litem* of P. B. who is an infant by one of the honorable judges of this court for the purpose of prosecuting the cause of action herein set up and alleged."

THE FOREMAN'S VERSES

FROM Sam B. Dannis, Esq., of the Los Angeles Bar, we learn the facts of a rather unusual incident. A case had been in progress in the criminal courts of Los Angeles for about three or four weeks, one McKinney being charged with manslaughter. A great deal of expert testimony was introduced by both sides and at the conclusion of which Judge Cabaniss charged the jury, and after twenty minutes' deliberation a verdict of not guilty was returned. After the court received the verdict Judge Cabaniss, in thanking the jury, composed a little poem which he recited at the time from the bench. The foreman of the jury replied to the judge in the following verses, written in his honor:

"THE GATES AJAR"

To Judge George H. Cabaniss

The honest man ne'er needs a law,
The just man wears a smile;
The criminal has a mental flaw,
Marring the whole with a soul of guile.

You naturally are kind and just,
Sometimes too much, by far;
You think of the lust, the measly crust,
With San Quentin's gates ajar.

Human nature is weak and depraved —
Knowing this you seek to be fair.
Mentally diseased many are enslaved
And fall in the Satan-meshed snare.

If men would think of the wasted years
Spent behind prison walls,
Of the useless tears and mental fears,
They would shun error that ever enthralls.

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When the convicts meet up yonder,
And change stripes for robes of white,
In their minds will ofttimes ponder
Over darkness turned to light.

We will not be seeking a witness
When we meet at the final bar.
It will be self-made fitness
Whether we find the gates ajar.

In our future incubator-hatch
We will find our joys galore,
At that royal, glorious potlatch,
When we meet on yonder shore.

JUDGES AS POETS

(From the London *Law Journal*)

LORD JUSTICE KENNEDY'S translation of the 'Plutus' of Aristophanes into English verse, which has just been published by Mr. John Murray, is another pleasing instance of the association of the English bench with scholarship and poesy. Two other living judges have found a rest from their judicial labours in wandering about the slopes of Parnassus. Mr. Justice Ridley has rendered Lucan's 'Pharsalia' into blank verse, and Mr. Justice Darling is the author of 'On the Oxford Circuit' and other peoms. Blackstone, whose 'Farewell to my Muse,' has secured for him a niche in the Temple of Fame apart from the larger one which he occupies as a jurist, deemed it necessary to bid 'a long, a last adieu' to his Muse when the duties of the bench drew him to 'wrangling courts and stubborn law.'

But welcome business, welcome strife,
Welcome the cares, the thorns of life,
The visage wan, the poreblind sight,
The toil by day, the lamp at night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,
For thee, fair Justice, welcome all.

No such obligation to renounce the Muses was recognized by Mr. Justice Talfourd, whose sudden death in the Assize Court at Stafford in the theme of the best of Mr. Justice Darling's poems; his tragedy 'Ion,' though written before he became a judge, was produced at Sadler's Wells two years after he was raised to the bench, and he continued while wearing the ermine to display his gifts as a writer of dramatic verse. Most of the poets of the bench have, like Lord Justice Kennedy, been translators. Lord Bowen's literary gifts found expression in his translation of the 'Æneid,' while Mr. Justice Denman's most notable achievements were his translation of Gray's 'Elegy' into Greek elegaic verse and his rendering of the first book of the 'Iliad' into Latin. But both these scholarly judges could on occasion turn their hands very neatly to light verse. Blackstone would probably have considered the administration of justice a less doleful thing if it had been his happy lot to be the recipient of a *jeu d'esprit* from Bowen's facile but fastidious pen.

STARVING A JURYMAN

SOME years ago there lived in Maine one Colonel Morse, who, unlike many citizens, was not only willing but anxious to serve as juror. When the jury retired for consultation, the Colonel came forward as the leader, no matter who might be foreman. If his opinion was not followed, there would be a "hung jury."

Once the Colonel's vanity was gratified. He was made foreman of the jury empanelled to try an important case. The consultation was a long one, but it failed to bring about an agreement. The Colonel led the jury back to the court room.

"Have you agreed upon a verdict?" the clerk asked.

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"May it please the Court," said the Colonel, rising, "we have not. I have done the best I could, but — " and the Colonel, turning, cast a withering glance on his colleagues — "here are eleven of the most obstinate men I ever had any dealing with."

If the vain Colonel had lived in colonial days, he would have found that his glorious minority of one entailed unpleasant consequences. For we read that once in Boston, when a juror stood out against his eleven fellows, the attorney-general took him aside and directed him as to what he should do.

But the man refused to follow the attorney's advice, and so the court ordered that the eleven should be allowed to eat and drink as much as they pleased, while the refractory one might look on without tasting a drop or eating a morsel.

The method proved effective, for starvation did what argument could not do; it brought about a unanimous verdict.

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

The *Pall Mall* tells of a cynical American judge. "The prisoner," said counsel in a case, "can prove that at the time the crime was committed her maid was combing her hair."

"That," replied the judge, "only proves an alibi for her hair — not for herself."

Apropos of our story last month as to the prolixity of counsel, there is an old story of Mr. Justice Darling. Counsel, in cross-examining a witness, was very diffuse and wasted much time. He had begun by asking the witness how many children she had, and concluded by asking the same question.

Before the witness could reply, Justice Darling interposed with the suave remark, "When you began she had three."

Of the same order was the retort of a judge of older day, when counsel, in addressing the jury, had spoken at great length, repeating himself constantly, and never giving the slightest sign of winding up. He had been pounding away for several hours, when the good old judge interposed and said, —

"Mr. ——, you've said that before."

"Have I, my Lord?" said counsel, "I am very sorry; I quite forgot it."

"Don't apologise," was the answer. "I forgive you, for it was a very long time ago."

Law Notes (London).

The Legal World

Monthly Review of Leading Legal Events

Ohio has given some surprise to the more conservative parts of the country by adopting a constitution of which the direct initiative and referendum are the most salient feature, and the experiment of a flexible organic law is unlikely to be attended by wholly satisfactory results. Doubtless the ease with which amendments may hereafter be adopted has had some influence in securing the introduction into the constitution of so many statutory matters. Some of these, such as the minimum wage, are of questionable value from the standpoint of public policy. The new constitution is far from being a model, either in form

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or in substance, but is less radical than one might suppose from a superficial impression.

One of the most wholesome proposals adopted was that effecting a reorganization of the courts. Many lawyers throughout the state voted for it to express their approval of the principle of "one trial, one review." Chief Justice Winch of the Circuit Court voted for the amendment notwithstanding his objections to the limitation on the authority of the Supreme Court to declare statutes unconstitutional. The result of the change will be to relieve congestion in the Supreme Court, by curtailing its appellate jurisdiction. The Circuit Courts have kept up with their business, and no reform in their case was necessary, but there have been delays in the trial courts which can now be remedied by legislation giving sufficient control of the trial of causes to the judges. A committee of the bench and bar is collaborating to frame a proposed practice act which will secure the objects sought by the amendment.

Important reforms of procedure are recommended by a committee of the Missouri Bar Association, looking to greater dispatch and more freedom from harmful technicality. The San Francisco Bar Association also has committees at work on questions of procedure and practice.

Uniform international regulations governing bills of lading may be considered by an international conference perhaps to be called soon under a vote adopted by the International Congress of Chambers of Commerce at Boston. The same body has expressed its approval of the Pomerene bill now pending in Congress, which bill also has the approval of the Uniform State Laws Conference.

International Congress of Chambers of Commerce

The Fifth International Congress of Chambers of Commerce met in Boston Sept. 24–26, 828 delegates being present, representing forty countries.

Dr. Max Apt of Berlin, in his advocacy of a unification of the systems employed by various nations of the world in the use of checks, explained in great detail the methods employed by German, French, English and American banks, bankers and business men and contrasted them. The difficulties attending the unification of the check systems of the world's leading nations, he contended, are not insurmountable, and he urged its accomplishment.

Count D'Almeida of Brazil warmly indorsed these recommendations.

Charles Christophe of Ghent, Belgium, presented the views of the Cercle Commercial et Industriel of Ghent, which opposed Dr. Apt's ideas. F. F. Begg, of the London Stock Exchange and London Chamber of Commerce, stood pat on the present English check system.

The Congress then voted that it was desirable to have a uniformity of checks throughout the world.

Dangers of loss to shippers through irregularity in bills of lading were discussed at length by Charles S. Haight of New York City. Mr. Haight quoted from the findings of Prof. Samuel Willisson, of the Harvard Law School, who made an exhaustive examination of the bills of lading law of foreign countries. Prof. Willison found "That the carrier is liable on a bill of lading issued where no goods have been received," and he adds that it may be safely asserted that this rule is the law prevailing outside the English-speaking nations."

"It is therefore, in Great Britain and her colonies," Mr. Haight said, "and the United States alone, that legislation

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is necessary to produce the first requirement of a safe bill of lading." He recommended that the Congress pass resolutions favoring legislation now pending before the United States Congress to make carriers responsible, specifying the Pomerene bill as the best measure; that the delegates express their approval of the work of the Cotton Bills of Lading Central Bureau of New York, and that they recommend to the permanent committee the question of the desirability of calling an international conference upon the validation of through order-notify bills of lading and upon legislation and other means of making the system more effective. These recommendations were adopted after discussion.

The delegates went on record in favor of two matters of world-wide importance the unification of consular invoices of all nations and the limitation of consular fees to cover the cost necessary for consular sevices, and also lower international postal rates and the generalization and simplification of the postal systems of leading civilized nations.

A discussion of the high cost of living was opened by Prof. Irving Fisher of Yale University, who proposed increasing the weight of the dollar enough to restore some of its lost purchasing power.

President Taft addressed the delegates on the subject of business-like administration of the Government, the value of accurate statistics as a guide to legislation affecting commerce, the importance of currency reform and international arbitration of all disputes not excepting those affecting national honor and vital interest.

A resolution was unanimously adopted in favor of the establishment of an international court of arbitration for the purpose of adjudicating all differences between nations and preventing war in the future. The resolution was presented by M. Louis Canon-Legrand of Belgium, president of the Congress, and was seconded by John Bingham, representing the London Chamber of Commerce. Through a representative of the State Department, the Conference was informed that the resolution had the hearty support of the United States Government.

On the afternoon of the closing day of the sessions, Dr. Candido de Mendes de Almeida, dean of the school of law of Rio de Janeiro, Brazil, and official representative of the Brazilian government at the conference, delivered a lecture at the Harvard Law School on Brazilian law.

Procedural Reform in Missouri

The committee on judicial procedure of the Missouri Bar Association, consisting of James M. Johnson, Taylor Bryan and John D. Lawson, has recommended several measures designed to expedite procedure. One is that courts should at all times be open for business, another is that all suits be made answerable at a certain day, as under the Kansas law. It is proposed that all rulings of the trial court be made subject to review on appeal. Other changes recommended are: —

Abolishing appeals to courts higher than circuit in cases where the total amount involved does not exceed $500 unless the judge certifies that a principle of the case should go to a court of appeals.

Abolishing motions in staying execution and allowing motions for a new trial to stay the proceedings.

Permitting all causes of action between the same parties to be united, regardless of classification.

Providing a penalty for sham and frivolous pleading.

Providing that a jury trial should be waived unless demanded in writing within ten days after the issues are joined.

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Providing that judges may compute the interest and place the amount of principal and interest in its instructions to the jury.

Providing that motions for new trials may be filed within four days, regardless of the ending of court terms.

Personal

Governor Osborn of Michigan recently appointed Attorney-General Franz C. Kuhn to the state supreme bench to fill the vacancy caused by the death of the late Jude Blair of Jackson, and appointed Roger I. Wykes, of Grand Rapids, to succeed Mr. Kuhn as Attorney-General.

John Barnett Knox of Anniston, Ala., was appointed Associate Justice of the Supreme Court of Alabama by Governor Emmet O'Neal, Sept. 25, to succeed the late Robert Tennent Simpson of Florence. The appointment of Mr. Knox occasioned little surprise in official circles. Mr. Knox is considered one of the ablest lawyers not only in Alabama, but throughout the South. In 1901 he served as president of the constitutional convention. Mr. Knox was born at Talladega on February 16, 1857. He is a Presbyterian and traces his descent from John Knox of Scotland.

Bar Associations

Michigan. — Chief Justice Orrin N. Carter of the Illinois Supreme Court delivered the annual address before the Michigan Bar Association at their twenty-second annual meeting at Saginaw, Mich., Sept. 4–5. "The People and the Courts" was his subject. President Ellridge's annual address dealt with the election of judges and selection of juries. He laid down the following text: "These are days of strenuous social and political upheaval. On the one hand the judges of our courts are attacked as no longer administering law and justice in the interest of the people, while on the other hand our jury system is attacked because it yields too readily to popular prejudices against certain interests." Judge Chester Collins, of Bay City, gave a paper on "Civil Procedure in Michigan Courts with Suggestions for its Improvement."

New Hampshire. — The annual meeting of the New Hampshire Bar Association was held Sept. 7 at New Castle, N. H. Judge Edgar Aldrich, the president, presided and made his annual address. The principal address was by Hon. Herbert Parker of Boston, former Attorney-General of Massachusetts, on "Constitutional Authority of the Judiciary." He attacked the policy of recall of judges. Hon. Frank N. Parsons, Chief Justice of the New Hampshire Supreme Bench, made an address. In the evening the annual banquet was held, Hon. Wallace Hackett presiding as toastmaster.

North Dakota. — At its annual meeting in Jamestown, N. D., early in September, the North Dakota State Bar Association adopted a recommendation on the reform in appellate practice, and a resolution was adopted favoring the proposition of dividing the state into four or five judicial districts. Resolutions were also adopted rejecting the initiative, referendum and recall measures before the legislature. It was not the sense of the bar association that the principle should be condemned, but it was declared that the bill now under consideration was not in the proper form, and a committee of fifteen was named to draft a suitable bill, which will receive the endorsement of the association. The following officers were elected: president, A. G. Divet, Wahpeton; vice-president, John Knauf, Jamestown; secretary, W. H. Stutsman, Bismarck.

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Obituary

Collins, Judge Loren W., former Justice of the Minnesota Supreme Court, and a man of nation-wide repute in the G. A. R., died at his home in Minneapolis Sept. 27. He was in his 75th year.

Corbin, William H., a prominent member of the New Jersey bar, died Sept. 25, He was the law partner of Gilbert Collins, former Supreme Court Justice in New Jersey, and was president of the New Jersey Title and Guarantee Company.

Dale, Richard, lawyer and financier, died in the Chestnut Hill Hospital, Philadelphia September 18. He had been prominent in railroad and express circles, president of the Pennsylvania Society of the Cincinnati and director of the United States Mint. He was eighty-five years old.

Dunbar, Chief Justice Ralph, of the Washington State Supreme Court, died in Olympia, Wash., Sept. 19. He had been a member of the State Supreme Court since Washington was admitted to the Union and served three terms as Chief Justice.

Lockman, General John T., of the law firm of DeWitt, Lockman & DeWitt, died at his home in New York City, Sept. 28, aged 78. He was a vestryman of Trinity Church, a director of the Lawyers Mortgage Company and the Mortgage Bond Company, a member of the New York Historical Society, the Metropolitan Museum of Art, and the American Museum of Natural History, and at the time of his death president of the St. Nicholas Society.

Money, Former United States Senator *Hernando de Soto*, died Sept. 18, at his home in Biloxi, Miss., at the age of seventy-four. He was elected to the House of Representatives in the 44th, 45th, 46th, 47th, 48th, 53d, and 54th Congresses. His service in the Senate began in 1897. Both as representative and as Senator Mr. Money always had leading committee places.

Pritchard, Col. Robert, one of the leading lawyers of Tennessee, died while pleading in the Circuit Court at Chattanooga Sept. 19. He was 63 years of age.

Robinson, Col. David C., a leading attorney of Elmira, N. Y., died Sept. 21. He had been mayor of Elmira and a member of the New York Assembly.

Twiss, Stephen P., former judge of the Supreme Court of Utah, died in Kansas City Sept. 21, aged 82. He was once a member of the Massachusetts senate, and also of that of Missouri, going West in 1865.

Wetherill, Charles, who died at Philadelphia Sept. 20, had served for a number of years as chairman of the Special committee of the Pennsylvania Bar Association on Comparative Jurisprudence, the other members being William Draper Lewis and William W. Smithers. He was British editor of the Comparative Law Bulletin since the first publication in 1908. The present Swiss Civil Code, which went into effect January 1, 1912, was translated into English by Robert P. Schick, Esq., and annotated by Mr. Wetherill, with references to every other known system of jurisprudence. This annotated edition is shortly to be published in this country.

Wright, Daniel Thew, Sr., one of the oldest members of the Ohio bar, who was appointed a member of the first Supreme Court of Ohio by President Hayes, died in Cincinnati, Sept. 10, aged 87.

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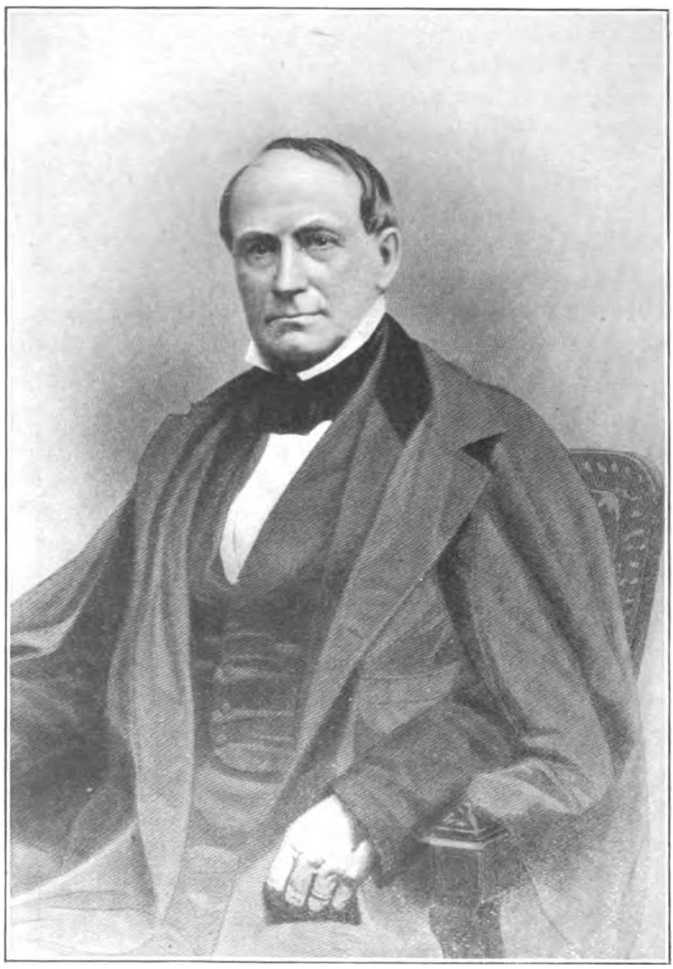

CALEB CUSHING

From a steel plate engraved by A. H. Ritchie

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The Green Bag

Volume XXIV December, 1912 Number 12

Caleb Cushing[1]

By Anson M. Lyman
of the Massachusetts Bar

THE oft-quoted remark that "a lawyer's fame is writ in water" has but a limited application to Caleb Cushing, the American statesman and jurist. Cushing's extended public services and the prominent part taken by him as senior counsel for the United States at the Geneva Arbitration have left some impression on the popular mind, even at this late day.

As a lawyer, statesman and linguist Cushing was one of the most remarkable men of any age; so remarkable that it is difficult to give a truthful description of the man and his unusual talents without an almost offensive use of superlatives.

He was one of the few public men [said Hon. William E. Chandler in a discourse delivered in 1880 before the Grafton and Coos County Bar Association] whose merits have been underestimated rather than over-estimated, and it will be many years before this country will see the equal of the learned, genial, marvelous Cushing.

In addressing the Massachusetts Historical Society in January, 1879, the late Charles W. Tuttle, Esq., who was in the same law office with Cushing, paid him this tribute: —

Mr. Cushing was endowed with extraordinary intellectual powers, with an uncommonly fine physique, and a vigorous constitution. Externally, nature had stamped him as a man of distinguished character. Such was the versatility of his talents that he could master with equal facility any subject. Had he so determined, he could have gone down to posterity one of the greatest scientists or the greatest philologists of the age, as he was a great jurist and statesman. His capacity and equally great memory, his unwearied industry, his scorn of delight and love of laborious days enabled him to conquer all knowledge. I know of no subject of intellectual contemplation that lay outside the range of his meditation and study. Like Bacon, he took all knowledge for his province. His name was already a popular synonym for extensive culture and vast erudition when I first heard it mentioned.

An iron constitution, a habit of unremitting labor, and an extraordinary memory account for his wonderful gifts.

Cushing was of striking appearance. In person he was tall, handsome and athletic; of ruddy complexion, bright, dark eyes and an alert vigorous manner which impressed all who met him. When the old Suffolk County Courthouse was taken down, a fine marble bust, believed to be of Cushing, was found and is now in the Social Law Library in Boston.

He who now attempts correctly to portray the attributes and qualities of Caleb Cushing is impressed by the lack of authentic information upon the subject. No biography of his life has been

[1] An address delivered before the Brookline (Mass.) Thursday Club, March 28, 1912.

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written and the later day historian must search for his material through newspaper files, law periodicals and magazine articles. From these sources one may find valuable expressions of contemporary opinion from which I have freely drawn.

Caleb Cushing was born in Salisbury, Mass., January 17, 1800, and entered Harvard College at the age of thirteen, graduating with high honors in 1817. It is worthy of note that on the occasion of President Monroe's visit to Harvard in 1817, Cushing, although probably the youngest in his class, was chosen to deliver the address of welcome. At the age of nineteen he became a tutor at Harvard in mathematics and natural philosophy, a post which he filled for two years. In his twenty-third year he was admitted to the bar, and at once became prominent, although the Essex County bar, where he began to practice, contained many able lawyers, among whom were Rufus Choate and Robert Rantoul. Cushing later acquired a national reputation as a lawyer, taking part in many important causes. At the Boston Public Library may be found a collection of his law briefs, which are models of concise statement, clearness and vigorous logic.

In 1824 he married Caroline E. Wilde, daughter of Judge Samuel S. Wilde, of the Supreme Judicial Court of Massachusetts, and a most accomplished woman. Her untimely death in 1832 deeply affected Cushing, who never remarried.

At the age of twenty-five Cushing had become a distinguished figure in the politics of Massachusetts, and from that age down to his death in 1879, his life was full of almost unexampled professional and political activities. Six times he was sent to the Massachusetts legislature, and twice was chosen mayor of Newburyport. He was eight years in Congress, minister to China and Spain, attorney-general under President Pierce, for a brief period upon the Supreme Bench of Massachusetts, and took part in the war with Mexico from which he retired with the rank of General.

Within the limits of this paper only the most important events in Cushing's extended career can be treated.

HIS MISSION TO CHINA

In 1843 Cushing was sent as envoy extraordinary and minister plenipotentiary to China. This mission was at that time an important event in the eyes of the people and press. A squadron of three vessels was assigned to convey Cushing and his suite to China. Cushing made elaborate preparations for his mission, seeking information from all available sources, and among other things so mastered the Chinese tongue that it was said that not once during his stay in China did he require the services of an interpreter.

On Cushing's departure President Tyler gave him a letter written by Webster and directed to the Chinese Emperor, from which I quote:—

> I, John Tyler, President of the United States of America, . . . send you this letter of peace and friendship, signed by my own hand.
>
> I hope your health is good. China is a great empire, extending over a great part of the world. The Chinese are numerous. You have millions and millions of subjects. The twenty-six United States are as large as China, although our people are not so numerous. The rising sun looks upon the great rivers and great mountains of China. When he sets he looks upon rivers and mountains equally large in the United States. . . .
>
> Now my words are, that the governments of two such great countries should be at peace. It is proper, and according to the will of Heaven, that they should respect each other, and act wisely. I therefore send to your Court, Caleb Cushing, one of the wise and learned men of this country. On his first arrival in China he will inquire for your health. He has then strict

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orders to go to your great city of Pekin, and there to deliver this letter. He will have with him secretaries and interpreters. . . . Our minister, Caleb Cushing, is authorized to make a treaty to regulate trade. Let it be just. Let there be no unfair advantage on either side.

This letter was characterized by the late Judge Joseph P. Bradley, as "finely conceived" and "a most admirable diplomatic paper."

The vessel carrying Cushing was burnt off Gibraltar, but he fortunately escaped, saved his papers, and, without waiting for further instructions from home, made his way to China by way of Egypt and India.

Prior to Cushing's mission to China, no ambassador had ever treated directly with the Chinese Emperor. Cushing not only delivered this letter to the Emperor in person, but negotiated on equal terms with him.

Cushing succeeded in his mission and negotiated a treaty which was signed July 3d, 1844, by the terms of which objects of contraband and monopoly became a matter of stipulation between the two governments and were not left to the Emperor alone; new provision was made for trade from port to port; the personal dignity of consuls was protected; citizens of the United States were allowed to erect houses, magazines, churches, cemeteries and hospitals in each of the five ports; provision was made for the employment of natives to teach the language of the Empire; and the purchase of books was legalized; the vessels of the United States were allowed to come and go between the ports of China; and for the first time in her history direct communication with the court of China was provided for.

Cushing's mission was one of extreme difficulty. China then, if not now, was a land of mystery, her language was incomprehensible, and she neither desired nor welcomed the presence of foreigners.

If Cushing had rendered no other services to his country than the negotiation of this treaty, he should be held in grateful remembrance.

SERVICES AS ATTORNEY-GENERAL OF THE UNITED STATES

In 1853 Cushing resigned from the Supreme Judicial Court of Massachusetts to become attorney-general under President Pierce, a position which he held for four years. On assuming this important office, Cushing discontinued the practice followed by his predecessors of arguing private cases before the Supreme Court at Washington. Cushing's opinions as attorney-general are found in volumes six, seven and eight of the Opinions of the Attorney-General, are frequently cited in textbooks and judicial decisions, and include a wide range of subjects. When Cushing argued the cause of the United States at the Geneva Arbitration, he had but to refer to his opinions given as attorney-general for the law upon which he relied before the tribunal of arbitration.

The opinion of perhaps the greatest interest to the layman was the one on the validity of the so-called Morton Anæsthetic Patent, issued to Doctors William G. Morton and Charles T. Jackson. Rufus Choate had made an elaborate argument before Cushing in support of the claims of the patentees, but Cushing decided that the patent was invalid, holding that the natural functions either of animate or inanimate matters were not patentable and that the employment of anæsthetic agents was not a recent discovery, but a universal fact coeval with historic knowledge, citing in support of this conclusion Pliny, Dioscorides and other ancient writers. The reader wonders at the

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wealth of learning displayed by Cushing and will be amply repaid by a careful study of the entire opinion.

HIS SERVICE AT THE GENEVA ARBITRATION

I desire to speak with some detail of the great service Cushing rendered to the United States at the Geneva Arbitration. When our Civil War was ended, the people of the North, who had spent countless treasures in money and blood to maintain the Union, felt intense indignation towards Great Britain. We believed that Great Britain had been under an obligation to maintain neutrality, a duty imposed on her by the law of nations; and that she had violated this obligation by suffering her ports to become the arsenal and the navy yard of the Confederates, and we further contended that the Confederate cruisers, which had destroyed our shipping, could never have taken and held the sea but for the gross negligence of the British Government, and that by the latter's premature recognition of the belligerency of the Confederates and her aid subsequently furnished in the British ports the war had been greatly prolonged.

Our feeling towards England was typified by Lowell in this verse from the "Biglow papers": —

> You wonder why we're hot, John,
> Your mark wus on the guns;
> The neutral guns that shot, John,
> Our brothers an' our sons.

The feeling of England and her press, was and for some years had been one of distinct hostility to the North. Thus the London *Times* spoke of us as a "degenerate people," while *Punch* waxed funny and referred to us as "the Untied States." Lord Russell in 1862 had notified Mr. Adams that England declined to make reparation for the captures made by the *Alabama* or to arbitrate the question, while in September of 1865 he wrote Gladstone that England would be disgraced forever if the claim of the United States was left to arbitration and that he thought paying twenty million pounds would be far preferable.

The unspeakable calamity of war between these two great English speaking nations was imminent. Happily the differences between the two countries were submitted to arbitration. The agreement to arbitrate, formerly called the Treaty of Washington, and entered into on the eighth day of May, 1871, provided that the claims of the United States should be referred to five arbitrators, one appointed by the President of the United States, one by Great Britain, one by the King of Italy, one by the President of the Swiss Confederation and one by the Emperor of Brazil.

It is not generally known that Cushing rendered a most important service in bringing about the arbitration. Cushing was sincerely desirous of peace, and through his acquaintance with Sir John Rose arranged a meeting between Secretary Hamilton Fish and Rose, at which Cushing was present, when various tentative propositions for arbitration were discussed. To Caleb Cushing is due no small credit that a treaty of arbitration was made, and that through the instrumentality of such a treaty war with England was avoided.

The five arbitrators were promptly appointed, the United States selecting Mr. Charles Francis Adams; Great Britain, the Lord Chief Justice of the Court of Queen's Bench, Sir Alexander Cockburn; the King of Italy, Count Frederick Sclopis; the Emperor of Brazil, the Baron d'Itajuba; and the President of the Swiss Confederation, Jacob Staempfli.

In accordance with the terms of the

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treaty the arbitrators met at Geneva, the capital of the Swiss Confederation. It was most fit and proper, as Cushing later declared, to select Switzerland, preeminently the land of neutrality, as the country, and Geneva as the city in which to hold the sessions of the tribunal.

The counsel for the United States were Caleb Cushing, then in his seventy-second year, William M. Evarts, and Morrison R. Waite, and for Great Britain, Sir Roundell Palmer, the leader of the English bar, later created Earl of Selbourne and twice Lord Chancellor under Gladstone, Montague Bernard, and Lord Tenterden.

The arbitrators from Italy, Switzerland and Brazil could read but not understand spoken English. "Great was their surprise and pleasure," says Mr. S. Arthur Bent, a former member of this club, who was at Geneva during the arbitration and knew Cushing intimately, "when General Cushing addressed them in French. It gave our side an advantage which contributed largely to our success. Equally important, I understand, was the ability of Mr. Evarts and Mr. Cushing to think upon their feet. Admiralty law was a branch of the science unknown to the Chief Justice. When he ventured into that field he was met by the extemporaneous argument of both the lawyers mentioned and retired *sine gloria*."

The success of the American case was largely due to the careful work of preparation by its counsel, again illustrating the truth so familiar to lawyers, that as a rule cases are won or lost by the preparation or the want of it before the trial in court.

So completely had Cushing mastered his case that during the sessions of the tribunal he was able to take part in social functions and to read a large amount of both light and solid literature.

To quote further from Mr. Bent:

> It was commonly said of him that he spent his mornings in Court and employed his afternoons in reading French novels. This was merely a way of saying that he knew his case. He was not obliged, like Cockburn, to lock himself up in order to study a case with which he was unfamiliar.

No one, even at this late date, can read the statement of the American case and the arguments of its counsel in its support without pride and admiration for the forensic skill, the legal acumen and the convincing logic which characterized the American argument.

Space does not permit me even to summarize this argument, but any student of law may read with profit the entire voluminous volumes containing the case, counter case and arguments of the respective parties.

On the seventh day of August, 1872, Mr. Cushing made the closing argument for the United States in reply to Sir Roundell Palmer, England's leading counsel. This argument, a most brilliant forensic effort, was delivered in French spoken with a fluency and accuracy which astonished his hearers.

When we recall that the arbitrators for Braxil, Italy and Switzerland did not understand English, it will be seen how great an advantage Mr. Cushing's linguistic accomplishments gave to the United States.

F. W. Hackett, Esq., of the Washington bar and Cushing's private secretary at Geneva, says of the preparation and delivery of Mr. Cushing's reply: —

> It is not too much to say that there was no American lawyer living who could surpass Mr. Cushing in fitness for this duty. In the field of public law, no less that of familiarity with diplomatic precedents, he stood almost without a rival. Though past threescore years and ten,

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his vigor of intellect and body continued unimpaired. Mr. Cushing's capacity for work was, as his secretary had frequent occasion to know, practically without limit. He therefore hailed with delight the opportunity now offered for a passage-at-arms with the famous leader of the English bar.

That Mr. Cushing improved the opportunity to the utmost will be the verdict, I think, of every lawyer who turns to the Reply Argument of August 7, 1872, and reads it, even only in part. Mr. Cushing dictated this argument to me in French, almost word for word as it now reads. It is a singularly able paper. It says just what ought to be said. There is not in it a superfluous sentence. The compactness of the reasoning, the rapidity of movement from one topic to the other (a quality which adds to the force of a style in itself animated) and the tone of confidence displayed throughout combine to render the reply a signal example of a triumph in forensic encounter.

Count Sclopis, the Italian arbitrator, was greatly impressed with this argument, and during its delivery interrupted Cushing with a question in the Italian tongue. Cushing answered in Italian. Lord Chief Justice Cockburn, not understanding Italian, objected to this colloquy, whereupon Cushing stated that, the arbitrator having addressed him in Italian, it seemed to him only courtesy to reply in the same language, but for the convenience of the Lord Chief Justice he would forthwith prepare a translation in English of the colloquy and present it to him by nine o'clock the following morning, and while he was aware that French was the official language of the tribunal, he was willing that the argument thereafter should be continued in any language which the Lord Chief Justice might select, *Chinese not excepted.*

Some years later his junior, Mr. Waite, then Mr. Chief Justice Waite, thus spoke of Cushing: —

It was my fortune to be associated with Mr. Cushing before the Tribunal of Arbitration at Geneva, and I should be false to my own feelings if I failed to record an expression of gratitude for the kindness and encouragement I received at his hands during all the time we were thus together. He was always just towards his juniors, and on that occasion he laid open his vast storehouse of knowledge for the free use of all. While assuming that our success would be his, he was willing that his should be ours. He knew that much encouragement can lighten the burden of labor, and never failed to give it when the opportunity was offered. Whatever he may have been to others, to us who were with him at Geneva, he will be remembered as a wise and prudent counselor and a faithful friend.

In a letter written after Cushing's death, Hamilton Fish thus refers to Cushing's closing argument: —

His argument before the Tribunal, delivered in a language understood by and familiar to each of the arbitrators, especially the three not named by either of the parties litigant, brought the facts and law on which rested the American case to the intelligence of the entire court. For this service, for many other great services, I join most cordially with you in the tribute of honor, high honor, to the memory of Caleb Cushing.

On the 14th day of September, 1872, in accordance with a previous announcement to that effect, the decision of the arbitrators was made. At the appointed time the court room was crowded with distinguished personages and representatives of the press from almost all parts of the world.

A newspaper correspondent thus referred to the counsel for the United States: —

Caleb Cushing with that dark, gypsy gleam and a flash of triumph in his luminous eyes; Waite, a modest lawyer from Ohio, little dreaming of the supreme honor that was soon to come to him; Evarts with his mediæval features, calmly observant.

The same correspondent's allusion to Lord Chief Justice Cockburn is worthy of reproduction: —

Cockburn was a handsome man; stately, a haughty, clear limned face, a character deeply

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written. He was very angry. . . . I stood beside his chair, and remember his magnificent scowl as he glared over the assemblage.

The scene is thus described by Cushing: —

The day was beautiful; the scene imposing and impressive. But the British arbitrator, Sir Alexander Cockburn, remained unaccountably absent, while curiosity grew into impatience, and impatience into apprehension, until long after the prescribed hour of meeting, when the British arbitrator finally made his appearance.

It is impossible that any one of the persons present on that occasion should ever lose the impression of the moral grandeur of the scene, where the actual rendition of arbitral judgment on the claims of the United States against Great Britain bore witness to the general magnanimity of two of the greatest nations of the world in resorting to peaceful reason as the arbiter of grave national differences, in the place of indulging in baneful resentments of the vulgar ambition of war. This emotion was visible on almost every countenance, and was manifested by the exchange of amicable salutations appropriate to the separation of so many persons who month after month had been seated side by side as members of the Tribunal, or as agents and counsel of the two governments; for even the adverse agents and counsel had contended with courteous weapons, and had not, on either side, departed, intentionally or consciously, from the respect due to themselves, to one another, and to their respective governments.

By the terms of the decision, as rendered, the United States was awarded the sum of $15,500,000, payable in gold.

After the decision Cushing declared in private conversation that it was the first time in history that a great nation had ever been indicted, convicted and fined fifteen million dollars.

It was no perfunctory compliment on the part of President Grant when he took occasion to express to counsel representing the United States his

thanks and high appreciation of the great ability, learning, labor and devotion to the interests, the dignity and honor of the nation, which each in his appointed sphere has made most conducive to the very satisfactory result which has been reached.

In this generation, when the public mind credits the legal profession with a highly developed commercial instinct, it is worthy of note that for Cushing's monumental services extending over a year and one half, a large part of which was spent abroad, he received the very moderate fee of $10,000.

Before leaving Geneva, Sir Roundell Palmer, who was a most versatile man and a distinguished hymnologist, wrote some verses, a rather ill-natured *jeu d'esprit*, from which I quote: —

GENEVA

In the city of noises where Freedom rejoices
All through the long summer to drive away sleep,
There is played the new drama, 'tis called "Alabama,"
Or, "How the World's Peace Arbitration shall keep."

Whether feeble or strong, the play's certainly long,
And the actors are numerous, some great and some small:
I will run through them lightly, and sketch very slightly,
Under signs of dumb letters, the features of all.

A stands for a cool and long-headed man,
Now judge of the claims which himself first began.[2]
B does double duty: Now Solon the Sage [3]
Now Thersites, uncivilest scribe of his age.[4]
C comes in like Cerberus, gentlemen three,
All at once, very different (as soon you will see).
One presents the great judge; 'tis impatience of wrong
Which kindles such scorn from his eloquent tongue.[5]
One's the militant lawyer, as sharp as a knife,
Who loves to spice strongly the cauldron of strife.[6]
And one's the dissector of monstrous demands,
Still swarming like hydras, though scotched by his hands.[7]

[2] Adams.
[3] Bernard.
[4] Beaman.
[5] Cockburn.
[6] Cushing.
[7] Cohen.

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D, master of dodges, would jockey old scratch;
For acuteness of practice, you'll ne'er find his match.[8]
E, keen but high-minded, would courteous have been,
If his name were not written too others between.[9]

I sits on the judgment seat; if not profound;
He's a good and true gentleman, honest and sound.[10]
P's arguments always come after the judgment.[11]
First the President comes — (only Latin can do him)
Persona verbosa et grandis, "bow to him."[12]
Then a judge of dark countenance, swarthy and stern,
Strong of will (but with some jurisprudence to learn).[13]

X, Y, and Z all to stage properties fall;
Cases, Counter Cases, Summaries;
Arguments, and such like mummeries,
Books of International Law,
Infinite in number,
Which our weary shelves encumber;
Who in the world ever saw
Such heaps of useless lumber?

SERVICES AS MINISTER TO SPAIN

At the conclusion of the arbitration Cushing returned to the United States with the intention of resuming his law practice. But the so-called "*Virginius* affair" had severely strained the relations between this country and Spain. The *Virginius*, a vessel sailing under the American flag, was captured by a Spanish war vessel in 1873, and its captain and fifty-five of its crew were hanged by order of a summary drumhead court-martial. Of the persons executed, nine were Americans. The affair nearly brought on war between Spain and the United States, and excited our people almost as much as did the blowing up of the *Maine* twenty-five years later.

[8] Davis.
[9] Evarts.
[10] Itajuba.
[11] Palmer.
[12] Sclopis.
[13] Staempfli.

Again our government called upon Cushing for public service. He was then in his seventy-fourth year and had earned retirement from public duties, but he accepted the call and went to Spain as our minister plenipotentiary.

It is said that the Imperial Court of Spain were amazed to hear Cushing, the courtly American, speak Spanish with the ease and accuracy of the best Spanish scholars, an accomplishment rarely to be found among the ambassadors of the great European governments.

On his arrival at Madrid, Cushing handled the delicate situation with rare diplomatic skill, and, although such authorities upon international law as Wheaton and Dana justified Spain's action in seizing the *Virginius* and executing its crew, he brought about a settlement, by the terms of which our flag was saluted and a satisfactory indemnity paid.

Upon his return from Spain he took up his residence in his beloved Newburyport, "the city which," in the words of Attorney-General Devens, "had loved and honored him in his youth, his manhood and his maturer years." . . . "The anchor of the storm-worn ship was to fall where first its pennant had fluttered in the breeze." And there, at his old home, surrounded by loving relatives and friends, he went to his final rest on the second day of January, 1879.

A study of the characteristics of such a man as Caleb Cushing should be interesting and instructive. He is described as simple and unaffected in manner, and indifferent to money and dress, while his disposition to respond to every appeal endeared him to all.

His personal integrity was unchallenged, his professional conduct was stainless, and no scandal marred his private life. In religion he was attached to the "Presbyterian Remnant."

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His industry was "beyond that of any man I ever knew," once declared Rufus Choate. Members of the Massachusetts Bar are familiar with many instances of his indomitable industry. Thus, on his appointment in 1852 to the Supreme Judicial Court of Massachusetts he read and analyzed in nineteen days the decisions then rendered and embracing fifty-one volumes of the Massachusetts Reports. And it is said that, after the argument of an intricate case before the full bench each justice was disturbed over the thought that the chief justice might assign to him the preparation of the opinion. The case was assigned to Cushing, who in two or three days handed in his opinion as a matter of course, having worked uninterruptedly for two or three days without taking off his clothes.

Chief Justice Shaw is reported to have remarked that when Cushing was appointed to the bench, the judges did not know what to do with him, and when he resigned, how to get along without him.

Charles Sumner once declared that he "never met, at home or abroad, one so full of knowledge as Caleb Cushing." No subject seemed to be beyond his range, and no question of law or statesmanship found him unprepared to answer. In the field of international law Cushing had no equal.

Choate and Cushing were frequently opposed to each other in court, and each had a high regard for the abilities of the other. The story is told that a case in which they were opposed was continued because each was afraid of the other. An acquaintance, understanding the situation, inquired why the case was not tried. Cushing replied, "It is warm weather, I don't want to hurry, and besides I am afraid of Choate's influence with the jury." Choate answered, "I am pressed with business and can afford to let this case stand over. Then, I admit, I am afraid of Cushing's overwhelming knowledge of the law."

He possessed a fine library, which contained a most complete collection of books on international law, and embraced nearly all of the authoritative works in French, Spanish, German and English. Another feature of this library was the large number of books in the Spanish language, while his collection of books in Chinese was probably the largest in the United States. Among the latter books were Kang Hi's dictionary in thirty-two volumes, the official lexicon of the empire, compiled by a literary committee of twenty-seven of the most illustrious *savans* of Pekin.

He was a great reader of romantic literature. But "his favorite relaxation," says Ben Perley Poore, "was at the social board, and fortunate was the host who was able to count Mr. Cushing as his guest at a dinner party. His inexhaustible magazine of incident and anecdote concerning remarkable persons and events, his thorough acquaintance with the prominent questions of the day on each shore of the Atlantic and of the Pacific, his keen wit and sparkling epigrams never failed to fascinate those who sat at the same table with him. Senator Sumner in the last years of his life became devotedly attached to Mr. Cushing and frequently invited him to his dinner parties. The sonorous sentences of the senator were illuminated by the brilliant comments of his guest, which reminded the fortunate hearers of the successive discharges of a Roman candle."

Cushing possessed the gift of clear statement and a way of putting things which held the attention of his audience. In an argument before the Massachu-

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setts Supreme Court in answer to a claim that a certain situation was an impossibility, Cushing exclaimed, "An impossibility! Your Honors! What is an impossibility? It is the greatest of all possible facts."

In 1877 Cushing's class at Harvard had its sixtieth anniversary. Of the eighty-one who entered in 1813, sixty-seven were graduated, of whom fourteen were present at the reunion. The average age of those present was eighty-one.

"Cushing," wrote a classmate, in speaking of this reunion, "was the life of the party and charmed all."

Cushing was a Democrat, knew Jefferson Davis and other Southern leaders, and had presided over the stormy Democratic National Convention of 1860, an undertaking which, it is said, makes large demands upon the physical and mental equipment of the presiding officer. On constitutional grounds he opposed the abolition of slavery, although personally objecting to slavery, and he clearly foresaw that the abolition of slavery meant civil war or a severance of the United States. This opposition and his advocacy of Democratic principles aroused bitter resentment and harsh criticism. The abolitionists never forgave him (with some notable exceptions like Charles Sumner) and the press attacked him with marked severity and with as much injustice as it had assailed Chief Justice Taney after the "Dred Scott" decision.

The story may be mythical, but it illustrates the bitterness of political feeling sixty years ago. It is said that a certain Bostonian once held with Edwin P. Whipple the following colloquy: —

"Don't you think Daniel Webster was a great man?"

"O, yes — really a great man."

"But don't you believe he was the greatest man that has appeared on earth since Jesus Christ?"

"Well, no — I couldn't say quite so much as that."

"Then you are a d——d abolitionist."

"Constantly misrepresented and often misunderstood," declared one of his admirers, "the language of King Henry to Cardinal Wolsey might have been appropriately addressed to Mr. Cushing."

> You have many enemies that know not
> Why they are so, but, like to village curs,
> Bark when their fellows do.

A typical instance of the injustice done him may be given. In 1860, at the request of the members of the Supreme Court of the United States, Cushing went to Charleston, South Carolina, to make an earnest effort to preserve the Union. "This patriotic act was misrepresented by the press," declared General Butler, "and it was charged and believed that he went to South Carolina to give advice in the interests of the rebellion."

Cushing's patriotism and devotion to the Union cause cannot fairly be doubted. On April 24, 1861, at a flag raising at Newburyport, he made a patriotic speech in which he stated: —

> I have before me the question which divides friend from friend, brother from brother, and sometimes arrays them in hostile camp. What, I ask, is the dictate of duty. Shall we retire in safe seclusion in a foreign country like Hyde, or remain to affront the perils of our lot like Falkland or Vane? The latter course, if not the safer one, is at any rate the more courageous, and I choose so to act. I am a citizen of the United States, owing allegiance to the country and bound to support its government, and shall do so. I am a son of Massachusetts, attached to her by the ties of birth and affection, from which neither friend nor foe shall sever me. I will yield to no man in faithfulness to the Union or in zeal for the maintenance of the laws, and to that end I am prepared, if occasion calls for it, to testify to my sense of public

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duty by entering the field again at the command of the Commonwealth or of the Union.

On April 25, 1861, Cushing wrote to Governor Andrew: —

I beg leave to tender myself to you in any capacity, however humble, in which it may be possible for me to contribute to the public weal in the present critical emergency. I have no desire to survive the overthrow of the United States. I am ready for any sacrifice to avert such a catastrophe, and I ask only to be permitted to lay down my life in the service of the commonwealth or of the United States.

Governor Andrew declined the offer, stating that there was "no place in camp or council" for Caleb Cushing.

It seems almost incredible that Governor Andrew should have made this reply, which is admitted to be unjust by Mr. Pearson, in his life of Andrew. Cushing's natural resentment was relieved by the treatment received by him from President Lincoln and his Cabinet. He whom Governor Andrew had declared to be unfit for a place in camp or council in Massachusetts was summoned to the capital of the nation, to deal with the larger problems of state and to act as the confidential adviser of Lincoln and Seward, who constantly consulted him upon delicate and difficult questions of international law. Lincoln appointed him brigadier-general, but the appointment was not confirmed, owing, it is said, to the opposition of friends of Governor Andrew, who declared that Cushing's confirmation would be a reflection on the Governor.

Senator Henry L. Dawes thus speaks of Cushing's services during the war: —

He was the confidential adviser to the different administrations, and in the most critical times through which the Government was passing, his services were invaluable; their history is yet to be written. Like Baron Stockmar, aiding the different ministries to the young Queen of Great Britain, he guided men in authority through crises and out of embarrassing complications with wonderful skill. Thus did he illustrate in every position he filled the sure test of greatness.

Cushing's intimate relations with both Democratic and Republican administrations made him the subject of charges of political insincerity to which Cushing made this reply: —

It is said, also, that other hypocritical persons impute to me tolerance for men of different shades of opinion regarding the political theories of the moment. Be it so. On the high road of public life are strewn broadcast the fragments of party doctrines, shattered by overstrain, like the dead mules and broken down wagons of advancing and retreating armies. Theories of mathematical precision are good in books of geometry, but not in the conduct of great affairs. Men of action are the masters, not the slaves, of doctrine. What the world needs, demands and will have is more practical statesmanship, and less exclusiveness of doctrine.

The truth seems to be that Cushing placed country above party.

After the Senate had refused to confirm the nomination of George H. Williams as Chief Justice of the Supreme Court of the United States, because of his alleged incompetency, Cushing, then in his seventy-fourth year, was named by President Grant for that high office. Opposition arose to his confirmation, based principally upon political considerations and coming largely from the abolition element of the Republican party. General Butler thus states the grounds urged against his confirmation: —

Opposition arose to the nomination in the Senate, led by a senator from the Pacific slope, who had formerly as a boy been a printer in a newspaper office in Newburyport, and held some grievance. The sole ground of opposition was the fact that Mr. Cushing early in the Spring of 1861, had written a harmless letter of introduction of a former clerk in his office, who belonged in the South and was going back there, to the President of the Confederate States. This letter if it had been published when it was written, would never have caused a passing thought; but Mr. Cushing, sensitive to any ground for opposition, wrote to the President to withdraw his name, which was done.

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Cushing was deeply hurt, but had consolation in the support of men like Charles Sumner, who went on record as saying:—

"I have absolute confidence in Caleb Cushing." And yet Cushing had strongly opposed Sumner when a candidate for the United States Senate in 1851, characterizing him as a "one-idealed abolitionist."

In his address before the Grafton & Coos Bar Association, from which I have already quoted, Mr. Chandler said:—

> I shall always deeply mourn because the jurist best fitted of all to adorn the chief-justiceship of the United States, and who was actually nominated for the position, was most foolishly and without reason denied a confirmation by the Senate, and the nation thus deprived of the services at that exalted post of the one person whose legal training, wide learning, keen sense of justice, and great capacity for full investigation and wise and impartial decision, would have made for him, if his life had been long spared, the equal of the great John Marshall.

Had this nomination been made thirty years later, it would probably have been confirmed.

The name of Williams being rejected and that of Cushing withdrawn, the nomination fell, as the late Judge Hoar wittily remarked, "to that favorite of the law, an innocent third party," Morrison R. Waite of Ohio, Mr. Cushing's junior at Geneva.

What ought to be our judgment of Cushing as a man, and as a lawyer?

The most trustworthy evidence on which to base a sound judgment of his eminence, worth and integrity as a lawyer is the testimony of his professional brethren whom he met in the fierce contests at the bar; and the best evidence of his uprightness and worth as a citizen is the testimony of his fellow townsmen and neighbors among whom the greater part of his life was spent.

The bar of the United States Supreme Court met in Washington on January 10, 1879, to honor Cushing's memory. Leading lawyers from different parts of the United States were in attendance, and William M. Evarts of New York presided. A committee on resolutions was appointed, which included Attorney-General Charles Devens and Roscoe Conkling. In concluding an address of discriminating eulogy, Attorney-General Devens presented the following resolution:—

> *Resolved*, That while the memory of Caleb Cushing deserves to be cherished as a citizen and a soldier, as a scholar and a historian, as a statesman and a diplomatist, the bar desires to especially remember him today as a wise legislator, as an accomplished publicist, and as a profound and learned lawyer, whose services in all these capacities have been most honorable to himself and most valuable to the Republic.

Speaking through Mr. Chief Justice Waite, the Court accepted the resolution "with cordial approval," the Chief Justice stating that the resolution and the remarks by Attorney-General Devens were "no more than was due to the occasion."

There is not the slightest reason to doubt either the competency of these distinguished lawyers to sit in accurate judgment upon Caleb Cushing's character as a lawyer, statesman, and citizen, or the sincerity or honesty of their judgment as expressed in a resolution entered upon the records of the court for the benefit of posterity.

At this meeting of the Supreme Court bar Mr. Albert Pike, a prominent lawyer, delivered a eulogy from which I quote:—

> Cushing served the country and his other clients faithfully and fearlessly. Nor did any reproach through him ever come upon the profession; for he never forgot either its duties, proprieties, amenities or courtesies.
>
> He was a man, ambitious no doubt, not re-

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jecting honors and stations in this courtly and splendid world, but descending to no low arts to obtain honors; one not of haughty carriage, nor who puts slights upon other men esteemed below him; a man of no pomp nor pretense, of grave simplicity, of an ancient freedom and integrity of mind.

I was, a little while ago, in the old town by the river Merrimac, where his home was all his life, and there heard him spoken of by many, old and young, and by all not only with pride but with affection; and, after all, to whatever heights of honor one may climb, and however widely soever his name may be known and honorably mentioned, it is the good opinion and the good word of those among whom his life or the greater part of it is spent, of his fellow townsmen and his neighbors, that are the truest testimony of his desert, and the most to be valued praise wherewith he can be crowned.

Charles Levi Woodbury, in a letter written October 1, 1879, expressed similar views: —

I regard as one of the most pleasing and impressive incidents of his political career the warm affection and esteem he received from the citizens of Newburyport. Without regard to party politics, time and again they sent him to the legislature because they believed his experience, judgment and knowledge were more important than his political affiliations. It is honorable to their independence as it is also creditable to his uprightness and integrity, that such rare evidence of good citizenship on the part of constituents and of agent should be furnished in Newburyport.

Cushing was esteemed by Newburyport as few citizens of any municipality have ever been esteemed. She delighted to honor him, sent him six times to the legislature, twice to the Senate, twice elected him Mayor, and at his death held elaborate memorial services in his honor.

Indeed he was always understood and appreciated by Newburyport, where he was "the first citizen." If any community was qualified to sit in judgment upon his worth and integrity as a man and citizen it was the city of Newburyport. It is convincing evidence of the rectitude of his life and character that during his long, eventful and stormy career, in which political animosities found free expression, he was held in such high honor and esteem by his fellow townsmen, regardless of their political affiliations.

Cushing, being human, undoubtedly had his faults. He had ambition, "that infirmity of great minds," if that be a fault. But it is our duty to make a just estimate of the man and of his best traits. I say his best traits, for I believe, as was said of John Wells, a justice of the Supreme Judicial Court, in a memorial address delivered before this club, that "Every one should be measured by his best traits," and the only judgment "we are entitled to pass upon another is based upon his life's best fruit. If a tree yields but one perfect pear, we know that represents its capability, and that under proper conditions of soil and temperature and light it would produce all perfect pears." Cushing was great in intellect and character and rendered services invaluable to his country.

He received his death summons like a philosopher, and was buried at Newburyport by the side of his beloved wife. A modest headstone bearing this inscription marks his grave: —

In memory of
Caleb Cushing,
Son of John N. and Lydia Dow Cushing,
Born in Salisbury,
January 17, 1800;
Died in Newburyport,
January 2, 1879.

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Petition in Equity

By R. H.

TRESPASS *quare clausum* is the tort
For which I bring this bill in equity.
The close that you have broken is my heart.
The grass you've trampled down so thoughtlessly
Is Hope. Of what? Ah me! I cannot tell
In stilted antique legal verbiage
Nor limping verse; and yet you know as well
As if 'twere writ in full upon this page,
How I had hoped my love for you might meet
Some answering love or pity at the least.
You could so easily make my lot sweet!
A crumb of love would be to me a feast!
Wherefore, I pray the court that it decree
Specific reparation unto me.

Reviews of Books

"GOVERNMENT BY JUDICIARY"

The Supreme Court and the Constitution. By Charles A. Beard, Associate Professor of Politics in Columbia University. Macmillan Co., New York. Pp. 127. ($1 *net*.)

Power of Federal Judiciary over Legislation: Its Origin; the Power to Set Aside Laws; Boundaries of the Power; Judicial Independence; Existing Evils and Remedies. By J. Hampden Dougherty, author of The Electoral System of the United States. G. P. Putnam's Sons, New York and London. Pp. 117+ index.

THAT the founders of the republic intended this government to be one of laws and not of men, that in accordance with this purpose they contemplated the powers of Congress being limited by the written Constitution, and that the doctrine of *Marbury* v. *Madison* was not an innovation but the affirmance of a principle early adopted, seem to most people fairly sound propositions. Nevertheless the cry of usurpation is often raised. If there is anything at all in the argument that the framers of the Constitution did not intend to give the judiciary the power to declare statutes unconstitutional, the historical evidence should be readily accessible, and when the proponents of the usurpation doctrine are unable to produce the evidence their case falls to the ground. Our faith in the doctrine of *Marbury* v. *Madison* as the legitimate offspring of the Constitution becomes, however, something more than a matter of unrebutted presumption when an impartial investigator, whose only interest is in ascertaining the truth, comes forward with positive proofs that appear to be conclusive. Professor Beard's book so squarely and effectively disposes of the question that it may help to silence discussion of what will be more likely henceforth to be regarded a fruitless theme.

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Professor Beard's little book is based upon an article of his in the *Political Science Quarterly* for March, 1912, of which it is enlargement considerably lengthened by quotation. The article may have been first called forth by L. B. Boudin's paper on "Government by Judiciary" in the same journal (v. 26, p. 238, June, 1911; 23 *Green Bag* 426). This was the ablest argument in favor of the doctrine of usurpation that had appeared for some time. Most writers on the subject, at the present day, agree with Professor Beard. Facts brought out, for example, by James B. McDonough (46 *American Law Review* 45, Jan.–Feb. 1912), by Charles H. Burr (60 *Univ. of Pa. Law Review* 624, June 1912), and by J. Hampden Dougherty in his recent book, ought to clinch Professor Beard's argument, so that future debate involving historical premises may be drawn into more profitable fields. The question for historical students now becomes not that whether the framers of the Constitution intended to give the judiciary the power of declaring statutes null and void, but whether they contemplated the more extreme forms of the exercise of that power of which we have had examples in recent years. There is also the interesting phase to be considered of state constitutional history, and of the development of the doctrine of judicial nullification of statutes in the states.

Mr. Dougherty has collected a weighty mass of historical evidence which leaves nothing of the argument that the framers of the Constitution did not intend to give the federal judiciary the power to set aside statutes. At the same time, he is not an extreme partisan of a wide judicial discretion knowing no limitations. On the contrary, he realizes the existing evils, and proposes sensible remedies for them. He thus urges that no law should be set aside as unconstitutional unless plainly and palpably so, and remarks that a law does not respond to this test when the court is seriously divided regarding it. He also urges that the federal Judiciary Act or the Constitution be so amended that every case in which due process of law is invoked against a statute designed to ameliorate human conditions may by appeal or writ of error be carried to the highest court of the nation.

JENKS' DIGEST

A Digest of English Civil Law. Edited by Edward Jenks, M.A., B.C.L., of the Middle Temple. Principal and Director of Legal Studies of the Law Society, formerly Fellow of King's College, Cambridge. Book II, part III, Quasi-Contract and Tort. Book III, Law of Property. By Edward Jenks. Betterworth & Co., London; Boston Book Co., Boston. Pp. xlii, 122 + 9 (index). (Each $1.25 *net*.)

JENKS' Digest, now in course of publication, is an interesting attempt to state the civil law of England in the form of a code. A similar attempt has been made in Lord Halsbury's Laws of England, but on a different scale, and greater significance attaches to the shorter abridgement if it proves adequate to the task in hand. Probably the only serious shortcoming of this digest, if any, will be deemed to be that arising from the suppression of matter not treated by the authors as essential, and from the sacrifices of light and shade entailed by condensation. Codification is primarily concerned with leading principles, but must also avoid vagueness and an amateurish simplicity by incorporation of the correct amount of detail, just so much and just so little. It is unlikely that Mr. Jenks has erred greatly on the side of undue condensation, or that he and his fellow draftsmen could have been desired to show themselves masters of a much greater succinctness of literary style. But the

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technics of codification have yet to be developed, and later attempts may show an advance in some directions, especially where so complicated a subject is to be treated as English real property law.

The present work maintains a high standard. In point of accuracy it has the advantages necessarily attendant on painstaking weighing of each paragraph by five different hands, all of them exceptionally capable. The typographical arrangement is admirable. In a model codification of American law a more complicated typographical scheme would be necessary, but for the nearly uniform body of English law, not split up like ours into forty-odd jurisdictional systems fusing often into no fewer than three positions on a single proposition, the arrangement of citations and small type commentary seems to achieve simplicity at not too great a cost.

HAZELTINE'S LAW OF THE AIR

The Law of the Air: Three lectures delivered in the University of London at the request of the Faculty of Laws. By Harold D. Hazeltine, LL.D., Fellow and Law Lecturer of Emmanuel College, and reader in English law in the University of Cambridge. Hodder & Stoughton, publishers to University of London Press, London. Pp. 144 + 8 (notes). ($1.50 *net*.)

MR. HAZELTINE, who is an American, has in these three lectures covered pretty thoroughly the major legal problems presented by the advent of aeronautics as a practical science. In the broadest terms, the text consists of close reasoning upon substantive law already existing, an examination of its actual or possible application to aerial questions and some speculation as to the peculiar aerial questions which are likely to be brought before the law. Throughout his work runs an insistence on the necessity of maintaining state sovereignty in the air, a thesis practically undisputed among Anglo-Saxons, though combated in Europe. In fact, a third of the book, the first lecture, is wholly devoted to this fundamental problem and the theories developed concerning it.

As a preliminary study of aerial law, Mr. Hazeltine has made his volume essentially complete and has done a distinct service in correlating the work of previous writers on the subject, almost all of whom have written from the Continental point of view. While this statement holds true more particularly of the first lecture on the rights of states in the air-space, it is also applicable to the second lecture on the principles and problems of national law, in dealing with which Anglo-Saxon jurisprudence is depended on to as great an extent as possible.

These cases involve the application of the maxim *cuius est solum eius est usque ad coelum*, particularly in respect to aerial trespass by overhanging signs, wires, etc. The close has been held to be broken by such aerial entries upon it, though it is not agreed whether it is a trespass or only a nuisance that is committed. The question is examined at length and serves to confirm the correctness of the sovereignty theory of international law in respect to the air.

Less disputed is the doctrine of absolute liability of airmen for accidents. The well-known case of *Guille* v. *Swann*, 19 Johns. 381, is discussed in this connection, but it is unfortunate that the author had not run across several Continental cases to the same effect which were available when he wrote. Mr. Hazeltine agrees with the present writer in believing that aerial law will be developed by international law to a greater extent than any other branch of law has been heretofore, and deems it therefore not amiss to cite extensively from Continental jurisprudence in considering questions of national jurisdiction where foreign decisions have come to his notice.

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In general, he leans strongly to the analogy of the future aerial law with admiralty law in considering such questions as collisions, contract, insurance and criminal jurisdiction, a view in which most of his readers will agree with him.

The third lecture takes up the principles and problems of international law, regarding which the analogous regulation of wireless telegraphy is examined in detail. The applicable texts of the 1906 project of the Institut de droit international and the 1906 international convention are examined. The well-known case of *The Haimun*, which was chartered by the London *Times* in the Russo-Japanese War and fitted with wireless, is studied for its sidelights on the effects of using the air in wartime. The author concludes generally that airmen cannot be considered as spies *per se*. Certain provisions of the conventions of the second Hague Conference and the positive action of the Declaration of London are discussed. And again the author concludes in favor of full aerial sovereignty. In fact, the book is virtually an argument for that theory, which to Anglo-Saxons is the only correct one. D. P. M.

ARIAS' PANAMA CANAL

The Panama Canal: A Study in International Law and Diplomacy. By Harmodio Arias, B.A., LL.B., sometime Exhibitioner and Prizeman of St. John's College, Cambridge; Quain Prizeman in International Law, University of London. P. S. King & Son, London. Pp. xiv, 148 + (appendices and index). (10*s.* 6*d. net.*)

THE questions of international law and diplomacy presented in the problems of the Panama Canal are both of vital importance and of great variety. Already since the writing of this book Great Britain and the United States have differed widely over the proper construction of the Hay-Pauncefote Treaty. Other problems of almost equal importance are discussed and presented in the pages of this book — the international status of the canal itself, neutralization, fortification, and the Monroe Doctrine.

The main feature of the volume, however, is to present the question whether the erection of fortifications on the route of the canal is repugnant to the neutralization of the canal. The author reaches the conclusion that it would not be.

The book does not pretend to be an exhaustive treatise, nor yet one for the merely casual reader. It is rather in the nature of an essay for the serious reader who wants a plain statement of the problem laid before him to assist him to appreciate this and kindred questions which the present generation of American citizens must solve in the management of the canal. L. M. F.

BOOKS RECEIVED

Carnegie Endowment for International Peace. Year Book for 1911. Published at 2 Jackson place, Washington, D. C. Pp. 195.

History of the Bench and Bar of California. Edited by J. C. Bates. With portraits. Bench and Bar Publishing Co., San Francisco. Pp. 572.

The Control of Trusts. By John Bates Clark and John Maurice Clark. Rewritten and enlarged. Macmillan Co., New York. Pp. 202.

The Relations of Education to Citizenship. By Simeon E. Baldwin. (Yale Lectures on the Responsibilities of Citizenship.) Yale University Press, New Haven; Oxford University Press, London. Pp. 171 + 6 (index). ($1.15 *net.*)

The Law relating to Conflicting Uses of Electricity and Electrolysis. By George F. Deiser, of the Philadelphia bar. T. & J. W. Johnson Co., Philadelphia. Pp. xv, 128 + 10 (index). ($2.50.)

The New Competition; an examination of the conditions underlying the radical change that is taking place in the commercial and industrial world — the change from a *competitive to a co-operative basis*. By Arthur Jerome Eddy, author of The Law of Combinations, etc. D. Appleton & Co., New York and London. Pp. 343 + 17 (appendices) + 14 (index). ($2 *net.*)

A History of French Private Law. By Jean Brissaud, late Professor of Legal History in the University of Toulouse. Translated from the 2d French edition by Rapelje Howell of the New York bar; with introductions by W. S. Holdsworth, Reader in English Law, St. John's College, Oxford, and John H. Wigmore, Professor of Law, Northwestern University. v. 3 of Continental Legal History Series, published under auspices of Association of American Law Schools. Little, Brown & Co., Boston. Pp. xlviii, 905 + 14 (index). ($5 *net.*)

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Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Accord and Satisfaction. "Payment by a Stranger." By Jeffreys Collinson. 48 *Canada Law Journal* 513 (Oct. 1).

Admiralty. "The Jurisdiction of State Courts over Maritime Vessels Engaged in Interstate and Foreign Commerce." By John E. Tracy. 75 *Central Law Journal* 257 (Oct. 4).

"Among the fallacies which often exist in legal as well as lay minds there is no more prevalent one than the belief that the only person who can law his hands on a maritime vessel is a United States Marshal."

"The *Titanic* Death Liability." By Joseph I. Kelly. 7 *Illinois Law Review* 137 (Oct.).

"The British right of action being available to foreigners and being substantially the same as that conferred by American state statutes, most of which are directly modeled upon it, would now doubtless be held to be transitory in a common law action in either state or federal courts. The view here maintained is that this right of action is also enforcible in an admiralty court by a libel *in personam*. The advantage or disadvantage of selecting a forum in which damages are not assessed by a jury is a question with which the writer has no concern. As indicated in the first part of this paper it is not probable that a recovery would be defeated by the success of a proceeding to limit liability."

Anglo-German Cases. "Legal Procedure in Anglo-German Cases." By Julius Hirschfeld. 28 *Law Quarterly Review* 392 (Oct.).

"The taking of evidence on commission, etc., presents no difficulties in a German lawsuit. The very opposite is the case here [in England], where one might say everything depends on *viva vox*, and where therefore the latter is only quite exceptionally dispensed with, not for reasons of mere convenience but for reasons of necessity."

Bank Deposit Guaranty. "Bank Deposit Guaranty Legislation." By Edwin S. Oakes. 19 *Case and Comment* 391 (Nov.).

Describing legislation in Oklahoma, Kansas, Nebraska, South Dakota and Texas, and its apparent effects.

Capital Punishment. "Capital Punishment: The Case for its Abolition." By A. F. Schuster. *Nineteenth Century*, v. 72, p. 732 (Oct.).

"When we come to look at the facts, as far as we have the power to do so, we come upon some things which tend to make us believe that the deterrent effect of capital punishment has, to say the least of it, been greatly exaggerated."

Statistics are presented which will repay the attention of those interested in the subject.

Comparative Jurisprudence. See Mohamedan Law.

Contracts. "The Rescission of Executory Contracts for Partial Failure in Performance, I." By C. B. Morison. 28 *Law Quarterly Review* 398 (Oct.).

"One would (since the passing of the Judicature Acts) expect to find in a harmonious system of law a single principle governing —

"(*a*) The right to resist the enforcement of a contract, on the ground of failure of consideration, whether such attempted enforcement were by action on the contract for damages, or by action for specific performance.

"(*b*) The right to enforce a contract by action for damages or by action for specific performance, with compensation to the defendant (or damages, as the case may be) for any breach or failure by the plaintiff falling short of such a failure of consideration as would justify rescission.

"It is submitted that the decisions in *Flight* v. *Booth* [1 Bing. N. C. 370] and *Bannerman* v. *White* [10 C. B. N. S. 844] have established such a principle."

Corporations. "The Stockholders' Right to Inspect Books of the Corporation." By Albert M. Kales. 7 *Illinois Law Review* 155 (Oct.).

"The usual and proper remedy to enforce the stockholder's right to inspect is by mandamus. Since mandamus will lie a bill in equity for the purpose of securing inspection alone will not do so, because the remedy at law is adequate. But if equity takes jurisdiction of a controversy upon other grounds it may certainly in that suit enforce the legal right of inspection and at the same time modify it according to any principle upon which it would by injunction modify the enforcement of the legal right at law."

"The Negotiation of Stock in France." By Layton B. Register. 60 *Univ. of Pa. Law Review* 700 (Oct.).

See Legal History, Public Service Corporations.

Criminal Law. See Capital Punishment, Procedural Reform, Public Defender.

Domicile. "Domicile." By N. W. Hoyles. 48 *Canada Law Journal* 474 (Sept.).

A brief exposition of the doctrine of domicile as established in English law.

Due Process of Law. "*Stare Decisis* and the Fourteenth Amendment." By Charles Wallace Collins. 12 *Columbia Law Review* 603 (Nov.).

"We may not expect a definition of the 'due process of law' and the 'equal protection' clauses of the Fourteenth Amendment. They are too vague and too elastic. This weakens the doctrine

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of *stare decisis* to the point where it no longer becomes authoritative. It thus leads to confusion instead of serving as a guide. The business interests do not know what laws the states may enact concerning them. The people of the states do not know how far they can go in their attempts to solve their own economic and social problems. The Fourteenth Amendment, uncertain in its scope from the day of its adoption, remains uncertain. Under present rules of procedure there is no escape from the dilemma."

See Recall of Decisions.

Equitable Actions. See Corporations.

Evidence. See Anglo-German Cases.

Federal and State Powers. See Monopolies.

Fourteenth Amendment. See Due Process of Law.

General Jurisprudence. "Law and Liberty." By W. Jethro Brown, University of Adelaide. 12 *Columbia Law Review* 613 (Nov.).

Dr. Brown here replies to the strictures on his doctrine of liberty contained in a review of his work, "The Underlying Principles of Modern Legislation," in the May number of the *Columbia Law Review*. His position, however, will perhaps strike his readers as more dogmatic than analytical. His defense of his views seems to us to illustrate the impracticability of basing a theory of legislation on the principle of liberty without sophistication and vagueness.

The *Law Quarterly Review*, in its review of "The Underlying Principles of Modern Legislation" in its current issue, observes: "It is really surprising to find that an alumnus of Cambridge should have so completely forgotten Seeley's fifth and sixth lectures on Political Science as to bring out the term Liberty and surround it with new ambiguities."

Government. "The Bald-Headed Man in the Omnibus." By W. J. Courthope. *National Review*, v. 60, p. 225 (Oct.).

Reverting to Bagehot's notable definition in 1865, of public opinion as "the opinion of the bald-headed man at the back of the omnibus." The writer denies that this still holds true today. The middle classes are no longer the supreme power in the English Constitution.

"Mr. Lowell [in 'The Government of England'] at least recognizes, what Mr. Bagehot never thoroughly did, that sovereign power in England has passed from Parliament to the electorate, and that the effect of this on the Constitution must be vital, though still uncertain."

The change has particularly affected party government, which Bagehot was able to view in a different light than is possible today. The author considers present and future problems of party government in England.

"Federal Government." By Rt. Hon. Herbert Samuel, M. P. *Nineteenth Century*, v. 72, p. 676 (Oct.).

"The principle of Federalism has made great strides in the modern world. Not far short of half the white population of the earth is now governed under federal constitutions. In area —excluding Asia and tropical Africa—more than two-thirds of the territories inhabited by white peoples are administered by federal authorities. Two of the greatest of the nations, the United States and Germany; the three vast British Dominions, Canada, Australia, and South Africa; two of the largest and most prosperous of the South American States, the Argentine Republic and Brazil; and, in addition, Switzerland and the less important countries of Mexico and Venezuela—all these, with a population of 224 millions of people, have chosen that their laws should be framed and their government conducted on the federal plan."

"The Electoral College: Its Prerogatives and Possibilities." By John Walker Holcombe. *Forum*, v. 48. p. 526 (Nov.).

Proposes that the Electoral College be made an actual nominating assembly. The original plan was that the Electors should assemble in a body for consultation; "the change which rendered them powerless to choose was made on account of the expense and difficulty of travel, a reason which no longer exists."

See Civil Service, Judicial Organization, Judicial Power to Annul Statutes, Mohammedan Law, Recall of Decisions, Royal Prerogative, Social Reform.

Infants. "A summary of the Law relating to the Custody of Infants." By Lewis Hochheimer. 46 *American Law Review*, 691 (Sept.–Oct.).

Injunctions. "Development of the Injunction in the United States." By George Whitelock. 46 *American Law Review* 725 (Sept.–Oct.).

"If use of the salutary restraining power of a court of equity in the *Debs* case and in the *Gompers* case was government by injunction, the conservative will prefer its beneficent control to that of parliaments whose only spring of action is the popular initiative, and whose statutes must be galvanized into life by the plébiscite, and they will also prefer an interpretation and administration of the law by a judiciary secure and independent in the dignity of life tenure, armed with plenary power to punish for contempt, to the action of invertebrate judges whose term of service is at the whim of a fickle and fluctuating majority, whose decisions on grave constitutional issues are reversible by popular referendum."

Insurance. Election in Insurance Cases." By John S. Ewart, Ottawa. 12 *Columbia Law Review* 619 (Nov.).

"There has been a struggle between the courts and the insurance companies, and upon the whole the companies have won and made the courts say so, although they had a very bad case. They wanted the courts to declare that their policies insured the payment of premiums rather than the liquidation of losses. They wanted policies that would be alive and active for premium-catching, and quite defunct and extinct—void, they called it—when the premium-payer claimed a loss. The courts saw the iniquity; struggled against it; and failed—failed because

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they used the wrong weapon. You cannot make much of a hole with a jack-plane, and with waiver you can do very little against the insurance companies. I recommend a trial of election."

"Waiver of Breach of Conditions in Insura nce Policy by Demanding Proofs and Adjusting Loss." By Clyde McLemore. 75 *Central Law Journal* 293 (Oct. 18).

Judicial Organization. "Judicial Legislation in Egypt." By Norman Bentwich. 28 *Law Quarterly Review* 372 (Oct.).

Dealing with the constitutional development of Egypt, particularly as regards legislation relating to the judiciary. "Judicial legislation," in the sense of the phrase which has become current in this country, is not the theme of the article.

"The New Federal Judicial Code." By Jacob Trieber. 46 *American Law Review* 702 (Sept.–Oct.).

Judicial Power to Annul Statutes. See Legal History.

Labor Laws. "Industrial War." By Hugh H. Lusk. *Forum*, v. 48, p. 553 (Nov.)

The remedy for industrial civil war is said to be practical recognition of the right of skilled labor to share with capital the profits of manufacturing enterprise. Arbitration is regarded defective as merely a temporizing remedy. What this author proposes is statute regulation of wages and dividend rates.

See Social Reform. Trade Disputes.

Legal History. "The Historic Relation of Judicial Power to Unconstitutional Legislation." By Hon. Hampton L. Carson. 60 *Univ. of Pa. Law Review* 687 (Oct.).

"Thus from 1790 to 1894 inclusive, the Supreme Court has exercised the power to declare acts of Congress unconstitutional, because of conflict with the Constitution, in twenty-one separate instances. I find none since. During the same period it exercised the same power without challenge of remark, as to jurisdiction, in relation to the statutes of the states and territories in one hundred and eighty-two instances.

"After these numerous and repeated exercises of power, all of which, even the earliest, rest upon the soundest and broadest foundations, it is preposterous to speak of a decision of the Supreme Court as an 'assumption of authority.'"

"An Historical Note on the *Dartmouth College* Case." By Charles Warren. 46 *American Law Review* 665 (Sept.–Oct.).

"In view of the immense effect of the decision upon the future jurisprudence and corporate growth in this country, it is interesting to note that its importance was little realized in the public press of the times."

"The Genius of the Common Law, V." By Sir Frederick Pollock. 12 *Columbia Law Review* 577 (Nov.).

See 24 *Green Bag* 225.

"The Evolution of the Modern Will." By Charles H. Lee. 46 *American Law Review* 641 (Sept.–Oct.).

See Mohammedan Law.

Literature. "Turkish and English Law Compared." By Roger North. "Law from Lay Classics, I." 7 *Illinois Law Review* 167 (Oct.).

An extract from a work published in 1744.

"It is granted, that Justice is a rare Thing, if it may be had; but if it is to be gained by sailing through a Sea of Delays, Repetitions, and Charges, really it may be as good a Bargain to stay at home a Loser. A wrong Determination, expedite, is better than a right one, after ten Years Vexation, Charge, and Delay. A good Cause, immediately lost is, in some Respects, gained; for the Party hath his Time, and Tranquillity of Mind reserved to himself, to use as he pleaseth; which is a rare Thing, in the Opinion of those who have felt the Want of both, and of their Money to boot."

Marriage and Divorce. "Annulment of Marriage for Fraud." 2 *Bench and Bar* N. S. 104 (Oct.).

Treating the subject from the point of view of New York law.

Minimum Wage. See Social Reform.

Mohammedan Law. "A Historical Study of Mohammedan Law, II." By Syed H. R. Abdul Majid. 28 *Law Quarterly Review* 355 (Oct.).

This instalment deals with the Islamite law of government, more specifically with the social contract doctrine of the Caliphate.

Monopolies. "The Need and Proper Scope of Federal Legislation against Restrictions upon Competition." By Frederick H. Cooke. 46 *American Law Review* 676 (Sept.–Oct.).

"It may well be a legitimate application of the 'rule of reason' to inquire whether *public* injury has resulted in the shape of increased price of groceries, or deterioration of the quality thereof. But why should the public concern themselves, in this connection, with the quarrels or other differences between the grocers, or, for that matter, with quarrels or other differences between the grocers or outsiders? Why should they concern themselves to determine whether the means employed to eliminate competition were fair or unfair? Why allow inquiry into the existence of a *public* injury to degenerate into inquiry into the existence of tortious interference of a mere private injury? To apply such irrelevant test seems to us to result from, and to result in, confusion. . . .

"Federal legislation against restrictions upon competition should be strictly confined to its proper scope, instead of being also allowed application to what is essentially distinct from restrictions upon competition, as has conspicuously resulted from the use of the expressions, '*restraint of trade*,' etc., the technical doctrine against

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'restraint of trade' being essentially distinct from that against restriction upon competition, as shown by the history of their origin and development. The result has been confusion between remedy for a *public* injury, produced by a restriction upon competition, and remedy for a *private* injury produced by a so-called 'restraint of trade.'"

Negotiable Instruments. "Bills of Exchange." By Prof. J. Laurence Laughlin, University of Chicago. 19 *Case and Comment* 374 (Nov.).

"One of the grave defects of our antiquated monetary system is that our national banks are not authorized to accept time bills of exchange. . . .

"In this country, the promissory note is the instrument commonly dealt in by our national banks. Its character is often purely local, because the merchant or manufacturer who makes it may not be known outside his community. Efforts to rediscount it with other banks are viewed, in many cases, with distrust. Its use deprives us of a rediscount system, such such as European countries enjoy.

"This defect in our banking laws inflicts great loss on our business men, keeps interest rates at an unnaturally high level, and shuts out millions of foreign capital from our shores. It explains why American borrowers of the best standing pay 5 per cent for three months' money, while French bankers are likely to be lending millions in Germany at 4 per cent."

Patents. "The Spirit of the American Patent System." By Gilbert Holland Montague. *North American Review*, v. 196, p. 682 (Nov.).

"Now, the all-important circumstance, which the majority of the Supreme Court held clearly in view, but which Chief Justice White completely overlooked, is that no license restriction, such as the *Mimeograph* case involved, is enforceable, or ever has been enforceable, or ever can be enforceable, under the law, unless the restriction be *brought home to the person acquiring the title at the time the article is acquired.* To make a license restriction enforceable, the patent-owner must give the purchaser notice that he buys the machine with only a qualified right of use. The notion, engendered by Chief Justice White's dissenting opinion, that Henry would have been held as an infringer if any mimeograph-user had bought his ink at a corner drug-store has absolutely no foundation in fact. Only such dealers as sell supplies to users whom they *know* have bound themselves by license restrictions forbidding the use of such supplies, and whom they *expect* and *intend* and *know* will use their supplies to violate this license restriction, and whom they deliberately instigate in this nefarious enterprise, have anything to fear from the *Mimeograph* case.

"Since Chief Justice White overlooked this point, it is hardly strange that the public should have ignored it."

Penology. See Capital Punishment.

Police Administration. "The Problem of the New York Police." By Sydney Brooks. *Nineteenth Century*, v. 72, p. 687 (Oct.).

"The people of New York simply have not the power, even if they had any real insight into the fundamentals of the problem, to ordain that the Chief Commissioner shall be kept in office during good behaviour, that the force under him shall be organized on a semi-military basis, and that the State Legislature shall be deprived of opportunity for meddling with the details of police administration. The only power that could effect these revolutions is in the hands of the politicians, and their interests are on the side of leaving things as they are.

"I should hardly call it an exaggeration to ascribe three-fourths of the short-comings of the New York police to the influence of the politicians. It is the politicians who are responsible for the general contempt for law that results from the passing of innumerable enactments which are never meant to be enforced, and which are simply used as occasions for blackmail. It is the politicians who prevent the organization of the force along the only lines campatible with decency and efficiency, by making the Chief of Police a political nominee of the machine. . . .

"Of all the crimes of the politicians against the good name of the city of New York, the worst and the most far-reaching is their prostitution of the magistrate's bench. A magistracy appointed by, recuited from, and dependent upon the local political machine is an insuperable obstacle to civic decency. All the police magistrates in New York owe their posts to the mayor, who turn in owes his post to the politicians, who in their turn owe their power to their thorough control and organization of the criminal and alien classes. A careful New York publicist, with a minute knowledge of his subject, wrote some five years ago: 'It is almost the unanimous opinion of those who come in contact with them that a majority of the fourteen magistrates now on the bench in Manhattan and Bronx can be illegitimately influenced, or "seen," to adopt the euphemism commonly employed.' General Bingham went so far as to declare that the presence of 'a crooked or supine or incompetent judiciary' was at the root of the police problem in New York."

Principal and Agent. "The Law Relating to Commissions to Real Estate Agents." 48 *Canada Law Journal* 549 (Oct. 15).

An extended annotation to the recent case of *Haffner* v. *Grundy*, in vol. 4 of the Dominion Law Reports, at p. 531, exhausts the Canadian authorities of the past few years on the subject. This note is here reprinted in full, forming a comprehensive digest of obvious value to lawyers outside the Dominion.

Private International Law. "Private International Law." By A. V. Dicey, K. C. 28 *Law Quarterly Review* 341 (Oct.).

A luminous review of the lately published fifth edition of Professor Westlake's Treatise on Private International Law."

See Domicile.

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Procedural Reform. "The Game of Law." By Morris J. Wessell. *Survey*, v. 29, p. 138 (Nov. 2).

"Even if Congress should pass the Moon, or a similar, bill, only the federal courts would be improved; the situation in the state courts, in which the most numerous instances of technicality worship occur, would not be affected in the least. Just how this crucial phase of the situation is to be remedied it is insuperably difficult to say. Much depends on the attitude and the energy of the state bar associations; and much upon the character of the press of the various states. Oklahoma and Wisconsin — the one evidently determined to build a new and sensible system of political institutions; the other transforming itself into a political laboratory for the nation—have splendid records. New York, Texas, Ohio and Missouri (in which state the situation, according to F. N. Judson, a veteran member of the American Bar Association, grows worse and worse), to name but a few, have need to look to their laurels. They have far from clean bills of health."

Progress of Science. "The Administrative Peril in Education." By Professor Joseph Jastrow. *Popular Science Monthly*, v. 81, p. 485 (Nov.).

A very fine article on the danger confronting the intellectual and research side of university life, owing to the menace of an ostensibly "efficient" administrative control which may tend to belittle the interests of scholarship.

Public Defender. "The Public Defender and What he has Accomplished in Oklahoma." By Dr. J. H. Stolper, Public Defender of the State of Oklahoma. 19 *Case and Comment* 307 (Oct.).

"Up to the present time we had on our books something over 4,000 cases. These cases, most of them, were probate cases, some general civil and criminal cases, misdeameanors and felonies, in the district courts, in the superior courts, in the criminal court of appeals and in the supreme court of the state of Oklahoma. And, it is with profound gratitude to the courts and jurors in the state of Oklahoma, that the public defender of the state of Oklahoma is enabled to say that not a single case represented by the public defender of the state of Oklahoma has ever been lost.

"We have not entered a single plea of guilty; and, where the public defender of the state of Oklahoma does appear, it is a guarantee to the court and jury that the public defender of the state of Oklahoma represents a just cause; and, it is with profound gratitude to the judges of the Oklahoma courts that I am enabled to say that the courts have given to the public defender of the state of Oklahoma their confidence and, through a mutual respect of the courts and the public defender, work has been accomplished with rapidity, and cases have been disposed of with justice to all concerned, in such a rapid manner that a tremendous amount of time and an enormous amount of expense has been saved, both to the state and to the various litigants that this office has represented."

Public Service Corporations. "The New York Public Service Commissions." By John S. Kennedy. *Forum*, v. 48, p. 584 (Nov.).

The secretary of the Commission (for the second district) here describes the results of the first five years of administrative regulation of public service corporations in New York State.

Recall of Decisions. "The Recall of Judicial Decisions—A Criticism." By Herbert Pope. The Recall of Judicial Decisions—A Reply." By Albert M. Kales. 7 *Illinois Law Review* 149 (Oct.).

Mr. Kales advocates the following proposed amendment to the state constitution: "Upon an act of the state legislature being passed at two different sessions and sustained by the electorate upon a referendum, it shall be deemed not to infringe the 'life, liberty and property' clause of the state constitution."

Mr. Pope considers that "If this proposed amendment is a suggestion of what the people really want, the simple and effective way of carrying out their wishes is to eliminate the 'life, liberty and property' clause from the state constitution."

Royal Prerogative. "The Exemption of the Crown from Charges in Respect of Land." By W. W. Lucas. 28 *Law Quar. Review* 378 (Oct.).

A digest of the law relating to taxation of crown lands as defined in recent British cases.

Social Reform. "The Influence of Socialism on the Ohio Constitution." By Hon. Daniel J. Ryan. *North American Review*, v, 196, p. 665 (Nov.).

"There are far-reaching purposes and wide influences in the adoption of the amendments relating to the initiative and referendum and the 'welfare of employees.' These two articles in their design and operation are socialistic and revolutionary. They are part of a plan adroitly consummated which at the proper time can be used to strike a fatal blow at the stable property and business interests of Ohio. The initiative and referendum amendment, now a part of the constitution of Ohio, is more radical and misrepresentative in its operation than the similar measure in any other state in the Union. . . .

"Another socialistic principle engrafted into the constitution was deceptively labeled on the ticket as 'Welfare of Employees.' It received support on account of its apparently generous purposes and well-sounding title. This amendment is as follows: Laws may be passed, fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety, and general welfare of all employees; *and no other provision of the constitution shall impair or limit this power.*'"

Status. "The Jew in His Relations to the Law of the Land." By Max J. Kohler. 46 *American Law Review* 714 (Sept.–Oct.).

"As to the United States, special Jewish jurisdiction never had any excuse for existing and never made real headway. Under our federal

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Constitution, Jews and Christians were made equal before the law, and Jews ever fought for 'the law of the land' and its protection, on the field of battle, at the polls, in the legislative assembly and from the bench of the courts of justice."

Taxation. See Royal Prerogative.

Trade Disputes (British Act.) "Trade Unions and Trade Disputes in English Law." By J. G. Pease. 12 *Columbia Law Review* 589 (Nov.).

"Thus the Trade Disputes Act has not only placed trade unions *super legem* but has given to all persons acting in contemplation or furtherance of a trade dispute immunities from civil and criminal proceedings which are denied to persons acting in furtherance of other objects, political, social, charitable or personal. The law has indeed changed since the day when a very learned judge [Crompton, *J.*, in *Hilton v. Eckersley* (1855) 6 E. & B. 47, 53] could say that he thought trade unions were 'illegal and indictable at common law as tending directly to impede and interfere with the free course of trade and manufacture.'"

Stare Decisis. See Due Process of Law.

Latest Important Cases

Admiralty. *Liability for Claims arising from Loss of Vessel at Sea — Constitution of Federal Statute.* U. S.

A preliminary step in the adjudication of the death claims arising from the sinking of the *Titanic* was taken in the federal District Court for the southern district of New York, in a ruling made by Judge Hough Oct. 7, on petition of the Oceanic Steam Navigation Company, Ltd., to have the gross liability of the company for these claims determined. The petitioners set up the contention that there should be no liability, or if they were overruled, that it should be limited to the value of the salvage, consisting of fourteen lifeboats, and the money collected for the transportation of passengers and freight.

Judge Hough granted an order appointing Alexander Gilchrist commissioner to receive claims, which must be filed by Jan. 14, and Henry W. Goodrich a commissioner to appraise the value of the company's interest in the steamer and the money received for the voyage. These are estimated at $91,805, and if the limitation asked for is granted, after hearing and argument, that will be all the victims can claim in the aggregate. This is on the assumption that the court does not decide that the company has no liability.

The law applying to the liability of carriers by sea is that the carrier is liable only to the extent of the salvage, while his loss of the vessel may be compensated by insurance, and his liability is not affected by the amount of insurance he collects. The liability is thus limited under a statute dating from 1851, section 4283 of the United States Revised Statutes (4 Fed. St. Ann. 839). At common law the liability was unlimited. Twenty-five or thirty years ago the point was raised that the insurance collected was available for the satisfaction of claims, but the Supreme Court held otherwise, and the law has been regarded as settled in this respect.

Lawyers for claimants, however, are preparing to contend that the ship's loss was due to the negligence of the captain or crew with the "privity or knowledge" of the owners, which would make the liability unlimited.

Bankruptcy. *"Place of Business" of Clerk on Small Salary — Jurisdiction.* U. S.

A "place of business" within the meaning of Section 2 of the National Bankruptcy Act was thus explained by Judge Mayer in a decision of the United States District Court of the southern district of New York (*Matter of Lipphart*, Oct., 1912):—

"Section 2 invests the District Courts with jurisdiction to 'adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof. . . .' While there is not any uniform rule of conduct, it may be said that people generally contract their debts where they live or where they do business. The debts contracted at the place of residence or domicile are usually of a personal character having to do with purchases for personal use or the household, and ordinarily a person living in one place and employed in another does not contract debts in the locality where he is employed. It seems to me that it was intended, among other things, by the Bankruptcy Law, that these proceedings should, as far as practicable, be carried on in the jurisdiction most convenient to all concerned. The debts of a clerk on a small salary would, most likely, be owing to the tradesmen doing business in the place where he lived. I think that a

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clerk or, for that matter, the general run of employees cannot be said to be in business or to have a place of business. It seems to me that 'place of business' means a place where a man is conducting a business of his own in which he is a principal. I am inclined to think that the statute contemplated 'place of business' as applying only to those who have a business of their own, but in this case it is only necessary to decide that a clerk, such as this bankrupt, did not have a place of business anywhere, and therefore he should have filed his petition at the place where he resided or had his domicile (*In re Kinsman*, Fed. Cases, No. 7832; *In re McGee*, Fed. Cases, No. 8951)." (*N. Y. Law Jour.*, Oct. 17.)

Constitutional Amendment. *Submission to Popular Vote — Dereliction of Administrative Officer in Performance of his Duty.* Kas.

Where a constitutional provision directs that any proposed amendment of the constitution which may be adopted by the legislature shall be submitted to popular vote at the next election, and the state officer whose duty it is to see that the proposed amendment is so submitted fails to do his duty, *held*, that this dereliction of duty on the part of an administrative officer puts an end to the proposed amendment, and it may not be submitted at the following election.

This was the ruling of the Supreme Court of Kansas in a recent case the title of which is not given (editorial in *National Corporation Reporter*, Oct. 17). The Court said:

"It may well be that under some circumstances, where the constitution prescribes when an act is to be done, the failure of an official to do it at the appointed time will not relieve him from its subsequent performance. Where the effect of the act will be substantially the same if done later — when its benefits to the public will thereby be secured — the rule may be the same as though only a statute were involved. We do not regard the present case as coming within that class. The question of policy whether a particular proposal to amend the constitution should be submitted to a vote in 1904 is not necessarily the same as whether the proposal should be submitted in 1906 or in 1912."

The Court also said that a subsequent legislature would be deprived, by holding that such an amendment should by submitted at the next election, of its right to submit three amendments of its own.

Copyright. *Outline of Plot of an Opera Libretto not an Infringement — Holder of Copyright does not Possess Exclusive Right to Make Abridged Versions.* U. S.

Judge Hazel of the federal District Court on Nov. 2 for the southern district of New York refused to hold that Henry L. Mason's "Opera Stories," in which appeared a non-dramatic version of the copyrighted operas, "Germania" and "Iris," was a violation of the copyright owned by G. Ricordi & Sons. Judge Coxe had already denied an application for a temporary injunction.

In his opinion Judge Hazel said that though the Copyright Act gave the complainant the broad right exclusively to translate his copyrighted work or "to make any other version thereof," to sum up a libretto by outlining its plot and relating its incidents in the fewest possible words did not constitute such a violation of the act as Congress contemplated.

"A literal definition of the words, 'make any other version thereof,' " said the judge, "would not only include the defendant's publication, but also newspaper publications after performance of reviews or criticisms, even when written by reporters invited by the owner of the play to witness the production. The production of abridgements or reviews of the play or opera having been permitted in newspapers, it makes no difference that another without dialogue or stage directions embodies practically the same information in a saleable booklet."

Criminal Procedure. *Technical Defenses.* Okla.

In *Steils* v. *State*, 124 Pac. Rep. 76, defendant's counsel relied upon a technical defense to secure the reversal of a conviction. The Criminal Court of Appeals of Oklahoma said, in denying a reversal: —

"The honest, hard-working, tax-burdened people of Oklahoma annually spend more money to enforce their laws than they do to educate their children. . . . It is an outrage on law and justice and a crime against society for apellate courts to turn criminals loose who have been legally proven guilty, or to send their cases back to be retired, at the expense of the people, upon legal quibbles, which are without substantial justice and which are only shadows, cobwebs and fly-specks on the law. . . .

"When we read some of these opinions (?) we are impressed with the thought that if the courts do not exercise more care in the future and see that they are courts of justice as well as courts of law, the people, who are the rightful source of all power, will take the matter into their own strong hands and there is no telling what the result will be. If we ever have the recall of

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judges in Oklahoma it will be the fault of the judges themselves."

Cruel Punishments. *Sterilization of Criminals not so Regarded — Construction of State Constitution.* Wash.

In *State* v. *Feilen*, 126 Pac. Rep. 75, decided in September, the Supreme Court of Washington had under consideration a statute of Washington (sec. 2287, Rem. & Bal.) providing:

"Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person for the prevention of procreation."

According to a statement appearing in the *New York Law Journal* (Oct. 8, 1912) "the defendant had been convicted of statutory rape committed upon the person of a female under the age of ten years. He was sentenced to imprisonment for life, and further, under the statute above quoted, to submit to vasectomy, the particular form of operation fixed by the trial judge under the broad legislative language. The only point seriously considered on the appeal was whether the undergoing of such operation, carefully and skillfully performed, amounted to a cruel punishment forbidden by the constitution. The Washington constitution differs from the federal Constitution and from those of most of the states in forbidding merely *cruel* punishment and not cruel *and unusual* punishment." The Court held the operation of vasectomy not to be a cruel punishment within the meaning of the state constitution.

The *New York Law Journal* comments as follows: "In the *Weems* case [*Weems* v. 217 *U. S.* 350] the judicial power was exerted to declare cruel and unusual a penalty imposed under a Philippine statute not because it was of unique character, but because it was excessively severe. It is not at all improbable that the state courts will interpret the corresponding clause of state constitutions as not fixed but progressive, and, conversely to the *Weems* case, so as to sanction forms of punishment not wantonly or extremely cruel and shown to be appropriate to an offense by new conditions developed under social progress."

Employer's Liability. *Defense of Assumed Risk — Violation by Employer of Safety Appliance Statute — Public Policy.* N. Y.

Public policy precludes an employee from assuming a risk created by his employer's violation of a statute or from waiving liability of the latter for injuries caused thereby, according to a ruling of the New York Court of Appeals (Cullen, C. J.) in *Fitswater* v. *Warren*, decided Oct. 22. The plaintiff, without previous experience in the work, was injured within four days after his employment by coming in contact with an unguarded setscrew in a revolving shaft near the floor. He knew of its existence, but the shaft revolved in a bed of sawdust which yielded to the pressure of his foot, bringing it in contact with the screw. It was *held* that the plaintiff's knowledge of the danger, which the employer in violation of the statute had permitted to exist, did not defeat a recovery for the injury and that, under the circumstances, the assumption of risk was a fair question for the jury.

Collin, J., dissented. (*N. Y. Law Jour.*, Nov. 4.)

Master and Servant. See Employer's Liability.

Negligence. See Employer's Liability.

Political Candidates. *Keeping the Judiciary out of Politics — Construction of State Constitution.* Wash.

A provision of the Washington constitution reads as follows:—

"The judges of the Supreme Court and the judges of the Superior Court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected."

Judge W. W. Black of the Superior Court, Democratic nominee for Governor of Washington, contended that as his term of judicial office would expire two days before the beginning of the Governor's term of office, his candidacy was not a violation of the constitution.

The Supreme Court interpreted the provision to mean that it was the paramount desire of the framers of the constitution "to keep the judges out of politics. Both the letter and the spirit of the constitution are in harmony with this view."

The Court further said that the framers "knew the importance of confining judges to the performance of their judicial duties, and the evils that would attend if judges were permitted to take part during their term in the activities of a political campaign for the furtherance of their political ambitions."

Judge Crow dissented, but said that as a matter of ethics he heartily concurred in the "wholesome idea expressed in the majority opinion."

Sterilization. See Cruel Punishments.

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The Editor's Bag

WOODROW WILSON

AGAIN the office of President of the United States is to be filled by a lawyer, whose public utterances render it safe to predict that he will be zealous in upholding the best traditions of the judiciary and the highest ideals of the legal profession. Problems of legislation will receive the study of an alert and disciplined mind, and the American people will have in Woodrow Wilson a trained advisor and competent guide of a special equipment not often duplicated in public life. The problems that confront the country can be solved only by patient, laborious investigation, and no one is likely to feel the truth of this more than the next President, or to seek greater assurance that the work of the Government shall be carried on in the proper spirit.

TEMPORARY RESTRAINING ORDERS

THE new rules adopted by the Supreme Court with reference to preliminary injunctions and temporary restraining orders are perhaps not so much to be viewed as a departure from previous practice as a formulation of usages adopted by the federal courts with pretty fair consistency in some typical jurisdictions. The prohibition of the issue of preliminary injunctions without notice is less significant than it would be were the loophole not left open for the granting of temporary restraining orders without notice. The procedure with regard to preliminary orders may without violence be assimilated to that in the case of final injunctions. The significance of the new rules appears to lie chiefly in the fact that they standardize the procedure with regard to temporary restraining orders, and lay down definite and uniform regulations which now for the first time enable the respondent in such proceedings to know to exactly how long notice he is entitled and how a *prima facie* case is to be made out against him.

Section 718 of the Revised Statutes of the United States provides as follows:

> Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security, in the discretion of the court or judge.

We have not had time to ascertain whether this section is retained word for word in the new Judicial Code; that is immaterial. The section first appeared in an act passed in 1872, before the revision of the statutes, and recognized a practice existing before that time, which Congress put into a statutory form. The federal courts have since continued, under its authority, to issue temporary restraining orders without notice and hearing, when confronted with threatened irreparable harm.

The new rules do not diminish the powers of the courts to issue such orders

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without notice when it appears that "immediate and irreparable loss or damage will result," but the difference is that the danger of such loss or damage must be shown, not by general allegations, but by "specific facts shown by affidavit or by the verified bill." Under the old rules, applications for restraining orders were often denied, and it is hardly conceivable that the new rules will make it more difficult for an aggrieved party with a sound cause of action to establish his right to have a restraining order issued in his favor.

The discussion fomented by the labor unions cannot be said to have furnished tangible and weighty evidence of abuse of the power to issue temporary restraining orders without notice, and the courts have, as a rule, been cautious in the exercise of this discretion. Consequently the new requirement that hearings on applications for temporary restraining orders shall be given in not less than ten days, is of interest as a prescribed limitation of time rather than as a remedy for an imaginary evil.

The new rules will by no means meet all the demands of the labor unions nor satisfy those who desire all the changes proposed by the Clayton bill. Many of the points of the Clayton bill are embodied in the new rules, but the court is not compelled to set forth its reasons for granting the restraining order, as provided by the Clayton bill, nor are those procuring the restraining order required to give bond. The labor unions will continue their agitation and will probably be satisfied with nothing less than legislation prohibiting the issuance of restraining orders altogether, where such orders are sought by employers in disputes between capital and labor. Harangues on the mischief of "government by injunction" will continue, notwithstanding the slight basis of such charges, and notwithstanding the formulation of rules which should enable the labor unions to feel more clearly than ever the equality of all men before the law.

HIS PROOF

A ST. LOUIS lawyer tells of a curiously complicated love affair that arose in a Missouri prison. One of the convicts, it seems, who had been serving in an exemplary way a very long sentence, fell in love with a woman employed in the wardon's household. She returned his affection, and some sort of dispensation was effected whereby the two might be wedded. They were called before the warden to advise him touching certain formalities necessary to the negotiation of the marriage.

A difficulty immediately arose by reason of the lack of proof of the death of the convict's first wife. It appeared that a communication sent to the town in the East where she had lived was returned unclaimed.

"It looks to me," said the warden, "that this marriage cannot proceed unless you can produce proof of your wife's death."

The convict reflected a moment, and then replied:

"If you must know, the first sentence I ever served was for killing my wife."

A JUDGE PUNISHED FOR CONTEMPT

JUDGE A. W. Fite of the Cherokee Circuit Court of Georgia recently criticized the intermediate Court of Appeals of that state for twice reversing him on a decision sentencing a negro to twenty years for attempted assault. The Court of Appeals declared him in contempt because of having published a contemptuous, defamatory, and libelous

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article, and sentenced him on Oct. 12 to pay a fine of $500 or serve ten days in jail.

The article in question was one of two appearing in the Atlanta *Constitution*, and in it Judge Fite commented on one of the decisions as follows: "It is the most dangerous decision ever rendered by any court, at any time, anywhere, under any circumstances." The higher court," he said, "should at once reconsider and recall this decision, and if they refuse to do so the Legislature should give the people the chance to abolish the court, which they would certainly do. "No wonder," he adds, "the people are losing faith in some of our reviewing courts."

At the hearing Judge Fite through his counsel denied that he had meant to reflect upon the honest purpose or integrity of the court. He sought to explain what he meant by charging the court with "pitiable misconception of the record," with having "reversed the Supreme Court with great complacency," and with "responsibility for recent lawlessness at Plainville"; and, further, with believing that a twenty years' sentence was too heavy for a negro charged with an attempted assault on the humble wife of a farmer, and, finally with having said, "No wonder our people are losing faith in some of our reviewing courts."

Judge Hill, in announcing the decision, said that the Court had given careful consideration to the question of its authority to issue the rule, and decided that it had the authority. The Court insisted that the letter of Judge Fite threatened the judges with a judicial recall unless their decision was reversed. The Court also declared that the assertions were gross and inflammatory libels; that if the Court did not punish such aspersions it would forfeit the respect of the public. To say that the judge did not intend to render a proper decision was a contemptuous utterance as was the statement that the Court of Appeals frequently reversed the Supreme Court.

This is the second case on record in England or America where an inferior court judge has been haled before the bar of a superior court and punished for contempt. The only other case on record is that of Judge Breen, of Nevada, which came up in 1908.

Conceding that some of the language used by Judge Fite in his comments on the Court of Appeals may have been in poor taste, it may be doubted whether the utterance tended to belittle or obstruct the administration of justice. We can hardly consider the punishment of a *nisi prius* judge for contempt under such circumstances to have been effectual in maintaining the dignity of the higher tribunal. If sixteen years' experience on the bench will not teach a judge moderation of speech and a proper regard for judicial etiquette, it seems rather late in the day to attempt to train him in new habits.

MONKEYING WITH SCRIPTURE

Received from Columbus, Ohio: "The Ward brothers, or half brothers, Benjamin and William, were charged with killing a colored woman in this bailiwick nearly thirty years ago and were duly indicted for murder in the first degree. Under the pauper act, separate counsel were assigned by the court to defend them.

"The prosecutor elected to try Ben first. The younger brother turned state's evidence and his testimony was very damaging to the defense of his brother on trial, whose counsel were Judge W. R. R—— in his prime one of the greatest natural lawyers Central Ohio has ever had — and his Junior E. C. B.,

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much disposed, upon occasion, to be flowery and figurative and to work up to a striking climax, in his way.

"The trial had progressed through six days to the argument and the Junior was opening for the defense. He had turned his batteries with force and bitterness against the younger brother for his treason to his blood and his effort to save his own neck by sending Ben to the halter. In the course of his denunciation and abuse of Bill he said, in perfervid oratorical style, designed to put the witness in bad with the jury, 'Yes, he is a dirty scoundrel, who, like Joshua, sold his birthright for a mess of sausage.'

"The old judge, sitting just behind his Junior, plucked his coat tail vigorously, and, in a low but emphatic growl, said, 'Sit down, you d——d fool; if you don't quit monkeying with the Scriptures, you'll hang him sure."

"Ben was sent to the Pen. for life; Bill was acquitted. Half way back to these trials the writer prepared the bar memorials of these two friends, the judge and the junior, near the same time."

SERVING EARLY WRITS

IT was not the easiest thing in the world to bring malefactors to justice in the early administration of the law in Virginia, as the following returns made to executions will illustrate. The extract is from the "History of Augusta County."

"In the case of *Johnson* v. *Brown* (1751), "Not executed by reason there is no road to the place where he (Brown) lives."

Again: "Not executed by reason of excess of weather."

"Nov., 1752. — Not executed by reason of an ax." The axe was evidently in the hands of the defendant, uplifted, no doubt, to cleave the officer's skull.

"Not executed because the defendant's horse was faster than mine."

"Not executed, by reason of a gun."

"*Emlen* v. *Miller.* — Kept off from Miller with a club, etc.; Miller not found by Humphrey Marshall."

"Not executed because the defendant got into deep water — out of my reach."

"Nov. 1754. — Executed on the within, John Warwick, and he is not the man."

"August, 1755. — Forty-nine executions returned not executed, by reason of the disturbance of the Indians."

MOOT POINT OF LAW

THE following is a good example of those quibbles in legal practice that have a fascination for certain minds. Some years ago an Englishman, while traveling on the Continent, met the leading lawyer for the government of one of the principalities, who told him of a curious legal question. It had reference to a railway station at the boundary between two principalities.

Some one standing outside the window of the ticket-office had put his hand through and robbed the till inside. The boundary line lay between where the thief stood and the till, so that he was actually in one territory while the crime was committed in the other. Here was a nice nut for the gentlemen learned in the law to crack. Which one of the principalities should undertake the prosecution of the culprit?

At it they went in good earnest and the arguments on both sides were long and vehement, until the whole case was embalmed in many volumes. At last one side yielded so far as to say: —

"We will permit you, as an act of courtesy, to prosecute, while at the

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same time we reserve all our sovereign rights."

At this point of the narrative a stranger would always ask: —

"And how did the prosecution end?"

Whereupon the invariable response was: "Ah! that is quite another matter. There was no prosecution. We were only arranging what we should do when caught the robber; but we never caught him!"

LEGAL FINESSE

IT IS said that no lawyer ever possessed to such a degree as did Jeremiah Mason the instinct for "finding the weak point." As an illustration of this there is told how he once cross-examined a witness who had previously testified to having heard Mason's client make a certain statement. So important, it seems, was this statement, that the adversary's case was based on it alone.

Mason put several questions, all of which the witness answered with more or less hesitation. Then he was required to repeat once more the statement he had heard made. Without faltering, witness gave it word for word as he had given it in the direct examination.

A third time did Mason lead the witness round to this statement, and a third time it was repeated *verbatim*.

Then, without warning, Mason walked to the witness stand, and pointing straight at the witness said in a perfectly matter-of-fact way, "Let us see that paper you have in your vest pocket."

Witness was taken completely by surprise, and mechanically withdrew a paper from the pocket indicated, handing it to the lawyer.

It was a profound silence that ensued in that court-room when Mason read, in a cold, unimpassioned tone, the exact words of the witness in regard to the statement, and called attention to the fact that they were in the handwriting of counsel on the other side. Mason then gathered up his papers with great deliberation, remarked that there seemed to be no further need for his services, and left the court-room.

A friend afterward asked Mason how he knew of the presence of the paper in witness's pocket.

"Why," explained the great lawyer, "it seemed to me that he gave part of his testimony more as if he had learned it 'by heart' than as if he had heard it. Then, too, I observed that at each repetition of his testimony he put his hand to his vest pocket, and then let it fall again when he got through."

A LEGAL CALAMITY

SOME years ago Judge W. T. Wallace, of San Francisco, was examining a candidate for admission to the bar. All questions had been satisfactorily answered, and the lawyer-to-be had passed so brilliantly that Wallace decided to put a simple question to terminate the ordeal. Gazing benignly at the young man he asked:

"What is the liability of a common carrier?"

Although lawyers the world over and from time immemorial had wrestled with this problem, though millions of words had been taken into the record of various cases in which this unanswerable question was involved, the fledgling calmly eyed the Judge and solemnly replied:

"Your honor, I must beg you to withdraw that question. I did know the answer, but unfortunately I have forgotten."

For a moment Wallace reflectively gazed upon the young man, and then

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turning to the lawyers who were grouped around him, remarked:

"Gentlemen, this is a sad case. The only living man who ever knew the liability of a common carrier has forgotten."

POSSESSION

DURING the cross-examination of a witness summoned in a case tried in an Indiana court involving the ownership of a tract of land counsel said to a witness:

"The property whereon you live was originally a part of the thirty acres in dispute, was it not?"

"Yes, sir."

"Have you had — and I ask that you give special attention to this question — have you had twenty-five years' undisputed possession of that property?"

Witness hesitated for a moment, a fact which the cross-examiner sought to turn to his advantage.

"Bear in mind, sir," he said in a most impressive tone, "that you are under oath. Have you had twenty-five years' undisputed possession of that land?"

"It has been disputed once, and only once," said the witness. "I found a nest of bumblebees there one day last summer."

The Editor will be glad to receive for this department anything likely to entertain the readers of the Green Bag in the way of legal antiquities, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

LEGAL DEFINITIONS

A fine is so called from the remark of a trust official after being ordered to pay one instead of being sent to jail as he feared.

Cross-examination is the process of convincing the witness that he is either a liar or an idiot.

An accident case is an insulting accusation against a philanthropic railroad corporation which fills every right-minded judge with indignation.

A lawyer is a man who draws a pension for his client's injuries.

A crime is a combination of unskillfulness in business and a bad lawyer.

An attorney's fee is what is left from a judgment after subtracting the court costs.

The word jury is derived from a Latin one meaning "to swear," a reference to the effect of their verdicts on litigants.

A verdict is an agreement between twelve jurymen as to which side needs the money most.

The decisions of judges and juries are called findings because for the winner a judgment is usually like finding money.

The Legal World

Monthly Analysis of Leading Legal Events

The month has offered some encouraging developments tending in the direction of an improved court procedure. The Becker trial, in New York, illustrates how much an efficient judge can do under existing conditions to insure the just and speedy conduct of a criminal trail. Mr. Justice Goff showed that it was not necessary to summon a panel of five hundred talesmen to get a jury, and the selection of the jury was spurred on by the holding of night sessions until it was named. By his discrimination in rulings upon evidence, by checking unduly lengthy cross-examination, and holding long sessions that the continuity of the evidence should not be interrupted, an important witness being

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required to complete his examination, direct and cross, at a single session, the presiding judge avoided a long trial. The evidence was very clearly marshalled in the charge of the court to the jury, and the comparative promptness with which the case was finished was due in large measure to this circumstance. The trial lasted only nineteen days, which is short for this country if it would not be for England, and it has well been said that Mr. Justice Goff's conduct of this case constitutes a precedent.

At the time of this writing, only newspaper reports of the substance of the rules of equity pleading and procedure promulgated by the Supreme Court are accessible, and they are too hazy to permit of an estimate of the extent and character of the reform. It is obvious, however, that the forms of equity pleading have been placed upon a simplified, progressive basis, in harmony with the general principle that there should be no more form and technicality than are necessary to an efficient procedural system. The restrictions on expert testimony and on voluminous stenographic records will doubtless help to diminish the expense and delay of litigation and may be nearly as important as the reform of equity pleading which has so long been needed. The next problem will be to secure a revision of rules of court on the common law side.

Of only slightly less significance than revision of the rules of federal equity procedure is the reform carried out in the new practice act of New Jersey. This state has treated the whole subject of pleading and practice, and the new system is likely to serve as a model for other states. The evil of insubstantial error seems to have been effectively dealt with, and the abolition of bills of exceptions will simplify procedure on appeal. Tennessee, like the Supreme Court of the United States, has concerned itself with the advantages of an abridged statement of the proceedings in narrative form on appeal. In Texas, one of the most backward of the states, perhaps, in the elimination of over-technicality, eight judges have proposed that there shall be no reversals in civil cases for insubstantial error.

The Revised Equity Rules of the Federal Courts

The revised rules governing pleading and practice in the equity side of the federal courts, upon which Chief Justice White and Justices Lurton and Vandevanter had been working for seventeen months, were promulgated by the Supreme Court Nov. 4, and will go into effect Feb. 1, 1913.

The Chief Justice, in orally explaining the rules from the bench, grouped the reforms under four heads. The first was in regard to the exercise of power by the federal courts in equitable matters.

The second was in regard to the modes of pleading, and was described as being designed primarily to remove all unnecessary steps and to bring the parties quickly to the issue. The old, time-honored forms of pleadings, the Chief Justice said, had been abrogated so far as it was within the power of the court to do so, and the most advanced and simplified forms substituted, such as now exist in certain states and in the English courts.

The third reform was described as being a restriction in the modes of taking testimony, particularly in patent and copyright cases in regard to expert testimony. The new rules, as a general thing, provide for trial of issues of fact by the court instead of by a referee.

The last reform spoken of was in regard to diminishing the size of records

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by which suits are taken from the trial court to appellate courts for review, by providing rules for compelling the reduction of their size and by excluding documents and requiring testimony to be printed in narrative instead of interrogatory form. This will lessen the danger of reverses for errors not prejudicial.

Among the revised rules is one which prohibits the granting of preliminary injunctions without notice, and restricts the issue of temporary restraining orders without notice. The new rule follows in a general way the rules of the federal court in the Ninth Circuit, which comprises the Pacific coast states. The new rule provides:

" No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice.

"In case a temporary restraining order shall be granted without notice in the contingency specified, the matter shall be made returnable at the earliest possible time and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order.

" Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

Procedure

The law school of the University of Wisconsin is now keeping close watch of the "time element in criminal prosecutions" in minor as well as in major courts. The results of the investigation are being published.

Justice Joseph I. Green, in a letter to the *New York Times* Oct. 3, declared that " in most criminal cases there should be no longer delay than a week from arrest to indictment and a week from indictment to trial." Justice Green believes that New York City has not enough judges for criminal cases, and suggests that the services of the ten justices of the City Court be employed upon designation when public exigency so requires.

Justice Blanchard, presiding over the criminal branch of the Supreme Court in the New York county court house Oct. 7, manifested his annoyance when his calendar for the week contained only a series of unimportant cases, in several of which pleas of " guilty " were to be made. He told the assistant district attorney to notify his chief that unless he had some cases of importance he would discontinue the criminal term and devote himself to civil business exclusively.

For the first time in twenty-one years, or since 1891, the Supreme Court of Tennessee has promulgated new rules of practice. These rules provide for abridgement of the record to be certified on an appeal when possible, and for statement of testimony of witnesses in narrative form in bills of exception.

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Transcripts must indicate every successive stage of the suit. All transcripts of record from trial courts, on appeal, shall be made and filed within forty days after the appeal is taken.

The Texas Bar Association was asked some time ago to suggest changes in the methods of the courts of that state for the purpose of freeing procedure from over-technicality. The objection was raised that the reforms it proposed did not go far enough. Eight Appellate Court judges met in Austin in October and decided that hereafter no judgment in a civil case should be reversed because of any error that had been committed in the trial of the case " unless the Appellate Court shall be of the opinion that the error complained of was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case." This rule, or rather proposed rule, further provides that " if it appears to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error."

New Jersey, which has been one of the few states to retain a distinct equity system, has joined the new movement in procedure by adopting a practice act which abolishes the distinction between suits at law and in equity. Three principles are applied, judicial control over procedure, minimum of delay upon points of procedure, and the settlement of the entire controversy in one suit so far as practicable. The practice act does not cover many details which may be regulated by rules of court. Judicial control is made possible by discretion vested in the Supreme Court to supersede or suspend all statutory and traditional regulations heretofore existing save those of the act and those guaranteed by the state constitution. The evil of delay is dealt with by abolishing demurrers and dilatory pleas, for which a summary disposition on motion is substituted, by denying appeals before final judgment except from a commissioner to a court of first instance, and by forbidding reversals unless it shall appear that the substantial rights of a party have been injuriously affected. The object of these provisions is to enable points of procedure to be disposed of summarily, on motion, that the case may proceed upon the merits to final judgment. Exceptions and writs of error are abollished. Lastly, the settlement of the entire controversy in one suit is promoted by the establishment of a single form of action, as in England and the code states, the object of the pleadings being simply to state the facts constituting the cause of action and the defense. There are permissive provisions making possible the joinder of all parties directly involved in the controversy. The joinder of any causes of action is permitted, with a few express exceptions. Pleadings are placed entirely under judicial control, and must be according to rules of court. Appeals are substituted for writs of error in civil cases, and seem to permit re-examination of the entire record, subject to the provision before noted that it must appear that the substantial rights of the party have been injuriously affected.

Personal

Lord Justice Fletcher Moulton of the English Court of Appeal took his seat in the House of Lords with the usual formalities on Oct. 14, with the new title of Lord Moulton of Bank.

Mr. Justice Hughes of the United States Supreme Court was elected honorary president of the national Delta

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Upsilon fraternity, at the annual meeting in Madison, Wis., on Oct. 19.

F. W. G. Haultain has been appointed Chief Justice of the Supreme Court of Saskatchewan, to take the place of Judge Wetmore, retired, the latter having reached the age limit.

Senator Elihu Root of New York has been chosen honorary president of the recently organized American Institute of International Law, formed for the purpose of promoting friendly relations among the Pan-American nations.

Judge John F. Main, of the Superior Court at Seattle, a former law partner of Justice George A. Cooke of the Illinois Supreme Court, has been appointed to the Supreme bench of Washington to fill a vacancy caused by the death of the Chief Justice.

Sir William Meredith succeeds the late Sir Charles Moss as Chief Justice of the Court of Appeal of Ontario. Justice R. M. Meredith of the Court of Appeal goes to the common pleas division as Chief Justice, replacing his brother. Frank E. Hodgins, K.C., Toronto, is appointed to the extra judgeship created at the last session. James Leith, chairman of the Ontario Railway and Municipal Board, goes to the High Court.

The Academy of Political Science

Speaking at the annual meeting of the Academy of Political Science in the City of New York, late in October, Professor Munroe Smith of Columbia University said that "The distinction between statute legislation and constitutional amendment is so purely formal that it is doubtful whether it can be maintained long. One of the signs that it is breaking down is the proposed 'recall' of judicial decisions. To formulate a limited recall amendment which will attain the ends which the advocates of the recall have in view without producing new complications will not be found an easy task. The best way to make our federal Constitution less rigid would be to amend the amending clause. It might not be easy to secure for such an amendment the approval of three-fourths of the states, but an effort should be made."

Prof. Frank J. Goodnow of Columbia, citing decisions of the Supreme Court, endeavored to show how that tribunal, in a number of relations, had adapted the Constitution to changed conditions. He concluded his remarks with a plea for the enlargement of the appellate jurisdiction of the Supreme Court in order that it might become the final arbiter of all constitutional questions. He expressed his belief that, if this was done, and if more simple methods of amending state constitutions were adopted, there was no reason to fear that judicial interpretation would be unable to adapt the Constitution to meet future requirements.

The "recall of judicial decisions" is considered a misnomer by Prof. William Draper Lewis, Dean of the Law School of the University of Pennsylvania. "No one questions that the persistent desire of a majority of the people should be carried out," he said. "The only question is as to the method. At present our only method is the formal amendment of the state constitutions. This method is wholly unsatisfactory. What is needed is the power to declare certain classes of laws free from restriction against arbitrary legislation. The so-called 'recall of decisions' is an attempt to provide a means of exercising such power; it is essentially conservative of the power of the courts."

Dean Clarence D. Ashley of the New York University Law School termed

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the judicial recall a "symptom of a general wave of dissatisfaction." He said it would seem that this proposal had been advanced as a sop to the people.

Speaking on "The Initiative and Referendum" Prof. Paul S. Reinsch of the University of Wisconsin said: "It is a new and direct way in which public opinion may make itself felt upon important matters, and as such it ought to be valued. But it ought to be looked upon more as a power held in reserve, to be used only on important and rather exceptional occasions."

Miscellaneous

Thirty-two states have notified Secretary Knox of their ratification of the proposed income tax amendment to the federal Constitution and four have notified the State Department of their rejection. To become effective thirty-six states — three-fourths of those in the Union — must ratify.

After being before the federal courts for nine years the *Danbury Hatters'* case resulted in a verdict for the plaintiff, Oct. 11 at Hartford, Conn., the jury finding damages in the sum of eighty thousand dollars, which will be trebled by the court and result in a judgment for two hundred and forty thousand dollars. The judgment will be reviewed by the higher courts. The case, which is a striking example of the law's delays, first appears in the reports as *D. E. Loewe & Co.* v. *Lawlor*, 130 Fed. 633.

Warren F. Spalding, secretary of the Massachusetts Prison Association and a well-known penologist, was asked by a reporter of the *Boston Herald* what the matter was with the Massachusetts prison system. "To answer the question in detail would require columns of space," replied Mr. Spalding. "In brief, however, Massachusetts has no 'prison system.' It has a great cumbersome, complicated and enormously expensive machine for dealing with criminals. Some parts of it are modern, like the probation organization and the reformatories. But they deal with only a small part of the criminals. It imprisons a man for a while; does nothing whatever to improve him and turns him out with the stigma of the jail upon him. It makes no effort to reinstate him. Some day we shall have a prison system, the main purpose of which will be to reform and restore those who have done wrong — a system which will aim to prevent the second offense."

The removal of certain Ohio common pleas judges by impeachment if necessary, was broached at the meeting of the Cleveland Bar Association held Oct. 5, following the presentation of a report which declared them "a disgrace to the bench and to the profession, and a scandal to the community." The matter has been in the hands of a special committee of five, which will investigate the records of the judges and make specific statement of their merits or demerits. Regarding longer hours, the original question, it appeared to be the sentiment of the bar association that the present schedule is sufficient. Where the trouble lies, it was declared, is in the waste of time in useless and inconsequential argument and in procrastination. "Many cases, motions and demurrers argued and submitted," said the report, "are carried weeks, months and sometimes years without decision, and often to the great injury of the parties and indeed until the judge himself has forgotten, in whole or part, the facts and laws as presented by counsel, sometimes making a rehearing necessary."

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The methods of conducting bar examinations in New York have been a reproach to that state and a distinct detriment to sound legal education for years, according to Harlan F. Stone, dean of the Columbia Law School in his annual report to the President, in which he says: "The practice of the bar examiners of asking questions based exclusively and minutely on statutes or decided cases and of judging the answer on the basis of their 'correctness,' places a premium upon memorization by the candidate, and affords no adequate test of his ability to reason in a legal way, or to apply his knowledge to a new state of facts, which are, after all, the essential qualifications of the lawyer. The law schools are devoting themselves to the development of these qualities in the law student, and it seems particularly unfortunate that no substantial effort is being made by the bar examiners to test the efficiency of the candidates for admission along these lines."

The Chicago Bar Association has elected the following officers: President, Alfred M. Allen; vice-presidents, John Galvin, George Hoadly, Robert Ramsey, Alfred C. Cassatt and Walter A. Decamp; recording secretary, Ben B. Nelson; corresponding secretary, Stanley W. Merrell; treasurer, William G. Hosea.

Bar Associations

Massachusetts. — The annual meeting of the Massachusetts Bar Association will be held in Springfield, Thursday and Friday, December 19 and 20. On Thursday afternoon a portrait of ex-Chief Justice Knowlton will be hung in the Springfield court house, when Charles W. Eliot, president emeritus of Harvard College, will deliver an address.

Missouri. — The thirtieth annual meeting of the Missouri Bar Association was held at St. Louis, on September 26–8. Morton Jourdan of St. Louis delivered the President's address, and the annual address was given by Hampton L. Carson, former Attorney-General of Pennsylvania, on "The Historic Relation of the Judiciary to Unconstitutional Legislation." Other speakers and their topics were as follows: Albert W. Biggs, "The Unrest as to the Administration of Law"; Dr. Roscoe Pound, Harvard University, "Social Justice and Legal Justice"; Dr. William M. Thorton, University of Virginia, "Who Was Thomas Jefferson?" At the annual banquet Governor Herbert S. Hadley spoke on "Progressive Jurisprudence," and Judge R. M. Wanamaker of Akron, Ohio, delivered an address on "The Recall of Judges."

Virginia. — At the annual meeting of the Virginia State Bar Association, held at Old Point Comfort, Va., on August 6–8, the president's address was delivered by J. F. Bullitt of Big Stone Gap and the principal address was made by Judge Martin, A. Knapp of the United States Court of Commerce, on "Transportation and Commerce." The following officers were elected: president, Professor William Minor Lile of the University of Virginia; vice-presidents, Judge T. P. Griffin, Bedford City; R. R. Prentis, Suffolk; John T. Harris, Harrisonburg; John W. Price, Bristol, and A. W. Wallace, Fredericksburg; secretary and treasurer, John B. Minor of Richmond.

Obituary

Carrington, Brigadier-General *Henry Beebe*, who died in Hyde Park, Mass., on Oct. 26, was an amanuensis for Washington Irving, under whose advice he

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afterward wrote "Battles of the American Revolution." He studied law at Yale in 1847, and was admitted to partnership with William Dennison at Columbus, Ohio, where he practised until the beginning of the Civil War. He was made Judge Advocate General of Ohio in 1857, and later was appointed Adjutant-General.

Elstner, Milton C., one of the best known criminal lawyers of Louisiana and a former United States Attorney, died at Shreveport. La., Oct. 13.

Eure, Judge *M. L.* who had declined nominations for Governor and for Congressman, died at Norfolk, Va., Sept. 29. He was at one time judge of the Supreme Court of North Carolina, his native state.

Gray, Robert T., formerly Supreme Court Reporter of North Carolina, died at his home in Raleigh, N. C., on Oct. 2. He was a leading citizen of Raleigh.

Hartwell, Brevet Brig.-Gen. *Alfred Stedman*, Attorney-General in King Kalakaua's cabinet and afterward Chief Justice of the Supreme Court of Hawaii, died in Honolulu in October. He was seventy-six years old and a native of Dedham, Mass.

Heyburn, Weldon Brinton, United States Senator from Idaho, died at his apartments in the Wyoming House, Washington, D. C., Oct. 17. He had been ill from heart disease ever since the adjournment of Congress, having overtaxed his strength. He was a stalwart Republican all his life. He was elected Senator in 1902, and served continuously until his death. Senator Heyburn was a prodigious worker, and was as responsible as much as any one for the passage of the Pure Food bill through the Senate.

Joline, Adrian H., a prominent corporation lawyer of New York, died on Oct. 15. He was the author of "Meditations of an Autograph Collector," "Diversions of a Book Collector," "At the Library Table," and other similar works.

Hindman, James R., former Lieutenant Governor of Kentucky, died in Columbia Ky., on Oct. 14.

Lane, Judge *Edward*, formerly Congressman from 1887 to 1894, serving on the Judiciary Committee, died at Hillsboro, Ill., Oct. 30. He was a prominent lawyer in his part of the state.

McDonald, James, former Chief Justice of Nova Scotia, died in Halifax early in October.

Moss, Hon. Sir *Charles*, Chief Justice of Ontario, died on Oct. 12. He was born at Cobourg, Ont., in 1840, and educated at the Ontario Law School. He became a Q. C. in 1881, and had been Chief Justice of the Province since November, 1902.

Nave, Frederick S., formerly United States Attorney for Arizona and Associate Justice of the Arizona Supreme Court, died at Globe, Ariz., on Sept. 27.

Purdy, Major *James H.*, lawyer and author of Purdy's Law of Corporations, died at Chicago, Nov. 4, aged seventy-four years. He practised law in Prescott, Los Angeles and St. Louis.

Spring, Alfred, Associate Justice of the New York Appellate Division, Fourth Department, who died Oct. 22, was the author of "The Monroe Doctrine," "Hamilton Fish," "Our National Government," and other articles which were published in the *American Law Review*. He had been a justice of the Appellate Division since 1899.

Young, Judge *David King*, who died near Clinton, Tenn., Oct. 24, was formerly district attorney, circuit judge, and chancellor. He retired from the bench, to practise his profession.

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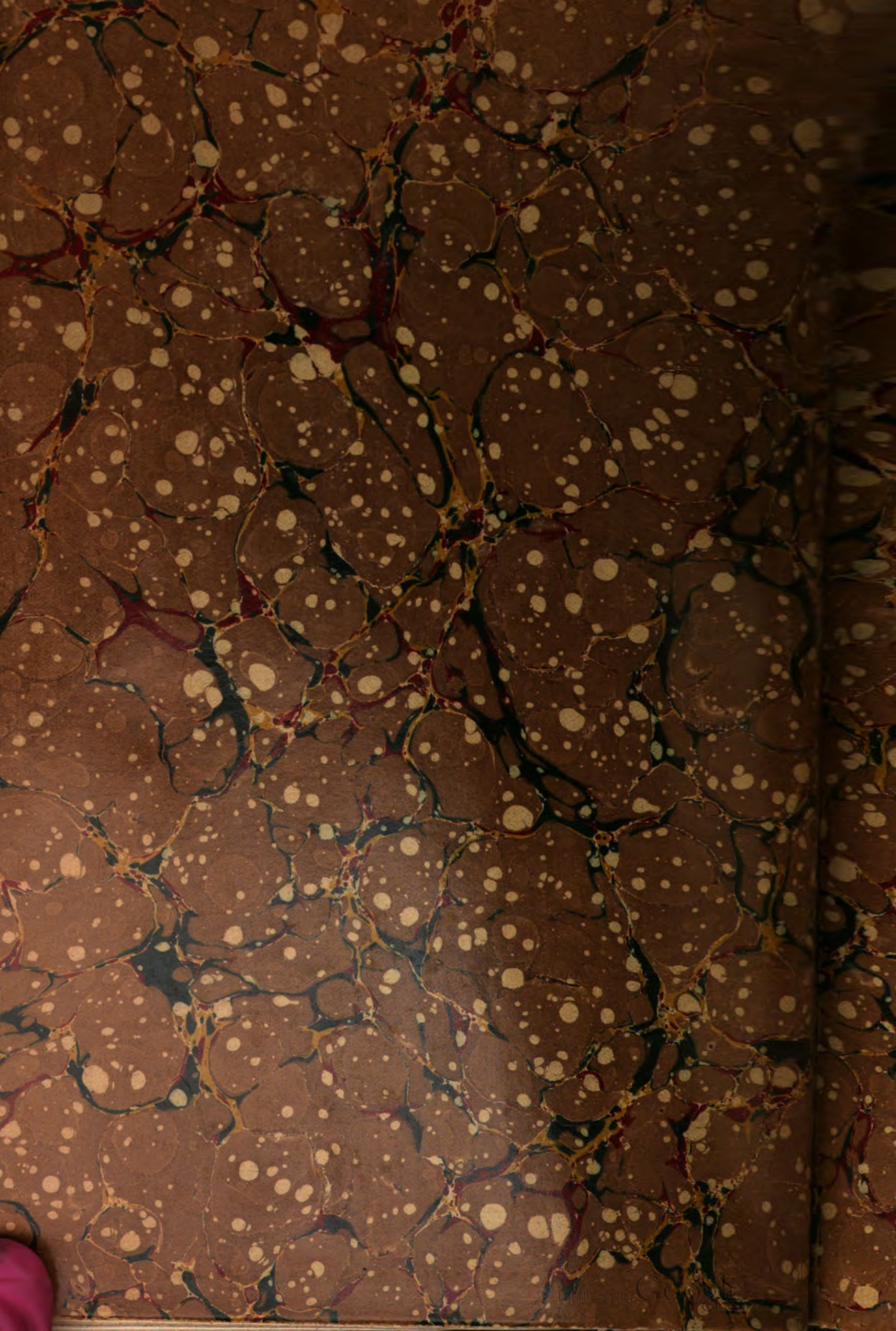
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